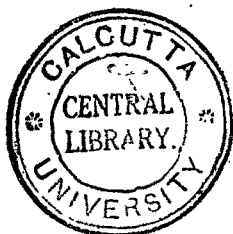


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THE SIXTEENTH YEAR OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE*

BY MANLEY O. HUDSON

The sixteenth year of the Permanent Court of International Justice was not marked by a great increase in the volume of its jurisprudence, but three judgments were handed down and several events of importance are to be chronicled for this period.

The Court held about seventy meetings during the year; it was in active session from May 3 to July 9, from September 20 to October 8, and from October 18 to November 6—a total of 107 days, as compared with 143 days in 1936, 107 in 1935, and 120 in 1934. A judgment in the case relating to the *Diversion of Water from the Meuse* was handed down on June 28, 1937; a judgment in the case relating to the *Lighthouses of Crete and Samos*, on October 8, 1937; and a judgment on preliminary exceptions in the *Borchgrave Case*, on November 6, 1937. Professor Charles De Visscher (Belgium) was elected a judge of the Court on May 27, 1937; and the Court sustained a grievous loss in the death of Judge Hammarskjöld on July 7, 1937.¹ Formal action was taken by various governments during the year which has significance both with reference to the future of the Court and with reference to the rôle which it may play in current international life.

Two new cases were submitted to the Court during 1937, and at the close of the year three cases remained on its docket: the case concerning *Phosphates in Morocco* between France and Italy, the *Borchgrave Case* between Belgium and Spain, and the *Panevezys-Saldutiskis Railway Case* between Estonia and Lithuania.

CASE CONCERNING DIVERSION OF WATER FROM THE MEUSE

On August 1, 1936, the Netherlands Government filed an application with the Registry, instituting a proceeding against Belgium with reference to the diversion of water from the River Meuse. As basis of the Court's jurisdiction, the applicant relied upon the declarations by which both The Netherlands and Belgium had accepted the Court's obligatory jurisdiction in accordance with the provisions of paragraph 2 of Article 36 of the Statute; this basis of jurisdiction was not contested by Belgium. The Netherlands Government appointed Professor B. M. Telders as its Agent, and the Belgian Government appointed M. de Ruelle to act in that capacity. Professor Charles De Visscher was designated by Belgium as judge *ad hoc*. The written proceedings consisted of a memorial, a counter-memorial, a reply and a

* This is the sixteenth in a series of annual articles on the Permanent Court of International Justice, the publication of which was begun in this JOURNAL, Vol. 17 (1923), p. 15.

¹ A memoir of Judge Hammarskjöld was published in this JOURNAL, Vol. 31 (1937), p. 703.

rejoinder. Oral arguments by the agents of the parties were heard by the Court from May 4 to 21, 1937; arguments on behalf of the Belgian Government were presented also by Maître Marcq as counsel, and by M. Delmer as technical adviser. On May 13-15, the Court made a visit to the scene (*descente sur les lieux*) to see on the spot the installations, canals and waterways to which the dispute related.² The judgment of the Court was delivered on June 28, 1937.³

The Meuse is an international river, rising in France, flowing across Belgian territory, then forming the Netherlands-Belgian frontier, then flowing across Netherlands territory, again forming the Netherlands-Belgian frontier, and finally flowing across Netherlands territory to the sea. The questions at issue depended upon the interpretation and application of a treaty of May 12, 1863,⁴ the purpose of which, as stated in its preamble, was "to settle permanently and definitively the régime governing diversions of water from the Meuse for the feeding of navigation canals and irrigation channels." The Court gave the following summary of the provisions of the treaty:

Article I provides for the construction below Maestricht at the foot of the fortifications of a new intake which will constitute the feeding conduit for all canals situated below that town and for irrigation in the Campine and in the Netherlands. Article II provides that the lock at Hocht (No. 19) is to be suppressed and replaced by a new lock in the Zuid-Willemsvaart above the intake provided for in Article I. The part of the canal between the site of the old lock at Hocht and the site of the new lock was to be enlarged and deepened so as to be of the same dimensions and depth as the reach from Hocht to Bocholt. Article III provides that the level of the canal between Maestricht and Bocholt was to be raised so that the quantity of water prescribed by the succeeding Articles IV and V could pass along the canal without raising the average current to a speed exceeding 25 to 27 centimetres per second. Article IV fixed the quantity of water to be taken from the Meuse at ten cubic metres per second when the level of the river was above the normal low level; when at or below the normal low level it was fixed at 7½ cubic metres from October to June and 6 cubic metres from June to October. Normal low level was defined by reference to the gauge on the bridge at Maestricht and corresponded to a minimum depth between Maestricht and Venlo of 70 centimetres. A gauge was to be fixed at the mouth of the new intake, and no further use was to be made of the intake at Hocht. Under Article V the Netherlands was to have a fixed proportion (2 or 1½ cubic metres) out of the total quantity of water fixed by Article IV as the amount to be withdrawn from the Meuse by the new intake; the Netherlands share of this water was to pass through lock 17 at Loozen. The second paragraph of this Article gives the Netherlands a right to increase the water to be withdrawn from the Meuse at Maestricht, provided the speed of the current in the canal was not raised above that stipulated in Article III.

² See this JOURNAL, Vol. 31 (1937), p. 696.

³ Publications of the Court, Series A/B, No. 70.

⁴ The text of the treaty, annexed to the judgment, is also published in 1 Martens, *Nouveau Recueil Général* (2nd Series), p. 117.

Article IX provided for the preparation and execution of a programme of works in the bed of the Meuse between Maestricht and Venlo over a series of years, Belgium to pay two-thirds and the Netherlands one-third of the costs.

On numerous occasions the two states had engaged in negotiations with a view to meeting the demands of an expanding navigation by the construction of works on the Meuse. A new and comprehensive treaty was signed in 1925, but it was not ratified by both parties. Thereafter, new constructions were undertaken on both sides without any change in the existing treaty situation. In 1929, The Netherlands finished the construction of a barrage at Borgharen, just below Maestricht; in 1931 it opened to navigation a new lock at Bosscheveld, situated just below the intake constructed at Maestricht under the Treaty of 1863, and giving access to the Zuid-Willemsvaart from the Meuse; and in 1934, it opened to navigation the Juliana Canal from Maestricht to Maasbracht. In 1930, Belgium began the construction of the Albert Canal, to connect Liège and Antwerp; the new canal is to be joined to the Zuid-Willemsvaart by a branch from Briegden to Neerhaeren, with a lock at the latter place, which was opened to service in 1934. While these undertakings on both sides had been the subjects of diplomatic correspondence from time to time, no agreement had resulted as to the extent to which the Treaty of 1863 applied to them.

The submissions of the parties and the Court's disposition of them were summarized in the Court's annual report, as follows: ⁵

"The Netherlands Government, in its first submission, asked the Court to declare that the construction by Belgium of works rendering it possible for a canal situated below Maestricht to be supplied with water taken from the Meuse elsewhere than at the intake at that town was contrary to the Treaty of 1863; these works, it was alleged, infringed the Netherlands' privilege of control over diversions of water, and the quantities of water diverted exceeded the maximum fixed by the Treaty. In this connection, the Netherlands Agent laid stress on the fact that the Neerhaeren Lock contained side-channels for filling and emptying the lock chamber, which channels could easily be converted into a lateral conduit enabling water to be discharged in large quantities.

"In the Court's view, the Treaty of 1863 did not place the Parties in a situation of legal inequality by conferring on one of them a right of control to which the other could not lay claim: for the Treaty is an agreement freely concluded between two States seeking to reconcile their practical interests with a view to improving an existing situation. Article I of the Treaty is a provision equally binding on the Netherlands and on Belgium. If, therefore, it is claimed on behalf of the Netherlands Government that, over and above the rights which necessarily result from the fact that the new intake is situated on Netherlands territory, the Netherlands possess certain privileges in the sense that the Treaty imposes on Belgium, and not on them, an obligation to abstain from certain acts connected with the supply to canals below Maes-

⁵ Series E, No. 13, pp. 137-140.

tricht of water taken from the Meuse elsewhere than at the treaty feeder, the argument goes beyond what the text of the Treaty will support.

"In its second submission, the Netherlands Government asked the Court to declare that the feeding of certain canals in Belgium (the Belgian section of the Zuid-Willemsvaart, the Canal de la Campine, the Hasselt Canal, etc.) with water taken from the Meuse elsewhere than at Maestricht was contrary to the Treaty.

"Examining the régime of water supply established by the Treaty, the Court finds that this régime consists both in the construction in Netherlands territory of an intake which was to constitute the feeding conduit for all canals situated below Maestricht, and in the fixing of the volume of water to be discharged into the Zuid-Willemsvaart at a quantity which would maintain a minimum depth in that canal and would ensure that the velocity of its current did not exceed a fixed maximum. As regards the canals which the Treaty had in view when it referred to canals situated below Maestricht, these canals are: the Zuid-Willemsvaart and the canals which branch off from it and are fed by it.

"Such being the treaty régime, it is clear, the Court says, that any work which disturbs the situation thus established constitutes an infraction of the Treaty: and this holds good for works above Maestricht just as much as for works below it. Thus the functioning of an intake other than the Maestricht feeder instituted by the Treaty would not be compatible with the Treaty. With regard to the question whether the passage of water through a lock constitutes an infraction of Article I—as contended by the Netherlands Government and denied by the Belgian Government—the Court holds that neither the Belgian nor the Netherlands contention can be accepted in its entirety. To adopt the Belgian contention to the effect that no lock when used for navigation, and no volume of water discharged through a lock when being utilized for that purpose, can constitute an infraction of Article I, would open the door to the construction of works and the discharge of water in such quantities that the intentions of the Treaty would be entirely frustrated. On the other hand, to adopt the Netherlands contention and to hold that any discharge of water into the Zuid-Willemsvaart through the Neerhaeren Lock, instead of through the treaty feeder, must result in an infraction of Article I—irrespective of the consequences which such discharge of water might produce on the velocity of the current in the Zuid-Willemsvaart, or on the navigability of the common section of the Meuse—would be to ignore the objects with which the Treaty was concluded. In the view of the Court, the use of the Neerhaeren Lock would contravene the object of the Treaty if it produced an excessive current in the Zuid-Willemsvaart or a deficiency of water in the Meuse; but this has not been established. Another circumstance which must be borne in mind in connection with the submission of the Netherlands Government regarding the Neerhaeren Lock is the construction by the latter Government of the lock at Bosscheveld, which is even larger than the Neerhaeren Lock and which leads directly from the Meuse into the Zuid-Willemsvaart. The Court cannot refrain from comparing the cases of the two locks, and it holds that there is no ground for treating one more unfavourably than the other. Neither of these locks constitutes a feeder, yet both of them discharge their lock-water into the canal, and thus take part in feeding it with water otherwise than through the treaty feeder, though without producing an excessive current in the Zuid-Willemsvaart. In these circumstances, the Court finds it difficult to admit that the Netherlands are now warranted in complain-

ing of the construction and operation of a lock of which they themselves set an example in the past.

"The third submission of the Netherlands Government is fundamentally concerned with the construction and bringing into use of the Albert Canal from Liège to Antwerp. This canal, which is fed from an intake at Liège-Monsin, follows for a certain distance the course of the old Hasselt Canal, and the Court is asked to declare that the feeding of this section with water taken from the Meuse elsewhere than at Maestricht is contrary to the Treaty. The Court rejects this submission. It holds that the Treaty forbids neither the Netherlands nor Belgium to make such use as they may see fit of the canals covered by the Treaty in so far as concerns canals which are situated in Netherlands or Belgian territory, as the case may be, and do not leave that territory. As regards such canals, each of the two States is at liberty, in its own territory, to modify them, to enlarge them, to transform them, to fill them in and even to increase the volume of water in them from new sources, provided that the diversion of water at the treaty feeder and the volume of water to be discharged therefrom to maintain the normal level and flow in the Zuid-Willemsvaart is not affected.

"Moreover, the contention of the Netherlands Government is invalidated by the singular result to which it would lead in practice. For it would amount to criticizing Belgium for having made the new canal follow the line of the old. She need only have sited the new canal a little to one side and then she would not have contravened the Treaty. No such effect can have been intended by the contracting Parties, nor can it result from a proper interpretation of the Treaty.

"For the same reasons the Court rejects the fourth submission of the Netherlands Government, which is similar to the foregoing.

"Having thus arrived at the conclusion that there is no justification for the various complaints made by the Netherlands Government against the Belgian Government, the Court proceeds to consider the latter Government's counter-claim which, as it points out before doing so, is directly connected with the principal claim.

"In its first submission, the Belgian Government prays the Court to declare that the Borgharen barrage, by raising the level of the Meuse, has altered the local situation at Maestricht, and that this, having been done without the consent of Belgium, is contrary to the Treaty. The Court rejects this submission; for the Treaty does not forbid the Netherlands to alter the depth of water in the Meuse at Maestricht without the consent of Belgium, provided that neither the discharge of water through the feeder nor the volume which it must or can supply, nor again the current in the Zuid-Willemsvaart, are thereby affected. Furthermore, the Belgian Government has not produced evidence to show that the navigability of the Meuse has suffered; and in any case, barge traffic, under whatever flag, now has at its disposal the Juliana Canal which is much better adapted to its needs.

"In the second submission of its counter-claim the Belgian Government prays the Court to declare that the Juliana Canal is subject, as regards its water supply, to the same provisions as the canals on the left bank of the Meuse below Maestricht. The Court holds that the Juliana Canal, situated on the right bank of the Meuse, cannot be regarded as a 'canal situated below Maestricht' within the meaning of Article I of the Treaty. The question of how the Juliana Canal is, in fact, at present supplied with water would only require to be considered if it were alleged that the method by which it is fed was detrimental to the régime instituted by the Treaty for the canals situ-

ated on the left bank. Belgium however does not allege that this is the case.

"For these reasons, the Court rejects the various submissions both of the Memorial presented by the Netherlands Government and of the counter-claim presented in the Belgian Counter-Memorial."

On both the principal claim by The Netherlands and the counter-claim by Belgium, the Court's decision was adopted by ten votes to three. Five separate opinions were appended to the judgment: Judge Anzilotti did not concur in the judgment; Judge Altamira and Jonkheer van Eysinga did not concur in all the findings of the Court; Sir Cecil Hurst did not concur in the findings of the judgment with respect to the counter-claim; and Judge Hudson, concurring in the judgment, added certain observations. Judge De Visscher was also unable to concur in the findings of the judgment with respect to the counter-claim, but wrote no separate opinion.

CASE CONCERNING LIGHTHOUSES IN CRETE AND SAMOS

On March 17, 1934, the Court gave a judgment in the *Lighthouses Case* between France and Greece,⁶ holding that "the contract of April 1st/14th, 1913, between the French firm Collas & Michel, known as the *Administration générale des Phares de l'Empire ottoman*, and the Ottoman Government, extending from September 4th, 1924, to September 4th, 1949, concession contracts granted to the said firm, was duly entered into and is accordingly operative as regards the Greek Government in so far as concerns lighthouses situated in the territories assigned to it after the Balkan wars or subsequently." At that time, however, the Court made a statement which it characterized as a "reservation," in the following terms:

Moreover, the Court holds that the Special Agreement only requires it to decide on a question of principle, and that it is not called upon to specify which are the territories, detached from Turkey and assigned to Greece after the Balkan wars or subsequently, where the lighthouses in regard to which the contract of 1913 is operative are situated. It is moreover all the more necessary to make this reservation because the Parties have not argued before the Court the questions of fact and of law which might be raised in that connection and which the Court has not been asked to decide.

On July 17, 1934, four months after the delivery of the judgment, a *note verbale* was addressed by the Greek Ministry for Foreign Affairs to the French Legation at Athens, in which the Greek Government expressed its willingness to abide by the judgment of the Court, but as the Court had given only a *décision de principe* and had not specified the territories to which the contract applied, the Greek Government thought that "this question remains open." The *note verbale* proceeded to set forth the position of the Greek Government "that the lighthouses in Crete and Samos remained outside the ambit of the contract concluded on April 1st/14th, 1913, between

⁶ Series A/B, No. 62.

the concessionary firm and the Ottoman Porte, as the territories in which they are situated were detached from Turkey well before that date." This view was not shared by the French Government, and on August 28, 1936, a special agreement (*compromis*) was signed for submitting the "difference of opinion" to the Court.

The special agreement quoted the reservation made by the Court in 1934; it referred to the difference of opinion as one "regarding the applicability of the principle laid down in the said judgment in the case of lighthouses situated in Crete, including the adjacent islets, and in Samos"; it stated that the question was "regarded on both sides as accessory to the principal question which has already been decided"; and it added that the answer to the question submitted was "regarded as relating to the applicability in a particular case of the judgment already rendered by the Court." Accordingly, the parties requested the Court, "taking into account the period at which the territories specified were detached from the Ottoman Empire," to give its decision on the following question:

Whether the contract concluded on April 1st/14th, 1913, between the French firm Collas & Michel, known as the '*Administration générale des Phares de l'Empire ottoman*,' and the Ottoman Government, extending from September 4th, 1924, to September 4th, 1949, concession contracts granted to the said firm, was duly entered into and is accordingly operative as regards the Greek Government in so far as concerns lighthouses situated in the territories of Crete, including the adjacent islets, and of Samos, which were assigned to that Government after the Balkan wars.

The special agreement was filed with the Registry on October 27, 1936. Thereafter, each of the parties presented a memorial and a counter-memorial. The French Government was represented by Professor Basdevant as Agent, and the Greek Government by M. Politis as Agent, and M. Drossos as Assistant Agent. The Greek Government designated Professor Sfériadès to sit as judge *ad hoc*. Oral arguments were heard by the Court on June 28 and 29, 1937. The judgment, adopted by ten votes to three, was delivered on October 8, 1937.⁷

The judgment was thus summarized by the Registry of the Court: ⁸

"... The Court is simply asked whether, taking into account the period at which Crete and Samos were detached from the Ottoman Empire, these two islands are included amongst the territories to which the decision on the question of principle applies and whether, consequently, the contract of 1913 was duly entered into in so far as concerns them.

"The Court therefore has to determine the period at which Crete and Samos were detached from the Ottoman Empire. In the first place however it examines Article 9 of Protocol XII,⁹ signed at the same time as the Treaty of Lausanne of July 24th, 1923, in order to see whether this article, which is bind-

⁷ Series A/B, No. 71.

⁸ Unofficial Communiqué, No. 978.

⁹ 28 League of Nations Treaty Series, p. 203.

ing on both parties and formed the basis of the judgment of 1934, warrants in favour of Crete and Samos an exception to the principle laid down by that judgment. The Court comes to the conclusion that the article does not warrant such an exception: from the standpoint of the applicability of the principle in question, there is nothing in the text of the article to warrant any differentiation between the various territories which were assigned to Greece.

"The Court observes however that, in the contention of the Greek Government, Crete and Samos were not and could not have been detached from Turkey by a transfer of sovereignty from that State to Greece, seeing that Turkey had long since lost her sovereignty in regard to those islands. According to this argument, it would follow that the Ottoman Government, in 1913, no longer had any title, competence or capacity to conclude the contract now in dispute between France and Greece.

"Examining the régime of autonomy granted to the territories in question, the Court arrives at the conclusion that though the Sultan had been obliged to accept important restrictions on the exercise of his rights of sovereignty as regards Crete and Samos, that sovereignty had not ceased to belong to him. The Court finds proof of this more especially in Articles 4 and 5 of the Treaty of London (May 17/30, 1913), in the Treaty of Athens (November 1/14, 1913), and in Article 12 of the Treaty of Lausanne (July 24, 1923).

"The Court accordingly considers that the Greek Government has not proved its contention and that the lighthouses in Crete and Samos are lighthouses situated in territories which not only were assigned to Greece after the Balkan wars, but also were not detached from the Ottoman Empire until that time. Article 9 of Protocol XII of Lausanne is therefore applicable to the contract of 1913 and that contract must be considered as having been duly entered into and as accordingly operative as regards Greece in respect of the said territories. The 'particular case' therefore falls within the scope of the decision on the question of principle delivered by the Court in 1934.

"This conclusion deduced from the international instruments is not, in the opinion of the Court, invalidated by an argument founded by the Greek Government on the autonomous régime granted by the Porte to Crete and Samos prior to the date of the contract. These régimes of autonomy did not abrogate the rights of the Sultan. Accordingly Crete and Samos must be regarded as having still formed part of the Ottoman Empire at the date of the contract in dispute and that contract, being applicable to the whole of the Ottoman Empire, is therefore applicable to these islands."

Dissenting opinions were written by Sir Cecil Hurst, Judge Hudson, and Judge *ad hoc* Sefériadès. Jonkheer van Eysinga also attached separate observations to the judgment of the Court.

THE BORCHGRAVE CASE

On February 20, 1937, a special agreement was signed on behalf of the Belgian and Spanish Governments, for submitting to the Court a dispute in connection with the death of Baron Jacques de Borchgrave. The Court was requested to say "whether, having regard to the circumstances of fact and of law in the case, the responsibility of the Spanish Government is involved." The agreement was transmitted to the Registry of the Court on March 5, 1937. The Belgian Government was represented in the case by M. F. Muûls as Agent, and by Maître Delacroix as advocate; the Spanish Government

by M. J. M. de Semprun y Gurrea as Agent, and by M. Sanchez Roman as advocate.

As stated by the Court, the following allegations of fact were made in this case:

During the later months of 1936, Baron Jacques de Borchgrave, a Belgian national resident in Madrid, collaborated in the work of the Belgian Embassy in Madrid. He left the Embassy by automobile on December 20th, 1936, and never returned. On the same day, his disappearance was notified by the Embassy to the Spanish civil and military authorities. A body found on the route from Madrid to Fuencarral on December 22nd, five kilometres from Madrid, was later identified as the body of Baron Jacques de Borchgrave. Some days thereafter, the automobile in which Baron Jacques de Borchgrave had left the Embassy was retrieved in Madrid.

The Agent of the Spanish Government having informed the Registrar that his government intended to employ the Spanish language in all of the acts and documents to be presented in the course of the procedure, on May 13, 1937 the Court adopted an order on the subject. It was recited in the order that "an authorization to use the Spanish language is likely to facilitate the presentation of their oral arguments by the Agent and Counsel for the Spanish Government—it being understood that arrangements must be made by them for the immediate translation of their statements into one of the two official languages provided for by the Statute of the Court;" that the use of a language other than one of the two official languages for the statements constituting the documents of the written proceedings might involve difficulties; and that documents produced in support of the arguments of a party should, if they are not in one of the two official languages, be accompanied by a translation into one of these two languages. On this basis, the Court authorized the Spanish Agent to present his oral arguments in the Spanish language. The advocate for the Spanish Government availed himself of this authorization in the later presentation of his arguments, furnishing his own translation into French, the translation into English being given by an official of the Court; but a memorial filed on behalf of the Spanish Government was drawn up in French, with a Spanish version attached.

In its memorial, the Belgian Government presented two submissions, asking the Court to decide (1) that the responsibility of the Spanish Government is engaged by reason of the crime committed on the person of Baron Jacques de Borchgrave; and (2) that the Spanish Government is responsible by reason of its having failed, with due diligence, to find and punish the guilty persons. The Spanish Government then presented two preliminary exceptions, asking the Court (1) to declare that it lacked jurisdiction to deal with the second submission presented by the Belgian Government, relating to the alleged failure to use diligence; and (2) to declare the Belgian claim, both as to the first and as to the second submission, irreceivable by reason of the fact that the means of local redress afforded by Spanish municipal law had

not been exhausted. Written observations on these exceptions having been presented by the Belgian Agent, oral arguments were heard by the Court, October 18-20, 1937.

The Court gave its unanimous judgment on the preliminary exceptions on November 6, 1937.¹⁰ The first objection relating to the Court's jurisdiction to deal with the question of responsibility for an alleged failure to use diligence in the apprehension and punishment of the guilty was overruled, on the ground that

The history of the controversy between the Parties *à propos* the death of Baron Jacques de Borchgrave, and the accord reached in the notes exchanged for submitting the dispute to the Court, lead to the conclusion that the Special Agreement of February 20th gives the Court jurisdiction to examine the second submission in the Memorial of the Belgian Government relating to the alleged lack of diligence on the part of the Spanish Government in apprehending and prosecuting the guilty.

In the course of the argument, the second preliminary exception had been withdrawn by the Spanish advocate, and the Court took note of the withdrawal.

The case will not be ready for hearing on the merits before March 21, 1938.

THE PANEVEZYS-SALDUTISKIS RAILWAY CASE

This case was brought before the Court by the Estonian Government by an application dated October 25, 1937, and filed with the Registry of the Court on November 2, 1937. The Estonian Government had espoused claims made by an Estonian company with respect to the Panevezys-Saldutiskis Railway, contending that the Lithuanian Government's refusal to recognize the proprietary rights of the company constituted an infringement of Article 4 of a commercial convention concluded by the two states on January 13, 1934.¹¹ In its application, the Estonian Government asks the Court to declare that the Lithuanian Government has wrongfully refused to recognize the rights of the Estonian company, and is under an obligation to pay damages to the extent of 14,000,000 Gold-Lits with interest. Professor Baron Boris Nolde has been named as the Agent of the Estonian Government, and Professor André Mandelstam as Agent of the Lithuanian Government; the two Governments have nominated as judges *ad hoc*, respectively, M. Otto Strandmann and M. Mykolas Römer'is. The case will not be ready for hearing before June 15, 1938.

ELECTIONS OF JUDGES

A vacancy in the Court having been created by the death of Baron Rolin-Jaequemyns on July 11, 1936, the Secretary-General of the League of Nations requested the national groups mentioned in Article 4 of the Statute of the Court to send in their nominations by October 27, 1936. In response to this request, 21 candidates were nominated by 40 national groups.¹² The only

¹⁰ Series A/B, No. 72.

¹¹ 148 League of Nations Treaty Series, p. 337.

¹² League of Nations Document A.(Extr.) 3.1937.V.

candidate to receive more than three nominations was Professor Charles De Visscher (Belgium), who was named by 33 national groups.

On May 27, 1937, the Assembly of the League of Nations, meeting in extraordinary session, and the Council of the League of Nations, meeting simultaneously, proceeded to the election; representatives of Brazil and Japan participated in the voting in each body. The 52 valid votes which were cast in the Assembly were distributed on the first ballot among nine candidates; 35 of these votes were cast for Professor Charles De Visscher. The Council having voted for him also, the President of the Assembly declared M. De Visscher to be elected.¹³

Judge De Visscher was born in 1884. As a professor of international law at Ghent and more recently at Louvain, as a writer and editor of the *Revue de Droit International et de Législation Comparée*, as the Secretary-General of the *Institut de Droit International*, and as a practitioner whose counsel was often sought by his own and other governments, he has enjoyed an enviable reputation. He appeared before the Court as counsel in the following cases: Jurisdiction of the European Commission of the Danube (1927); Territorial Jurisdiction of the International Commission of the River Oder (1929); Access to the Port of Danzig for Polish War Vessels (1931); Treatment of Polish Nationals in Danzig (1932); Status of Eastern Greenland (1933). At the time of his election he was already serving as judge *ad hoc* in the case relating to the Diversion of Waters from the Meuse, and he had been designated to act in that capacity in the Borchgrave Case.

The death of Judge Hammarskjöld on July 7, 1937, within nine months after his election to membership in the Court, robbed the Court of its youngest member. On July 27, 1937, the Secretary-General issued an invitation to the national groups referred to in Article 4 of the Statute to nominate by October 30 candidates for the succession. A list published on November 29, 1937, indicated that up to that time 14 candidates had been nominated by 27 national groups; thirteen groups had nominated M. Rafael Waldemar Erich (Finland), four had nominated Sir Saiyid Sultan Ahmed (India) and M. Alfred Emil Fredrik Sandström (Sweden), and three had nominated M. Viktor Bruns (Germany) and M. Östen Undén (Sweden).¹⁴ The election will be held at a date to be fixed by the Council of the League of Nations.

CHAMBER FOR SUMMARY PROCEDURE for 1938

On November 4, 1937, the Court constituted its Chamber for Summary Procedure for the year 1938, to consist of M. Guerrero, President, Sir Cecil Hurst, Count Rostworowski, M. Fromageot, and M. Anzilotti, with M. Urrutia and M. De Visscher as substitute members.

ACTION BY STATES WITH REFERENCE TO INSTRUMENTS RELATING TO THE COURT

No change was made during the year 1937 in the list of states or members of the League of Nations which are parties to the Protocol of Signature of

¹³ Records of the Special Session of the Assembly (1937), p. 35.

¹⁴ League of Nations Document, C.545.M.382. 1937.V. M. Undén has declined the candidature.

December 16, 1920, to which the Court's Statute is annexed; the number of parties therefore continues to be fifty.

On January 26, 1937, the Brazilian Government deposited at Geneva its ratification of the Protocol of September 14, 1929, revising the Statute of the Court; this Protocol had entered into force on February 1, 1936.

Various declarations were made during the year 1937 recognizing the obligatory jurisdiction of the Court, under paragraph 2 of Article 36 of the Statute. On January 26, 1937, the Brazilian Government renewed its acceptance of the Court's obligatory jurisdiction, its previous declaration of November 1, 1921 having expired on February 5, 1935, by the following declaration: ¹⁵

[*Translation*] On behalf of the Government of the Republic of the United States of Brazil, I hereby renew, in virtue of the authorization of the National Legislature, the acceptance of the compulsory jurisdiction of the Permanent Court of International Justice, for a period of ten years, on condition of reciprocity, with the exception of questions which, by international law, fall exclusively within the jurisdiction of the Brazilian Courts of law, or which belong to the constitutional régime of each State. Geneva, January 26th, 1937.

(Signed) A. DOS GUIMARAES BASTOS.

On March 22, 1937, the Austrian Government, whose declaration of 1927 had expired on March 13, 1937, renewed its recognition of obligatory jurisdiction by the following declaration: ¹⁶

[*Translation*] On behalf of Austria and subject to ratification, the undersigned recognizes, in relation to any other Member of the League of Nations or State accepting the same obligation, that is to say, on condition of reciprocity, the jurisdiction of the Court as compulsory, *ipso facto* and without any special convention, for a further period of five years as from March 13th, 1937.

Geneva, March 22nd, 1937.

(Signed) E. PFLÜGL.

The Austrian ratification was deposited at Geneva on June 30, 1937.

On April 9, 1937, the Finnish Government, whose declaration of 1927 had expired on April 6, 1937, made the following declaration: ¹⁷

[*Translation*] On behalf of the Government of the Republic of Finland and not being subject to ratification, I recognize in relation to any other Member or State accepting the same obligation, that is to say, on condition of reciprocity, the jurisdiction of the Court as compulsory, *ipso facto* and without special convention, for a period of ten years as from April 6th, 1937.

Geneva, April 9th, 1937.

(Signed) P. HJELT.

On April 17, 1937, the Swiss Government's ratification of its declaration of September 23, 1936, was deposited at Geneva; and on May 24, 1937, the

¹⁵ Series E, No. 13, p. 277.

¹⁶ *Ibid.*, p. 278.

¹⁷ *Ibid.*

Danish Government's ratification of its declaration of June 4, 1936, was deposited.

On October 30, 1937, the Colombian Government made a new declaration under Article 36, paragraph 2, of the Statute, to replace its declaration of January 6, 1932. The reasons for the new declaration are set forth in the following *procès verbal*, which is of interest for procedural reasons as well as for its legal consequences:¹⁸

[Translation]

Whereas the Delegate of the Government of Colombia signed on January 6th, 1932, a Declaration of Acceptance of the Optional Clause recognising the jurisdiction of the Court, as provided in Article 36 of the Statute annexed to the Protocol of Signature of the Permanent Court of International Justice, opened for signature at Geneva on December 16th, 1920, which Declaration was as follows:

"The Republic of Colombia recognises as compulsory *ipso facto* and without special agreement, on condition of reciprocity, in relation to any other State accepting the same obligation, the jurisdiction of the Permanent Court of International Justice, in accordance with Article 36 of the Statute."

And whereas the said Delegate of the Government of Colombia deposited on the same date the instrument of ratification of the aforesaid Declaration, and the deposit was brought to the notice of the Governments by a letter from the Secretary-General of the League of Nations, C.L.2.1932.V, dated January 18th, 1932;

And whereas the Permanent Delegate of Colombia to the League of Nations informed the Secretariat of the League, by a Note of August 3rd, 1936, No. 450, that there was an omission in the aforesaid Declaration and in the instrument of ratification of His Excellency the President of the Republic of Colombia, as the said Declaration was to be made subject to a reservation concerning disputes prior to January 6th, 1932;

And whereas the Delegate of Colombia informed the Secretariat, in a letter dated September 16th, 1930, that the law passed by Colombia to enable His Excellency the President of the Republic to proceed to the ratification of the Optional Clause provided that the said ratification was to be made subject to the aforesaid condition;

And whereas the Permanent Delegate of Colombia requested the Secretariat in his letter of August 3rd, 1936, to inform the Governments Parties to the Optional Clause that the Government of the Republic of Colombia considered that the Declaration of January 6th, 1932, was to be regarded as having been made with the reservation mentioned above, and that, in order to avoid any misunderstanding, the said Government proposed to add to its original Declaration the following:

"In accordance with Article 2 of Law No. 38 of 1930, authorising the President of the Republic to accept the compulsory jurisdiction of the Court as provided in Article 36 of its Statute, this declaration is made with a reservation concerning disputes prior to January 6th, 1932, the date on which it was signed."

And whereas the desire of the Government of the Republic of Colombia was made known to the States Parties to the Optional Clause on August 27th, 1936, by letter C.L.153.1936.V, and the Secretariat of the League of Nations has received replies from two Governments accepting the proposed modification—that of the Federal Government of Austria (see C.L.177.1936.V. of October 8th, 1936) and that of the Government of Peru (see C.L.228.1936.V. of December 19th, 1936);

And whereas the Secretary of the Permanent Delegation of Colombia to the League of Nations informed the Secretary-General of the League, by a letter dated July 16th, 1937, No. 592, that the Colombian Government, with a view to supplementing its

¹⁸ League of Nations Document, C.L.201.1937.V. Annex.

Declaration of January 6th, 1932, and thus correcting the involuntary error made when it was drawn up, would formally deposit with the Secretariat, on October 30th, 1937, the addition to the instrument of ratification of the Statute of the Permanent Court of International Justice, and would add the following to the Declaration of January 6th, 1932:

"This Declaration is made with a reservation concerning disputes prior to January 6th, 1932."

And whereas the Secretary-General of the League of Nations, in his letter C.L.133.1937.V. of July 24th, 1937, communicated to the interested States the Note from the Secretary of the Permanent Delegation of Colombia, mentioned in the preceding paragraph, and no reply from any of the said States has been received by the Secretariat of the League up to this day, October 30th, 1937;

And whereas the Legal Adviser of the Permanent Delegation of Colombia to the League of Nations, duly accredited, has deemed it desirable to proceed this day, October 30th, 1937, on the basis of the foregoing paragraphs, to the signature of a new Declaration of Acceptance of the Optional Clause recognising the jurisdiction of the Court, as provided in Article 36 of the Statute annexed to the Protocol of Signature of the Permanent Court of International Justice, opened for signature at Geneva on December 16th, 1920, the said Declaration being as follows:

"The Republic of Colombia recognises as compulsory *ipso facto* and without special agreement, on condition of reciprocity, in relation to any other State accepting the same obligation, the jurisdiction of the Permanent Court of International Justice, in accordance with Article 36 of the Statute.

"The present declaration applies only to disputes arising out of facts subsequent to January 6th, 1932."

The Legal Adviser of the Permanent Delegation of Colombia to the League of Nations called today at the Secretariat of the League to deposit an instrument of ratification, by His Excellency the President of the Republic of Colombia, of the new Declaration mentioned in the preceding paragraph.

The Legal Adviser of the Secretariat, after taking cognisance of the desire expressed by the Legal Adviser of the Permanent Delegation of Colombia to the League of Nations and after examining the said instrument of ratification, which was found in good and due form, formally accepted the instrument for the requested deposit. The said instrument will be kept in the archives of the League of Nations.

Certified true copies of this Procès-Verbal will be communicated to all interested States. In faith whereof the undersigned have drawn up the present Procès-Verbal.

Done in duplicate at Geneva, October 30th, 1937.

J. M. YEPES

*Legal Adviser of the Permanent Delegation
of Colombia to the League of Nations*

L. A. PODESTA-COSTA

*Legal Adviser
of the Secretariat*

At the close of 1937, declarations made under Article 36, paragraph 2, of the Statute were in force for forty states or members of the League of Nations; at the beginning of the year, such declarations had been in force for only thirty-seven states or members of the League of Nations.

ACCEPTANCE OF THE COURT'S JURISDICTION BY MONACO

Article 35 of the Statute provides that "the conditions under which the Court shall be open" to states not members of the League of Nations and not mentioned in the Annex to the Covenant "shall, subject to the special provisions contained in treaties in force, be laid down by the Council" of the

League of Nations, adding that in no case shall the conditions be such as to "place the parties in a position of inequality before the Court." On May 17, 1922, the Council adopted a resolution in exercise of the power thus conferred, setting as a condition that

such State shall previously have deposited with the Registrar of the Court a declaration by which it accepts the jurisdiction of the Court, in accordance with the Covenant of the League of Nations and with the terms and subject to the conditions of the Statute and Rules of Court, and undertakes to carry out in full good faith the decision or decisions of the Court and not to resort to war against a State complying therewith.

The resolution also provides that "such declaration may be either particular or general," and it explains that "a general declaration is one accepting the jurisdiction generally in respect of all disputes or of a particular class or classes of disputes which have already arisen or which may arise in the future." The text of the resolution was communicated to various states by the Registrar, acting under instructions from the Court.

On several occasions since 1922 particular declarations have been made under this resolution,¹⁹ but no general declaration was made by any state until 1937. On April 26, 1937, the Minister of State of Monaco, a state to which the Council's resolution had been communicated on June 30, 1922, deposited with the Court's Registry a general declaration by the Principality. Both the declaration and the ratification by the Prince were dated April 22, 1937. The text of the declaration is as follows: ²⁰

[*Translation*] The Principality of Monaco, represented by the Minister of State, Director of External Relations, hereby accepts the jurisdiction of the Permanent Court of International Justice, in accordance with the Covenant of the League of Nations and with the terms of the Statute and Rules of the Court, in respect of all disputes which have already arisen or which may arise in the future. The Principality of Monaco undertakes to carry out in full good faith the decision or decisions of the Court and not to resort to war against a State complying therewith.

At the same time, the Principality of Monaco accepts as compulsory, *ipso facto* and without special convention, the jurisdiction of the Court, in conformity with Article 36, paragraph 2, of the Statute of the Court and No. 2, paragraph 4, of the Resolution of the Council of May 17th, 1922, for a period of five years in any disputes arising after the present Declaration with regard to situations or facts subsequent to this Declaration, except in cases where the Parties have agreed or shall agree to have recourse to another method of pacific settlement.

Monaco, April 22nd, 1937.

(Signed) M. BOUILLLOUX-LAFONT.

Certified copies of the declaration were communicated to governments by the Registrar of the Court.

¹⁹ See Hudson, *Permanent Court of International Justice* (1934), p. 353.

²⁰ Series E, No. 13, p. 273.

CONDITIONS OF VOTING REQUESTS FOR ADVISORY OPINIONS

On September 28, 1935, the Assembly of the League of Nations adopted a resolution requesting the Council to "examine the question in what circumstances and subject to what conditions an advisory opinion may be requested under Article 14 of the Covenant."²¹ On January 23, 1936, in view of the "complexity" of the question, the Council decided to invite the members of the League of Nations to express their views on the question; and a memorandum was prepared by the Secretariat listing the previous discussions of the whole problem.²²

The replies of seventeen members of the League have now been published.²³ A number of governments—Belgium, Chile, China, Denmark, Ecuador, Portugal, Sweden—expressed the opinion that a majority vote in the Council or Assembly is sufficient for requesting an advisory opinion; on the other hand, some governments—Poland, Turkey—expressed the view that unanimity is required in all cases. Several governments—Australia, United Kingdom, Estonia, Finland, Netherlands—expressed the view that a majority vote would suffice for certain cases, and not for others, but these governments were not agreed as to the bases for distinguishing the two classes of cases. Some of the replies expressed no clear choice between the opposing solutions.

On January 22, 1937, when the problem was considered by the Council, the representative of Rumania expressed the view of the Rumanian Government "that complete unanimity was a condition of any request by the Council or Assembly for an advisory opinion."²⁴ On January 26, 1937, the Council requested that a study of the matter be made by the Special Committee created under the Assembly resolution of October 10, 1936, to study the application of the principles of the Covenant.²⁵ No report on the question had been made by that Committee before the close of the year.

CONTRIBUTIONS BY STATES NOT MEMBERS OF THE LEAGUE OF NATIONS

Certain states which are not members of the League of Nations are parties to the Protocol of Signature of December 16, 1920, to which the Court's Statute is annexed. The Statute contains no provision for financial contributions to be made by such states, providing merely that "the expenses of the Court shall be borne by the League of Nations." During the year 1937 the first contributions to the expenses of the Court were made by non-member states. On January 22, 1937, Brazil paid to the Registrar of the Court

²¹ See this JOURNAL, Vol. 30 (1936), pp. 22-24.

²² League of Nations Document, C.L.63.1936.V. Annex 2. The previous history of this question is also traced in Hudson, Permanent Court of International Justice (1934), pp. 437-444.

²³ Documents C.543.M.351.1936.V; *id.*, (a) and (b); C.283.M.184.1937.V. The first of these documents includes also a memorandum by the International Labor Office.

²⁴ League of Nations Official Journal, 1937, p. 77.

²⁵ *Ibid.*, p. 108.

82,203.27 Swiss francs for the financial year 1936; and on July 9, 1937, Japan paid to the Registrar 60,037.52 florins for the financial year 1937.

The precise status of these contributions is not fixed by the existing texts, but the Supervisory Commission of the League of Nations has expressed a confident hope "that the principles enunciated in Article 22 [of the Financial Regulations of the League of Nations] will eventually be accepted by all the States parties to the Statute" of the Court, "as they have been accepted by the States Members of the International Labour Organisation." In practice, Article 22 of the Financial Regulations is to some extent applied by analogy.²⁶ On October 5, 1937, Article 22 was amended to read as follows:²⁷

(1) States not members of the League which have been admitted members of any autonomous organisation of the League shall contribute towards the expenses of the autonomous organisation concerned in the proportion in which they would contribute to such expenses if they were Members of the League.

The contributions of States not members of the League, which shall be calculated on the total outlay of the autonomous organisations to which they have been admitted members, shall be applied exclusively to the expenses of such autonomous organisations.

(2) The amounts receivable in accordance with paragraph (1) shall be shown separately in the budget; they shall be entered as revenue in the budget for the financial year for which they have been fixed, and shall be applied to reduce the sums to be contributed by the Members of the League. They shall be collected by the autonomous organisations themselves, which shall, in so doing, be guided by the rules laid down in Article 21; the competent officials shall supply the Secretary-General with the necessary information as to the results obtained.

(3) States not members of the League which either (a) have been admitted members of any non-autonomous organisation or (b) participate in the work of the League in the sense of being represented at conferences convened by, or at the expense of, the League or of having official representation upon committees set up by the League and maintained at its expense, shall contribute towards the cost of such organisation or work, in the same proportion as if they were Members of the League.

(4) The amounts receivable in accordance with paragraph (3) shall be calculated on the total outlay which such non-autonomous organisation or such work involves for the League in any given year, irrespective of the budget heads to which the relevant expenditure has been charged.

The Secretary-General shall assess the contributions due from the non-member States in accordance with the provisions of this paragraph on the basis of the completed accounts; he shall take the steps prescribed in Article 21 which shall apply *mutatis mutandis* to the collection of contributions from the non-member States. The amounts received shall be inserted in the first budget under preparation thereafter, in reduction of the total sum chargeable, for the year in question, to the Members of the League.

²⁶ See Series E, No. 12, p. 220.

²⁷ League of Nations Official Journal, Spl. Supp. No. 168, p. 20.

PUBLICATIONS OF THE COURT

Notable additions were made to the serial publications of the Court during the year. The 1937 volume of Series A/B contains three fascicules, Nos. 70, 71, and 72. Four volumes of Series C were published: No. 78, concerning the *Losinger & Co. Case*, Nos. 79 and 80 (combined in 1472 pages), concerning the *Pajzs, Csáky, Esterházy Case*, and No. 81, concerning the *Meuse Case*. In Series D, a third addendum to No. 2, containing 1092 pages, was published with the title "Elaboration of the Rules of Court of March 11, 1936." The year also saw the appearance of Series E, No. 13, the *Annual Report of the Court for the period from June 15, 1936 to June 15, 1937*; this continues the bibliographical list of publications concerning the Court, in which there are now 6032 entries, as well as the collection of texts governing the jurisdiction of the Court, in which 529 international instruments are now listed. The volumes published by the Court in permanent form now number about 200, with a total of almost 70,000 pages.

THE FORM AND FUNCTION OF THE DECLARATION OF WAR

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In 1881-2, during discussions of a committee of the Board of Trade, which was considering the question of a tunnel under the English Channel, the following question was asked: "Is it possible that war would be declared against us, as we might say out of a clear sky, without any previous strain or notice that a quarrel was impending?" To answer this question, the Adjutant-General ordered a special investigation concerning the extent to which wars had been made without previous declaration. The report,¹ when completed, evidenced the surprise of the author at the great number of undeclared wars, and incidentally remarked:

The most excellent general impressions as to what ought to be the mode of procedure by which statesmen give warning before they make war, will not be an adequate security for the freedom of a kingdom, if it is in fact true that under the excitement of popular passion or private ambition, rulers of armies or of armed nations have sometimes disregarded all obligations of the kind, and have, in the midst of profound peace, taken advantage of the confidence of their neighbors.

The anxiety which these investigators felt was a military one; they feared that they might be attacked without warning. There are today more impressive reasons for considering the part which the declaration of war plays in the affairs of the community of nations. The science of warfare has itself been greatly changed; the interrelationships between states have become much more numerous, more complicated, and more important; and the community of nations has developed an organization and has accepted new principles through which it attempts to control the right to make war. These forces have all had their impact upon the declaration of war; and recent happenings raise doubt as to whether war will ever again be declared by belligerents. Under these changed circumstances, the declaration of war seems to be regarded by some as an anachronism to be discarded. There are many, however, who consider it as firmly established in custom and in treaty, and as serving a purpose indispensable in the community of nations. Without an understanding of the functions of the declaration of war, it is impossible to reach any conclusion as to its value; and it is amazing how little attention has been given to this, as to other phases of the legal status of war in general, including the definition of war.

The idea of the declaration of war seems to have originated in the sportsmanlike belief that one should give fair warning in advance of an attack

¹ Brevet-Lt.-Col. J. F. Maurice, *Hostilities Without Declaration of War*. From 1700 to 1870. (London, H.M. Stationery Office, 1883.)

to follow. Phillipson tells us that it was the practice of ancient peoples; to the Romans it partook of the nature of a religious duty and ceremony.² The practice continued during the Middle Ages, doubtless influenced by the ideals of chivalry, and by the analogy of the challenge in dueling—to which the private wars of that time could be compared.³ The declaration of this era was in the nature of a challenge, ceremoniously delivered to the sovereign; later it was transmitted through diplomatic channels, or merely published for all to read. The early writers on international law insisted upon the declaration of war;⁴ but by the time of Bynkershoek, he was only able to say that it was an honorable, though not obligatory, custom. The 18th and 19th centuries were characterized by disregard for the practice of issuing declarations. During the period from 1700 to 1870, according to Maurice, there were not less than 107 cases of undeclared war, and not more than 10 in which war was declared.⁵))

[Toward the end of the century, however, the idea revived. The *Institut de Droit International* made recommendations which were adopted with little change at the Second Hague Conference in 1907.⁶ The third Convention, signed at this conference, provided as follows:

- / Considering that it is important, in order to ensure the maintenance of pacific relations, that hostilities should not commence without previous warning;
- / That it is equally important that the existence of a state of war should be notified without delay to neutral Powers;

Article 1 ✓

The contracting Powers recognize that hostilities between themselves must not commence without previous and explicit warning, in the form either of a reasoned declaration of war or of an ultimatum with conditional declaration of war.

Article 2

The existence of a state of war must be notified to the neutral Powers without delay, and shall not take effect with regard to them until after the receipt of a notification, which may, however, be given by telegraph. Neutral Powers, nevertheless, cannot rely on the absence of a notification if it is clearly established that they were in fact aware of the existence of a state of war.

✓ Since the Crimean War, a declaration of war has been the rule, though not always adhered to.)) There was no declaration of war between China

² Coleman Phillipson, *The International Law and Custom of Ancient Greece and Rome* (London, 1911), II, 179, 197-202. He adds: "This appears to have been the rule also amongst the ancient Chinese, as well as the Hebrews."

³ H. Ebrein, "*Obligation juridique de la déclaration de la guerre*," *Revue Générale de Droit International Public*, XI (1904), p. 136.

⁴ Grotius, *De Jure Belli et Pacis*, III, 5; Vattel, *Le Droit des Gens*, III, 51.

⁵ Maurice, *op. cit.*, p. 4.

⁶ A. Rolin, *Le Droit Moderne de la Guerre* (Bruxelles, 1920), I, p. 181.

and Japan in 1894, nor between Japan and Russia in 1904. A declaration, more or less definite, was issued for the Franco-Prussian War of 1870, the Russo-Turkish War of 1877, and the Spanish-American War of 1898; they were customary during the World War. Thus adding recent practice to the Hague Convention, it may be possible to aver that there is a rule of customary international law to the effect that war must be declared. What this signifies, it is difficult to say: whether war without a declaration is illegal, or, since it is not declared, it is not war. In either case, grave difficulties arise. There was no declaration of war in the hostilities between Japan and China, nor in those between Italy and Ethiopia. Were they, under the Hague Convention, illegal wars, or were they wars at all? In such a situation, should other states take the part of neutrals? Should the League of Nations apply its sanctions against war? Should the United States put into effect its neutrality legislation?

The situation has, of course, altered greatly since the Hague Convention was adopted. War has been declared illegal, to a varying extent, in a number of modern treaties; it therefore becomes highly important to know what war is. If these prohibitions are to apply only to declared wars (others not being wars under the convention because not declared), they would have little effect upon war; for it would be absurd for a state to declare war when by its mere failure to do so it would be absolved from the guilt of having carried on illegal war.

Aside from this very important matter—which we do not take up in this paper—investigation reveals a great many uncertainties as to the purpose, the form, and the significance of the declaration of war. These uncertainties are reflected in numerous judicial decisions, affecting a wide range of important interests, such as insurance claims, effect upon treaties, interpretation of statutes, *et cetera*. In spite of numerous decisions in the past, it is still true that, from the viewpoint of customary international law, and leaving aside the new problems introduced by modern international government, the term and the practice of the declaration of war need much clarification.

The declaration of war creates the legal status of war. This much seems sure, amid many uncertainties. It is not intended thereby to say that war can exist only after a declaration; the contrary undoubtedly is true,⁷ but the announcement is sufficient evidence that peace has been transmuted into war, and that the law of war has replaced the law of peace. This may be accomplished by the declaration of one state alone. Lord Stowell was quite clear as to this:⁸

⁷ We do not at this time investigate undeclared war. Reference may be made to a previous study by the writer, "The Attempt to Define War," in *International Conciliation*, June 1933, No. 291.

⁸ *The Eliza Ann*, 1 Dodson 244, 165 Reprint 1298 (1813). Even where there was no declaration by either side, but physical war conducted against an unwilling opponent, the

✓ A declaration of war by one country only is not . . . a mere challenge, to be accepted or refused at pleasure by the other. It proves the existence of actual hostilities on one side at least, and puts the other party also into a state of war, though he may, perhaps, think proper to act on the defensive only.)

No answer has been given to the Chinese delegate at the Second Hague Conference who asked "whether a declaration of war can be considered by the State toward which it is directed as a unilateral act and whether the latter can regard it as null and void?"⁹ Practice would indicate that the war god is in absolute control. No matter how little the other party may desire war, no matter how little the entire community of nations may desire to be upset by war between some of its members, they must all give way when one state declares that it, at any rate, wishes war. It is usual to issue a manifesto to give warning to neutrals; but common knowledge of the war is enough, even under the Hague Convention.

✓ The magic of the declaration seems enough also to establish the legal status of war even in the absence of any actual exercise of physical power.) As we shall see, some South American states occupied a position of belligerency ✓ during the World War without furnishing a man or a fighting vessel to the armed forces of the Allies. ✓ Indeed, during this war, some states between which war had been declared never actually met in conflict. Attention has been directed to the long period between the armistice and the ratification of the treaties of peace, during which war had not yet ended, though there was no conflict, and though armies were being demobilized and ships returning to their stations.¹⁰)

✓ The declaration, then, establishes a state of war. Beyond this, nothing is sure. What constitutes a declaration of war? What function is it intended to serve, or does it serve?)

R. ✓ (A declaration of war is usually a formal proclamation issued on behalf of a state. ✓ According to the Hague Convention, it should be "in the form either of a reasoned declaration of war or of an ultimatum with conditional declaration of war"; and it should not take effect as regards neutrals until they had been notified—though they were not excused if they could be shown to have had knowledge of it.) ✓ The form in which this notice has

latter has been held to be at war, even while denying it. *The Nyade*, 4 C. Rob. 251, 165 Reprint 602 (1802).

⁹ Proceedings of the 1907 Hague Conference (Oxford University Press, 1921), III, p. 169.

¹⁰ Costa Rica seems to have been an example. See P. A. Martin, *Latin America and the War* (Baltimore, 1925), pp. 459-460. See also the editorial comment of G. G. Wilson, in this JOURNAL, Vol. 26 (1932), p. 327: "Under this convention there might be a state of war in the legal sense after declaration even though there might be no use of force upon the part of either state." Of the termination of the World War he says: "There existed accordingly for the United States a legal state of war for a considerable period after the use of force had ceased. . . . There may, therefore, be a state of war without the use of force or after the use of force has ceased, or there may be the use of force without a state of war."

been given has varied with time. In the days of Rome, a herald was sent to the frontier to give notice according to established usage. Later, a special messenger delivered the notice into the hands of the sovereign; and still later, in the 17th and 18th centuries, notice was given through a printed proclamation. As late as 1854, "The Sergeant-at-Arms, accompanied by some of the officials of the City, read from the steps of the Royal Exchange Her Majesty's declaration of war against Russia."¹¹ Whether notification reaches the enemy does not seem of much consequence. (The United States began the War of 1812 without allowing time for notice to reach England. Perhaps it may be assumed, with the improved communications of this day, that a proclamation made in one country will be immediately known in the enemy country.)

Under the terms of the Hague Convention, an ultimatum may serve as a declaration. On July 23, 1914, the Austro-Hungarian Minister presented to the Serbian Government the famous note containing a forty-eight hour ultimatum. The reply received was regarded as inadequate, and the government at Vienna issued a formal declaration:¹²

The Royal Serbian Government having failed to give a satisfactory reply to the note which was handed to it by the Austro-Hungarian minister in Belgrade on July 23, 1914, the Imperial and Royal Government is compelled to protect its own rights and interests by a recourse to armed force.

Austria-Hungary, therefore, considers herself from now on to be in state of war with Serbia.

In this case the ultimatum was followed by a declaration. One may say the same of the procedure in the Spanish-American War. The Boer War was begun by an ultimatum; and in 1904 Japan informed Russia that the Japanese Government

reserve to themselves the right to take such independent action as they deem best to consolidate and defend their menaced position as well as to protect their established rights and legitimate interests.

Two or three days later Japan had begun hostilities.¹³ Germany, on August 2, 1914, issued an ultimatum to Belgium; and two days later:¹⁴

¹¹ Maurice, *op. cit.*, p. 9. See also the *Maria Magdalena*, Hay & M. 247, 165 Reprint 57 (1779): "They could not but know also, being French houses, of the King of France declaring in terms, on the 10th of July, that he was engaged in actual hostilities with England. . . . Where is the difference, whether a war is proclaimed by a Herald at the Royal Exchange, with his trumpets, and on the Pont Neuf at Paris, and by reading and affixing a printed paper on public buildings; or whether war is announced by royal ships, and whole fleets, at the mouths of cannon?"

¹² Naval War College, *International Law Documents*, 1917, p. 49.

¹³ Coleman Phillipson, *International Law and the Great War* (London, 1915), p. 54. He regards the Japanese action as quite in order. See also S. Takahashi, *International Law Applied to the Russo-Japanese War* (New York, 1908), p. 5.

¹⁴ Naval War College, *op. cit.*, pp. 101-102.

In accordance with my instructions, I have the honor to inform your Excellency that in consequence of the refusal of the Belgian Government to entertain the well-intentioned proposals made to them by the German Government, the latter, to their deep regret, find themselves compelled to take—if necessary by force of arms—those measures of defense already foreshadowed as indispensable, in view of the menace of France.

Whether the latter document is to be regarded as a declaration of war seems doubtful. In general, declarations were the rule during the World War, even when ultimatums had been issued.

If an ultimatum may serve as a declaration, possibly other acts of a minatory or warning nature may serve to establish the state of war. Maurice remarks:¹⁵

the extreme anxiety which is shown everywhere in the history of modern diplomacy to avoid coarseness or bluntness of expression, the desire not to provoke, which makes it a point of honor delicately to hint at possible or intended war, and combined with this the eager wish, even at the last moment, to arrange terms of reconciliation, has led in several instances to very curious results. (Thus . . . what has been on one side intended as an ultimatum, to be followed under certain contingencies and after a certain lapse of time by a declaration of war, has been, according to the strength or weakness of the power receiving it, treated sometimes as an actual declaration of war, and thereupon at once acted upon; sometimes it has been regarded as only a more than ordinarily threatening communication, suggesting a more active stage of diplomacy; so that in either event a virtually complete surprise has been effected when hostilities have actually commenced.

The rupture of diplomatic relations, it is generally agreed, does not create war; there have been many such cases where no war followed, nor was there any intent to make war.¹⁶ Yet it is open to question whether the action of some of the Latin American Republics, in breaking off relations with Germany, was not intended to mean war, or did not in fact establish the status of war. Thus, Ecuador, after breaking off relations with Germany, but without a declaration of war, gave orders that ships of the United States or of the

¹⁵ Maurice, *op. cit.*, p. 6.

¹⁶ Of one such episode Maurice says that even the astute Lord Palmerston was deceived, though "it is abundantly clear that if ever the withdrawal of an ambassador was used as the modern equivalent of a declaration of war, or warning of war to be followed by acts of hostility without further notice, that withdrawal of the French Ambassador was so regarded by the withdrawing Cabinet, and so understood by the French Senate and House of Representatives to which it was announced." *Ibid.*

A British court, called to pass upon the beginning of the Franco-Prussian War, said: "Their Lordships do not think that either the declaration made by the French Minister to the French Chambers on the 16th of July, or the telegram sent by Count Bismarck to the Prussian Ambassador in London, in which he states that that declaration appears to be equal to a declaration of War, amounts to an actual declaration of War." And, though war can exist without declaration, yet "this can only be effected by an actual commencement of hostilities." *The Teutonia*, VIII Moore N.S. 411, 17 Reprint 366 (1872).

Allies should be admitted to Ecuadorean territorial waters without restriction.¹⁷ Long before a rupture of diplomatic relations was under consideration, the Uruguayan Government had issued its famous decree, based upon South American solidarity: "That no American country which in defense of its own rights should find itself in a state of war with nations of other Continents will be treated as a belligerent"; and when the rupture was decreed on October 7, the neutrality decrees were revoked with regard to Allied states outside the American Continent. Germany, with some justification, regarded this situation as one of war between herself and Uruguay.¹⁸ El Salvador, without even breaking off diplomatic relations, expressed benevolent neutrality toward the United States; and when inquiry was made concerning her intent, replied that it was to grant to the United States the use of her waters in such a way that the ships of the American marine might have the same privileges and rights as the ships of El Salvador.¹⁹

If such announcements or actions as these can be regarded as equivalent to declarations of war, it might be possible to proceed further along such lines of reasoning and to say that certain acts of a hostile nature are to be regarded as equivalents. Thus Serbia, in 1886, "*regarde cette agression non motivée comme une déclaration de guerre*"; and Mexico announced to the United States that she would regard as a declaration of war the ratification of a treaty annexing Texas.²⁰ The proclamation of blockade by the United States against the Confederacy, in the American Civil War, seems to be regarded as a substitute for a declaration of war. In such cases as these, we are obviously making the transition to another point. Such acts may be interpreted, not as substitutes for declarations, but as evidencing a state of undeclared war. It nevertheless remains true that if certain announcements or acts may be regarded as performing the same functions as a declaration, it would be very difficult to say which is a declared war and which is not. Any act of hostility accepted as creating the status of war could then be called a declaration.)

* If there is uncertainty as to what constitutes a declaration of war, there is uncertainty also as to the authority which can issue it. It is conceded that an individual cannot make war, and could not, therefore, issue a declaration of legal effect,²¹ but when a number of individuals are grouped together, they

¹⁷ Martin, *op. cit.*, pp. 459-460.

¹⁸ *Ibid.*, pp. 363, 376. A German submarine, acting upon orders from its government, stopped the ship upon which Uruguayan officials were traveling to visit the Allied front, took them off, and held them as prisoners of war until they gave their parole.

¹⁹ *Ibid.*, p. 513.

²⁰ *Revue de Droit International et de Législation Comparée*, XVIII (1886), p. 518; Message of the President of the United States to the Senate, May 15, 1844. The Mexican position raises the question whether every rejection of an ultimatum, or action contrary to it, constitutes a declaration of war; and, in such a case, who has declared war?

²¹ "But whenever men are formed into a social body, war cannot exist between individuals. The use of force among them is not war, but a trespass, cognizable by municipal law." *U. S. v. The Active*, 24 Fed. Cas. 755, No. 14,420 (1814).

may or may not be able to make war. When such a group form a sovereign state, the prerogative is clear; but it is not always easy to distinguish a sovereign state. When Bulgaria attacked Serbia in 1886, Bulgaria was not independent, but an autonomous part of Turkey; should Serbia be regarded as at war with Turkey? If India, an independent member of the League of Nations, should declare war against Great Britain, would neutrals regard such a declaration as imposing upon them the duties of neutrality, or would they regard it as rebellion? American courts have held Indian fights to be wars;²² but foreign states have felt no obligation to proclaim neutrality as between the Comanche Indians and the United States. What of an insurgent group, fighting against the parent state: Has it a right to declare war, and thereupon declare a blockade? Or are they merely pirates?²³ When a Polish army was created and on October 5, 1918, asked recognition as belligerents, the British Foreign Minister agreed to "henceforth recognize the Polish National Army as autonomous, Allied, and co-belligerent."²⁴ To take one more case, as a *reductio ad absurdum*: when the Tinoco Government in Costa Rica declared war against Germany, on May 23, 1918, it was regarded by Germany as at war, since Germany had recognized this government; but it was not regarded by the United States as at war, since the latter had refused to recognize the Tinoco régime.²⁵

In this connection, also, arises the question: Can a third state, not a party to the conflict, issue a declaration which establishes the existence of war? Does a proclamation of neutrality as between two other states at war establish the legal relationships of war as between those two states? European states issued such a proclamation during our Civil War; and during the Italo-Ethiopian conflict, neither side having publicly declared war, the President of the United States issued a proclamation which asserted that a state of war existed between those states. (Can it be argued that, since certain states have adopted an attitude of declared neutrality as between the legitimate government and the insurgents in Spain, they have thereby converted the situation from rebellion into war?) In any of such cases, it could scarcely be maintained that a proclamation of neutrality could do more

²² See, for example, *Montoya v. U. S.*, 180 U. S. 261 (1900); *Julian Alire v. U. S.*, 1 Ct. Cl. 233 (1865); *Marks et al. v. U. S.*, 28 Ct. Cl. 147 (1893).

²³ "From these principles it necessarily follows that in the absence of recognition by any government of their belligerent rights, insurgents that send out vessels of war are, in legal contemplation, merely combinations of private persons engaged in unlawful depredations on the high seas; that they are civilly and criminally responsible in the tribunals for all their act of violence; . . . that such acts are therefore piratical . . ." *The Ambrose Light*, 25 Fed. 408 (1885).

²⁴ Quoted in Hudson, *Cases and Other Materials on International Law* (2d ed., St. Paul, Minn., 1936), p. 178. He adds, in a footnote, that the Permanent Court of International Justice (Series A, No. 7, p. 28), declared that this recognition could not "be relied on as against Germany, which had no share in the transaction."

²⁵ Martin, *op. cit.*, p. 508; see also M. W. Graham, "Neutrality and the Great War," this JOURNAL, Vol. 17 (1923), p. 709.

than establish the relationships of neutrality as between the belligerents and the state declaring neutrality; it could not have compelling force over the relations of the belligerents themselves—such, for example, as compelling them to observe the rules of land warfare.²⁶ On the other hand, it may be noted that courts in one state have often passed judgment as to whether a state of war existed between two other states;²⁷ and the conclusion reached by such a neutral court might be in utter disagreement with the declared intentions of those states.

Assuming, as a general rule, that only such political entities may declare war as have been recognized to be independent or belligerent, what authority within such an entity may issue the declaration? English courts have disclaimed the right to say whether their country is at war. Thus, the Court of Appeal said in 1799:²⁸

It always belongs to the Government of the country to determine in what relation any other country stands toward it; that is a point on which Courts of Justice cannot decide.

In *The Hoop* it was held that "By the law and constitution of this country, the sovereign alone has the power of declaring war and peace."²⁹ American courts have taken a similar stand. A Tennessee court asserted:³⁰

The question, whether or not war, in its legal sense, exists, is to be determined alone by the political power of the government; and of this determination the courts must take judicial knowledge . . .

* // (Thus, according to the courts, the political department of the government alone can determine that war is in existence. Under the Constitution of the United States, only Congress can declare war; the constitutions of other states frequently name the authority for this purpose. Yet it remains true, as we have seen, that courts have, for the purpose of applying a statute or of enforcing a contract, or otherwise in the course of their judicial duties, frequently determined that war had or had not existed at a certain time, in the absence of any statement by the political department.)

²⁶ We are speaking in terms of customary international law. Where states have agreed by treaty, as under the Covenant of the League of Nations, to permit other states to determine the existence of war, the situation is of course different. See, on this point, M. Gonsiorowski, in the *American Political Science Review*, XXX (1936), pp. 673-678.

²⁷ There are numerous such cases. See for example, *Compañía Minera etc. v. Bartlesville Zinc Co.*, 115 Texas 21, 275 S. W. 388; or *The Ambrose Light*, (cited in note 23, *supra*); or *The Nayade* (cited in note 8, *supra*); or *The Teutonia* (cited in note 16, *supra*).

²⁸ *The Pelican*, Edw. (App.) iv, 165 Reprint 1160 (1809); affirmed in *Blackburn v. Thompson*, 3 Camp. 62, 170 Reprint 1306 (1811). See W. J. Ronan, "English and American Courts and the Definition of War," this *JOURNAL*, Vol. 31 (1937), pp. 656-657.

²⁹ *The Hoop*, 1 C. Rob. 196, 165 Reprint 146 (1799).

³⁰ *Sutton v. Tiller*, 46 Tenn. (6 Cold.) 593 (1869). See also *Kneeland-Bigelow v. Michigan Central R. R. Co.*, 207 Mich. 546 (1919), where it was said: "The existence of war and restoration of peace are determined by the action of the legislature, supplemented by the executive department of the government."

While domestic courts may be bound by the constitutional provisions of their respective states, the situation may be different from the viewpoint of other states. Thus, if the President of the United States should, without Congressional authority, declare war against another state, there is little doubt that that state would consider itself at war with the United States.) On the day after the United States had entered the World War, the President of the Republic of Panama issued a proclamation in which he declared that "Panama makes the cause of the United States her own, and is disposed to follow the United States in whatever action she may take." This was not a formal declaration of war, but it was so regarded by the Panama Foreign Office, and hostile measures, such as internment of Germans, followed. Yet, under the Constitution of Panama, the sole right to declare war is vested in the Legislative Assembly.³¹ (Similarly, when the Chinese Government, by Presidential mandate, on August 14, 1917, declared war against Austria-Hungary, the Minister of that state replied:³²

I can not here enter into the arguments contained in the declaration of war, but feel bound to state that I must consider this declaration as unconstitutional and illegal, seeing that, according to so high an authority as the former President Li Yuang-hung, such a declaration requires the approbation of both Houses of Parliament. //

In actual fact, the proclamation of a commander in the field, or of an admiral in the navy, may be equivalent to a declaration of war, or may establish the state of war. Greek independence was in fact due to the unauthorized action of naval commanders of the fleets which sunk the Turkish vessels at Navarino. Hostilities in the Austro-Prussian War of 1866 started with a proclamation by Prince Frederick Charles, who commanded the Prussian forces:³³

Soldiers! Austria faithless and regardless of treaties, has for some time without declaring war, not respected the Prussian frontier in Upper Silesia. I, therefore, likewise, without a declaration of war, might have passed the frontier of Bohemia. I have not done so. Today I have caused a public declaration to be sent, and today we enter the territory of the enemy in order to defend our own country.

Where a general, or an admiral, is authorized to use his discretion, it might be said that his government has delegated to him its power to make—if not declare—war. Again we are on the edge between declared and undeclared wars.

The Third Hague Convention says nothing as to the time at which a declaration of war should be issued. It was proposed, in the debates, that a delay of at least twenty-four hours should be required before hostilities could begin, after the declaration was issued.³⁴ In practice, such a delay is very rare; the military objective is rapid attack before the other state is prepared.

³¹ Martin, *op. cit.*, p. 508.

³² Naval War College, *op. cit.*, pp. 71-74.

³³ Annual Register, 1866, p. 222.

³⁴ The argument for delay is presented in Rolin, *op. cit.*, I, pp. 185-189.

We shall have more to say of this in connection with the functions of the declaration; at this point it suffices to say that, so far as international law lays down a rule, the declaration of war may be issued after the war is ended and the treaty of peace signed.

* We may say, then, with confidence, only one thing: that a declaration establishes the legal status of war. It is not always clear what is to be regarded as a declaration, nor what authority can issue it, nor when it is to be regarded as in effect. Consequently, even though there has been what purported to be a declaration of war, the attacked state—and other states—may not realize that their placid situation of peace has been shattered, or when it occurred, or whether it was legitimately done. Maurice was able to find only one case³⁵ in two centuries where

not only did the declaration of war precede any overt hostilities, but where the declaration of war was actually *delivered as a warning at the Foreign Court* before hostilities were commenced.

This case he was able to explain as due to the suddenness of the crisis, there being no opportunity for either side to get the jump on the other. Modern military organizations are especially directed toward rapidity of action, and it is not to be expected that they would lose an advantage of swifter attack by waiting for and after a declaration. It is perhaps assumed, too, in these days of ubiquitous and omniscient newspaper men, that enough information will have been published to give some warning to the state about to be attacked. The declarations during the World War were of little significance in this regard; each state knew as well without a declaration as with it, the danger which was threatening. Thus the element of sportsmanlike warning, which seems to have been the original purpose of the declaration, is no longer served, or may easily be evaded.

What, then, is the function of the declaration of war? The most obvious answer to this question is that it is very important to establish a date upon which the metamorphosis from peace to war takes place. For the benefit of private individuals whose ordinary activities become imperiled, as well as for the benefit of states whose rights and duties are thereby abruptly changed, fair warning should be given as to the day, even the moment, when the new legal status is to become effective. Yet the cases reveal no certainty whatever as to when war begins, even where a declaration of war is issued; and courts must perforce determine this time as they are able.) Thus, the *Teutonia*, a Prussian brig, was advised by the German consul that war had begun, and therefore abandoned its voyage. An English court later held, in a suit for breach of contract, that war had not begun until a day after the *Teutonia* had abandoned the destination which she was supposed to have reached.³⁶ The French declaration of war against Austria, issued on May 3,

³⁵ Maurice, *op. cit.*, p. 76.

³⁶ This case is cited in note 16, *supra*.

1859, said: "Austria in causing her armies to enter the territory of the King of Sardinia, our ally, declares war against us"; the French troops, however, were in motion on April 23, before any declaration, even before the date of the Austrian act which was offered by the French as the cause of the war, and, indeed, offered by them as an Austrian declaration of war.³⁷ (At what time, then, did this war begin? The question has arisen more often, doubtless, in the case of undeclared wars; but it can remain uncertain even where there is a declaration.)

An amazing illustration of this is found in the declaration of war by the United States against Spain. The Congress of the United States passed a joint resolution on April 20, 1898, declaring that the people of Cuba "are free and independent of Spain," and demanding that the "Government of Spain at once relinquish its authority and government in the island of Cuba, and withdraw its land and naval forces from Cuban waters"; it also instructed the President of the United States "to use the entire land and naval forces of the United States, and to call into the actual service of the United States the militia of the several States, to such extent as may be necessary to carry these resolutions into effect." Was this equivalent to a declaration of war? The American Minister in Spain required an answer by April 23; the Spanish Foreign Minister replied on April 21 that the joint resolution "is equivalent to an evident declaration of war," and handed the American Minister his passports. It was not until April 25, however, that Congress resolved "that war be and the same is hereby declared to exist, and that war has existed since the 21st day of April. . . ." The Spanish Foreign Minister apparently would regard April 20 as the date for the beginning of the war, since he interpreted the resolution of that date as a declaration of war. One would normally expect that the war was begun on the date of the declaration, April 25; but this is impossible, since that declaration expressly dated it back to April 21. Why this date? Why not April 20? Or, for that matter, January 1? It is a fact that American warships had made captures on April 22, which captures would not be legal if war had not at that time begun (but if a declaration of war can be dated back to legalize acts otherwise illegal, then a declaration is not only worthless, but vicious).

American courts have, of course, followed the resolution of Congress. Chief Justice Fuller, speaking for the Supreme Court, said: "When, on the 22nd day of April, this Spanish steamer sailed from Havana, the United States and Spain were at war."³⁸ A British court has held that the war began on April 23, and probably two days earlier, but for quite different reasons:³⁹

I will state why it is a fact that a state of war then existed. An act of hostility had been committed on April 22 by American men-of-war

³⁷ Maurice, *op. cit.*, p. 68; Annual Register, 1859, p. 231.

³⁸ *The Pedro*, 175 U. S. 354 (1899), from which the facts above stated are taken. See also *The Buena Ventura*, 175 U. S. 384; and *The Rita*, 87 Fed. 925.

³⁹ *U. S. v. Pelly*, 4 Com. Cases, 100 (1899).

against Spanish traders, or, at all events, against one Spanish trader, which act, in my opinion, was only consistent with the existence of a state of war.

If the courts can not agree, even with the aid of a declaration of war, what chance has the poor trader? Whether one is uncertain as to the date of the declaration, or whether one holds that this is a case of undeclared war, the result is the same: Of what value is the declaration?

Worse than this, however, the date of the beginning of war has been retroactively set by courts. In the case of *The Boedes Lust*, a Dutch vessel had been seized by the British a month before the declaration of war. The British court said:⁴⁰

It is contended . . . : That the property was taken in a state of peace . . . and consequently that this property could not be considered as the property of an enemy, either at the time of capture or adjudication . . . the declaration had a retroactive effect, applying to all property previously detained, and rendering it liable to be considered as the property of enemies taken in time of war. This property was seized provisionally, an act itself hostile enough in the mere execution, but equivocal as to the effect, and liable to be varied by subsequent events, and by the conduct of the Government of Holland. If that conduct had been such as to re-establish the relations of peace, then the seizure, although made with the character of a hostile seizure, would have proved in the event a mere *embargo*, or temporary sequestration✓

In the case of *The Fortuna*, "The Court sometimes looks to the circumstance of an approaching war, where the expectation of such an event appears to have guided the conduct of the parties themselves when the contracts were entered into, and in such cases it feels itself justified in applying the principles that belong to a state of actual war."⁴¹ From these cases, it is evident that the declaration of war by the political department is not determining upon the courts, who feel able to say the legal effects of the status of war reach back before the declaration was made. There are, however, decisions which uphold a contrary viewpoint. In the days of the Continental System, Lord Ellenborough declared: "We are placed in a strange anomalous situation with regard to that country and others on the continent; but it is not that of war. We have published no declaration of war against Prussia; we have not issued letters of marque and reprisals; we have not done any act of hostility."⁴² The idea of retroactivity was more clearly denied in a later case before the House of Lords, Lord Lindley speaking:⁴³

⁴⁰ *The Boedes Lust*, 5 C. Rob. 233, 165 Reprint 759 (1804).

⁴¹ *The Fortuna*, Edw. 56, 165 Reprint 1031 (1809). In *The Herstelder*, dealing with a capture made almost three weeks before war was declared: "Subsequent events have retroactively determined, that the character of Holland during the whole of that doubtful state of affairs, is to be considered as hostile; and that the property of Dutch subjects seized under it, is to be treated as hostile . . ." 1 C. Rob. 113, 165 Reprint 116 (1799).

⁴² *Muller v. Thompson*, 2 Camp. 610, 170 Reprint 1268 (1811).

⁴³ *Janson v. Driefontein Consolidated Mines*, L. R. [1902] A. C. 484, 509. In this case Lord Brampton said: "it would indeed be strange that a declaration of war should be held to have

Q. threatened war or anticipated war or imminent war is peace, which may not after all result in war; and to apply the rules of war to insurances against loss before war breaks out would paralyze commerce, and often without any real necessity.

P. To concede that a unilateral declaration of war is so far omnipotent as to validate seizures previously made in time of peace is unfair to private citizens, and should be regarded as an invasion of the rights of their states; it constitutes an invitation to illegal actions.

(In this uncertain and confused record of judicial action, it is clear that the time of the beginning of war is not necessarily fixed by the declaration. No matter how formal it may be, it has usually failed to perform this function. If the declaration be made after hostilities have begun, it serves no purpose of fair warning to the other state of impending attack. If it is intended to fix a date for the information of individuals, it is useless if retroactive; and if not retroactive, it is equally useless when courts can decree that it nevertheless has retroactive effect.⁴⁴)

Indeed, the declaration seems, in many cases, to do no more than recognize a state of war already in existence. It is a frequent form in declarations, doubtless accounted for by desire to put the blame on the other party, to declare that the war initiated by the opponent is accepted. This is the usual form of declaration by the United States.) Thus, the declaration of war against Mexico, May 13, 1846, reads:

The Congress of the United States, by virtue of the constitutional authority vested in them, have declared by their act bearing date this day, that by the act of the Republic of Mexico, a state of war exists between that government and the United States.

That against Germany, on April 6, 1917, was as follows:⁴⁵

Whereas the Imperial German Government has committed repeated acts of war against the Government and the people of the United States of America: Therefore, be it

Resolved by the Senate and the House of Representatives of the United

relation back to an indefinite period of time during which both the hostile countries believed themselves to be and conducted themselves towards each other as in a condition of amity, and were negotiating with a view to avoid any rupture of a then existing state of peace." *Ibid.*, p. 503.

⁴⁴ More care as to timing came to be shown during the World War. Thus China, in her declaration against Germany, fixed the time at 10 a.m. on Aug. 14; France against Austria-Hungary on Aug. 12 at midnight; etc. Naval War College, *op. cit.*, p. 74, and *passim*. See also M. O. Hudson, "The Duration of the War between the United States and Germany," *Harvard Law Review*, 39 (1926), p. 1028, note 29.

⁴⁵ Naval War College, *op. cit.*, pp. 225-226. By subsequent act of Congress (Oct. 6, 1917) the beginning of war was fixed at "midnight ending the day on which Congress has declared or shall declare war or the existence of a state of war." This, however, seems inconsistent with the declaration, which affirms that Germany had already thrust a state of war upon the United States. See Hudson, *loc. cit.*; also F. R. Black, "The Declaration of War," *American Law Review*, 61 (1927), p. 415.

States of America in Congress assembled, That the state of war between the United States and the Imperial German Government which has thus been thrust upon the United States is hereby formally declared; and that the President be, and he is hereby, authorized and directed to employ the entire naval and military forces of the United States and the resources of the Government to carry on war against the Imperial German Government; and to bring the conflict to a successful termination all the resources of the country are hereby pledged by the Congress of the United States.

Other states as well take this attitude in their declarations.⁴⁶ Even though the purpose of this form is simply to shift the onus of beginning war to the enemy, the result is to imply, if not admit, that war was already in existence before the declaration was issued. On the whole, then, it is difficult to maintain that the declaration of war serves the purpose of fixing the time at which war begins.¹¹

Other functions have been suggested for the declaration of war. In the *cause célèbre* of *McLeod*, the court asserted, in the course of a long opinion:⁴⁷

All national wars are of two kinds, and two only; war by public declaration, or war denounced without such declaration. The first is called solemn or perfect war, because it is general, extending to all the inhabitants of both nations. In its legal consequences, it sanctions indiscriminate hostilities on both sides, whether by way of invasion or defence. The second is called unsolemn or imperfect war, simply because it is not made upon general, but special declaration. The ordinary instance is a commission of reprisal.

This would seem to return us to the theories of earlier writers—Vattel, Grotius, and Ward were the authorities cited—who made such distinctions. If this explanation of the declaration of war were ever justified, it is not so now, for the distinction between public and private war has been abandoned, and letters of marque and reprisal are no longer legitimate. Indeed, courts have held that ever more extended hostilities constitute limited, but none the less public, war, in the absence of a declaration.⁴⁸ If the purpose of the declaration is no more than to distinguish war, or public war, from other forms of forceful action, it is contrary to practice; for it is admitted that an undeclared war may none the less be war.¹¹

Again, the declaration of war may be for the internal or domestic purpose of arousing the citizens, or calling them to arms. As to this, Maurice remarks:⁴⁹

⁴⁶ See the declarations of war quoted in the Naval War College Documents above cited, particularly those of France against Turkey (p. 90), Germany against France (p. 103), Great Britain and France against Austria-Hungary (pp. 117-118). The Brazilian declaration says "The state of war initiated against Brazil is recognized and proclaimed," Brazilian Green Book (authorized English version, London and New York, 1918).

⁴⁷ *People v. McLeod*, 1 Hill (N. Y.) 375 (1841).

⁴⁸ *Gray, Adm'r., v. U.S.*, 21 Ct. Cl. 340 (1886). There remains, however, the interesting question whether there is an intermediate stage between war and peace. See Ronan, *loc. cit.*, p. 643.

⁴⁹ Maurice, *op. cit.*, p. 9.

✓ Moreover, the wording of most "declarations of war" shows clearly that they are intended formally to require the subjects of the declaring nation to aid the war, and are not intended as a warning to the Power declared against.¹

The implication may reach further than this. In the case of *Bishop v. Jones & Petty*, the court said:⁵⁰

When the sovereign power of a state declares war against another state, it implies that the whole nation declares war, and that all the subjects or citizens of the one are enemies to those of the others.

✓ The extent to which private rights are affected by war need not concern us here; but, whatever that extent, it is not affected by the declaration. War, and its effect upon private rights, may exist whether or not there is a declaration. The declaration may, however, serve internal purposes, such as calling citizens to arms, furnishing a guide for the courts, *et cetera*.¹

Finally, it may be suggested that the function of the declaration is to furnish a vehicle for the statement of the reasons why war is being waged. Such a purpose is indicated in the Hague Convention, which asks for a "reasoned declaration"; and, as has been seen, the opportunity is often taken in practice to argue the cause of the state which issues the declaration. For this purpose, the ultimatum seems more often used—some of those issued during the World War occupy several printed pages. If, however, this is the sole function of the declaration of war, it must be admitted that it has not much *raison d'être*. The same thing could be done in other ways as efficient.

✓ The declaration of war could serve various useful purposes, and the care with which it has been avoided in recent situations is evidence that it still has significance. Internally, it could furnish authority for legislative or executive acts which depend upon the existence of war; it could furnish a guide for domestic court action—if its authority and implications were clearly stated; it could state the reasons for the entry into war, both to arouse popular support at home and to win favor abroad. More important, it could give notice to neutral states of the coming into force of a different legal status, with its consequent variation of rights and duties; and it could fix the exact time at which this new legal status should go into effect, for the benefit of individuals and of foreign states. In order to do this, it would be essential to require that the declaration should precede hostilities, to accept the date of the first declaration as authoritative, and to bind the courts of the various states to accept this date at face value.¹

✓ It is unfortunately true that, from the viewpoint of the old international law, these functions are not served in a reliable and trustworthy fashion; and that, from the viewpoint of more recent international agreements dealing with the status of war, the situation has been so greatly changed that the declaration of war has become inadequate. It does not, today, perform satisfactorily the task for which it was intended, that is, to determine the exist-

⁵⁰ *Bishop v. Jones & Petty*, 28 Texas 294 (1866).

ence of a legal status of war, and to differentiate it, on the one hand, from the status of peace, and on the other hand, from lesser hostilities.⁵¹ It seems to be accepted, among international lawyers, that the legal status of war may exist in the case of hostilities without a declaration.)

✓ The dilemma of the Third Hague Convention, in the situation of today, is apparent. ✓ If one says that a use of force is not war unless so declared by a state employing it, then it becomes possible for a war-making state, simply by failing to issue a declaration, to avoid the opprobrium of waging war, to evade the duties imposed by international law for the conduct of war, and to escape the repressive measures now being provided by the community of nations against war-makers.) The charge against the Hague Convention would thus be that under it, the undeclared war remains legitimate, and that it permits a state to decide for itself whether it will subject itself to the laws for the conduct of war, and to treaties seeking to limit the use of war. Naturally, as recent experience demonstrates, they choose not to declare war.

✓ On the other hand, if the Hague Convention means that undeclared war is illegal, it must be regarded as contrary to practice, and as impossible of execution. If it creates an obligation, "a failure to perform the obligation will not preclude the existence of a state of war."⁵² ✓ Courts of law do not say that undeclared war is illegal, nor do they award damages for failure to declare war. It is not enough to say that undeclared war is an illegal use of force, and to add an expression of regret that international law is unable to prevent such situations; if international law had such power, it could stop war, and there would be no need for declarations. Nor can we now afford to argue that—as has sometimes been true in the past—the use of force in peace may render war unnecessary. Recent history demonstrates that such force may be of as much enormity, and of as much shock to the community of nations as any declared war; and the pressure of public opinion and of treaties condemning war makes it probable that undeclared wars, rather than declared wars, will be the rule.)

✓ The rule requiring a declaration of war has been of value in the past; it becomes defective now because of a new situation in the community of nations. Its defect lies in that it permits a state to judge for itself on a matter which is no longer the exclusive right of a sovereign state, but which is now recognized to be a matter of concern to the entire community of nations. The community may not yet be able to enforce a rule forbidding war, but it cannot afford to legitimize hostilities on the scale of war by permitting the war-making state, in its independent judgment, to decide that it is not making war. (On the other hand, if the community is to declare such use of force illegal, it could as easily, and should, declare all use of force illegal, whether as declared war or not.)

⁵¹ Naval War College, International Law Situations, 1933, p. 96.

⁵² M. O. Hudson, *loc. cit.*

CANADA AND INTERNATIONAL LABOR CONVENTIONS

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The opinion of the Judicial Committee of the Privy Council, delivered January 28, 1937, in the case of Attorney-General for Canada *v.* Attorney-General for Ontario,¹ voids certain "new deal" measures² of the Dominion of Canada. This opinion is important not alone because it has given a harsh blow to social legislation in the Dominion, and because the judgment is a reminder of one of the last vestiges of Imperial authority over Canada, these aspects of the judgment being internal to the British Commonwealth, but also important are the external aspects. These involve the power of Canada to give effect to treaty obligations assumed by the Dominion as a member of the international community.

The issue, more particularly, raises the question of the legislative competence of the Dominion Parliament to carry out the obligations of Canada under draft conventions which have been adopted at International Labor Conferences and which have received the assent of the Canadian House of Commons and Senate in resolutions approving ratification of the conventions, such ratification having been effected by Orders in Council and deposited with the Secretary-General of the League of Nations. Many aspects of this issue concern questions of pure constitutional law, but there are also international repercussions. The extent of these repercussions in the present case well demonstrates that the international lawyer cannot be indifferent to constitutional rules regulating the exercise of treaty-making power. The final pronouncement on the rules prevailing in Canada,³ as laid down by the Judicial

¹ 1937 A. C. 326. This is only one of six opinions rendered at this time by the Judicial Committee of the Privy Council on constitutional references dealing with Canadian social legislation of 1935. The other opinions are: Att.-Gen. for Canada *v.* Att.-Gen. for Ontario, *Ibid.*, 355; Att.-Gen. for British Columbia *v.* Att.-Gen. for Canada, *Ibid.*, 368; Att.-Gen. for British Columbia *v.* Att.-Gen. for Canada, *Ibid.*, 377; Att.-Gen. for British Columbia *v.* Att.-Gen. for Canada, *Ibid.*, 391; and Att.-Gen. for Ontario *v.* Att.-Gen. for Canada, *Ibid.*, 405. These six judgments are the subject of a Special Constitutional number of The Canadian Bar Review, Vol. XV, No. 6, June, 1937.

² The Weekly Rest in Industrial Undertakings Act, 1935, The Minimum Wages Act, 1935, and The Limitation of Hours of Work Act, 1935.

³ In theory the Judicial Committee is merely adviser to the King in judicial matters. The determination of the issues before the Board takes the form, not of a decree with dissenting opinions, but of a report to His Majesty, which is then embodied in an Order in Council. In fact, of course, the Judicial Committee is a court of law. In the words of the Judicial Committee itself (in *British Coal Corporation v. The King*, 1935 A. C. 500, at 511) it is "in truth an appellate Court of Law" because by constitutional convention it is "unknown and unthinkable" that His Majesty in Council should not give effect to its advice. The advice of the Board, as a Committee of the King's Privy Council, in the present instance was given in

Committee in the above case, has left the Dominion in a state of international delinquency from which it cannot easily extract itself. This is a matter with which the international lawyer must be directly concerned. The judgment now leaves only four international labor conventions, out of a total of fifty-eight adopted to date, with legislative force in Canada.⁴

ADOPTION OF INTERNATIONAL LABOR CONVENTIONS

Before considering Canadian obligations under the three particular international labor conventions which are the subject of the controversy in the above case, it will be useful to recall the more general obligations which are binding upon the Dominion by virtue of its membership in the International Labor Organization, the procedure prescribed for bringing into existence labor conventions, and finally the procedure of the Canadian Government in respect to such conventions. The obligations of membership and the procedure for adoption of international labor conventions are set forth in the Treaty of Versailles, Part XIII—now familiarly known as the Constitution of the International Labor Organization. Part of the machinery herein provided is a General Conference of representatives of the members of the International Labor Organization. This conference, when it has decided by a two-thirds vote on the adoption of proposals appearing on its agenda, may embody these proposals: (a) in recommendations to be submitted to the members for their consideration with a view to giving effect to such recommendations, or (b) in draft international conventions for ratification by the members. Copies of the recommendations or draft conventions—authenticated by the signature of the President of the Conference and of the Director—are deposited with the Secretary-General of the League of Nations, who in turn communicates certified copies to each of the members. At the 23 sessions of the International Labor Conference, 1919–1937, 48 recommendations and 58 draft conventions have been adopted.

Despite the fact that international labor conventions are often referred to as lawmaking treaties *par excellence*, the International Labor Conference is not a truly legislative body, and its proposals in either of the above forms must await further action on the part of individual members. The members have,

the following form: "Their Lordships are of the opinion that the answer to the three questions should be that the Act in each case is *ultra vires* of the Parliament of Canada, and they will humbly advise His Majesty accordingly." For further discussion of this point see Hector Hughes, *National Sovereignty and Judicial Autonomy in the British Commonwealth of Nations*, London, 1931; Norman Bentwich, *The Practice of the Privy Council in Judicial Matters*, 2nd ed., London, 1926; and W. Ivor Jennings, "The Statute of Westminster and Appeals to the Privy Council," *Law Quarterly Review*, Vol. VIII, April, 1936, pp. 173–188.

⁴ These are No. 7 (Minimum Age at Sea), No. 8 (Unemployment Indemnity, Shipwreck), No. 15 (Minimum Age for Trimmers and Stokers), and No. 16 (Medical Examination of Young Persons at Sea). All of these are maritime conventions and, therefore, fall within Dominion legislative authority. See I. L. O., *Industrial and Labour Information*, Vol. 64, Oct. 4, 1937, Chart on "The Progress of Ratifications."

however, certain well-defined and specific obligations with regard to proposals emanating from the conference. The following paragraphs directly from the Constitution of the International Labor Organization, Part XIII of the Treaty of Versailles, set forth these obligations:

(5) Each of the Members undertakes that it will, within the period of one year at most from the closing of the session of the Conference, or if it is impossible owing to exceptional circumstances to do so within the period of one year, then at the earliest practicable moment and in no case later than eighteen months from the closing of the session of the Conference, bring the recommendation or draft convention before the authority or authorities within whose competence the matter lies, for the enactment of legislation or other action.

(6) In the case of a recommendation, the Members will inform the Secretary-General of the action taken.

(7) In the case of a draft convention, the Member will, if it obtains the consent of the authority or authorities within whose competence the matter lies, communicate the formal ratification of the convention to the Secretary-General and will take such action as may be necessary to make effective the provisions of such convention.

(8) If on a recommendation no legislative or other action is taken to make a recommendation effective, or if the draft convention fails to obtain the consent of the authority or authorities within whose competence the matter lies, no further obligation shall rest upon the Member.

(9) In the case of a federal State, the power of which to enter into conventions on labour matters is subject to limitations, it shall be in the discretion of that Government to treat a draft convention to which such limitations apply as a recommendation only, and the provisions of this Article with respect to recommendations shall apply in such case.⁵

One of the most important innovations introduced by Part XIII of the Treaty of Versailles is the obligation imposed without exception on all governments to submit draft conventions to the competent authority, *i.e.*, the authority which is competent to enact or amend national legislation with a view to bringing it into conformity with the draft convention in question.⁶ In accordance with the above provisions, three draft conventions were adopted by general conferences of the International Labor Organization as follows: (1) The Convention Limiting the Hours of Work in Industrial Undertakings to Eight in the Day and Forty-Eight in the Week (adopted as a draft convention by the International Labor Conference at its first session on November 28, 1919); (2) the Convention Concerning the Application of the Weekly Rest in Industrial Undertakings (adopted at the third session on November 17, 1921); and (3) the Convention Concerning the Creation of Minimum-Wage-Fixing Machinery (adopted at the eleventh session, June 16, 1928).

⁵ Art. 405, par. 5-9.

⁶ R. Teltsik, "The Ratification of International Labour Conventions," *International Labour Review*, Vol. 18, 1928, pp. 718, 722.

PROCEDURE OF RATIFICATION BY CANADA

From the very inception of the International Labor Organization there were uncertainties in Canada as to the proper authority or authorities before whom the draft conventions should be brought in order to secure the enactment of legislation or other action necessary to give effect to the conventions. An Order in Council of November 6, 1920, embodies the opinion of the Canadian Minister of Justice on the question whether the 1919 draft convention limiting the hours of work in industrial undertakings came within the legislative competence of the Dominion Parliament or of the several provincial legislatures. The Minister of Justice reported that this draft convention required legislation "which is competent to Parliament in so far as Dominion works and undertakings are affected, but which the provincial legislatures have otherwise the power to enact and apply generally and comprehensively."⁷ In 1922 and 1923 there were Dominion-Provincial conferences to which the draft conventions were submitted, and it was agreed by all the delegates that these were matters for provincial action.⁸ In 1924 the matter was referred to a select committee on industrial and international relations for examination and report. This committee reported to the House that in spite of the Order in Council of November 6, 1920, the subject was of such importance that it should be submitted to the Supreme Court of Canada by way of a reference. This procedure was followed, and in 1925 the Supreme Court, in answer to questions referred to it by the Governor-General, gave an advisory opinion⁹ that the matter was within provincial authority.¹⁰ The Provinces declared that the draft convention of 1919 did not offer sufficient flexibility for them to approve of its adoption. Under these circumstances nothing further could be done—so long as the opinion of the Supreme Court in 1925 was accepted—and no further steps were taken until 1935.

In February, March, and April, 1935, resolutions were adopted by the Senate and House of Commons of Canada approving the Weekly Rest Convention,¹¹ the Minimum Wage-Fixing-Machinery Convention,¹² and the

⁷ P. C. 2722, Nov. 6, 1920.

⁸ For a review of these conferences see the speech of Ernest Lapointe in the Canadian House of Commons, Feb. 8, 1935, *Debates, 1935*, Vol. I, pp. 647-648.

⁹ Which in law has the force of a judgment.

¹⁰ In the Matter of Legislative Jurisdiction over Hours of Labour, 1925 S. C. R. 505.

¹¹ The resolution approving the Weekly Rest Convention, 1921, was passed by the House of Commons Feb. 8, 1935, and by the Senate on Feb. 19, 1935. The resolution states: "That it is expedient that Parliament do approve of the convention concerning the application of the weekly rest in industrial undertakings adopted as a draft convention by the general conference of the International Labour Organisation of the League of Nations at its third session in Geneva on the 17th day of November, 1921, reading as follows:" (The resolution then sets forth the terms of the convention). See Canada, *Journals of the House of Commons, 1935*, pp. 101, 104; *Journals of the Senate, 1935*, pp. 53-56. The resolutions with respect to the other two conventions are similar in form.

¹² Resolution passed by the House of Commons March 15, 1935, and by the Senate on

Hours of Work Convention.¹³ Orders in Council were then adopted by which the Canadian Privy Council, upon the recommendations of the Secretary of State for External Affairs and with the concurrence of the Minister of Labor, advised that the conventions be confirmed and approved and that formal communication thereof be made to the Secretary-General of the League of Nations.¹⁴ The ratifications as thus approved by Orders of the Governor-General in Council were immediately recorded¹⁵ in instruments of ratification executed by the Secretary of State for External Affairs. The instrument of ratification of the Convention Concerning the Application of the Weekly Rest is typical of the others and may, therefore, be presented here for purposes of illustration. The instrument of ratification is as follows:¹⁶

WHEREAS on the 31st day of January, 1922, the Secretary-General of the League of Nations communicated to His Majesty's Government in Canada a certified copy of a Convention concerning the application of the weekly rest in industrial undertakings which had been adopted as a Draft Convention by the General Conference of the International Labour Organisation at its Third Session in Geneva on the 17th day of November, 1921:

His Majesty's Government in Canada having considered the aforesaid Convention, hereby confirm and ratify the same and undertake satisfactorily to perform and carry out the stipulations therein contained. In witness whereof this Instrument of Ratification is signed and sealed by the Secretary of State for External Affairs for Canada.

(Seal)

(Signed) R. B. BENNETT,

Secretary of State for External Affairs.

Ottawa, 1st March, 1935.

The Secretary of State for External Affairs dispatched the instruments of ratification, in the above form, to the Canadian Advisory Officer accredited to the League of Nations,¹⁷ instructing him to deposit the instruments with the Secretary-General of the League. The Advisory Officer, following these instructions, presented himself at the Secretariat of the League of Nations to proceed to the deposit of the above instruments of ratification. These instruments, "having been found, after examination, to be in good and due form," were deposited with the Secretariat. The Acting Legal Adviser of the Secretariat in each case drew up a *procès verbal* accordingly,¹⁸ and texts of the

April 2, 1935. Journals of the House of Commons, 1935, pp. 234-236; Journals of the Senate, 1935, pp. 136-138, 143-146.

¹³ Resolution passed by the House of Commons Feb. 8, 1935, and by the Senate on Feb. 20, 1935. Journals of the House of Commons, 1935, pp. 104, 110; Journals of the Senate, 1935, pp. 56-62, 66-73.

¹⁴ The Orders of the Governor-General in Council approving the Weekly Rest Convention and the Hours of Work Convention were adopted March 1, 1935, P. C. 543 and 544. The Order in Council approving the Minimum Wage Convention was adopted April 12, 1935, P. C. 934.

¹⁵ On the same dates, March 1 and April 12, as the respective Orders in Council were adopted.

¹⁶ International Labor Office, Official Bulletin, April 30, 1935, pp. 23-24; July 15, 1935, pp. 48-49.

¹⁷ Dr. Walter A. Riddell.

¹⁸ The Hours of Work and Weekly Rest Conventions were deposited March 21, 1935, and the Minimum-Wage-Fixing Machinery Convention was deposited April 25, 1935. See League of Nations Official Journal, April, 1935, p. 502, and July, 1935, p. 899.

ratification were, following the usual procedure, communicated by the Secretary-General of the League to the International Labor Office for publication in its *Official Bulletin*.

The above international labor conventions and the procedure connected therewith provide interesting illustrations of the present-day treaty practice of the British Dominions. International labor conventions are not signed at the time of their adoption by the International Labor Conferences. Yet they are "ratified" at a later date. The Constitution of the International Labor Organization does not require that draft conventions be ratified in any special form. Each member of the Organization may choose the form of ratification which it prefers. A majority of the members effect ratification by heads-of-states instruments. This form is not necessary, however, and a substantial number of members of the Organization, including members of the British Commonwealth, ratify the conventions by less formal procedures.¹⁹ In Canada, as illustrated above, ratification is effected by an instrument executed by the Secretary of State for External Affairs. International labor conventions, then, are illustrative of that form of agreements between governments in which His Majesty does not formally appear as a party and in respect of which there has been no royal intervention whatsoever either in the conclusion or in the ratification.²⁰

Following the recommendations of the 1926 Imperial Conference,²¹ it is now the practice of all the Dominions to conclude with foreign countries agreements in this form—agreements between governments. The same practice is followed with regard to the ratification of such agreements. There is no royal intervention and His Majesty does not appear in the instrument of ratification. International labor conventions are invariably treated in this manner and, following the procedure outlined at length above, are ratified by the government of the particular Dominion concerned. It is not "His Majesty in respect of Canada" but rather "His Majesty's Government in Canada" which confirms and ratifies international labor conventions and undertakes to carry out the stipulations contained in these conventions. This procedure is not at all unusual today because the Dominions now regularly negotiate and ratify agreements between governments entirely without any intervention by British ministers or even by the King himself. Here, at any rate, all semblance of diplomatic unity of the Commonwealth has thus disappeared.

A further observation should, perhaps, be made with regard to the nature of international labor conventions. As noted above, draft conventions adopted at an International Labor Conference are not signed by representatives at the conference. For this reason it is often pointed out that "ratification" is not,

¹⁹ C. Wilfred Jenks, "The Present Status of the Bennett Ratifications," *The Canadian Bar Review*, Vol. XV, No. 6, special Constitutional number, June, 1937, p. 466.

²⁰ N. A. M. MacKenzie observes that His Majesty, through the Governor-General as His representative, would seem to participate even in governmental agreements made by the Dominions. *Ibid.*, p. 449.

²¹ Imperial Conference, 1926, Summary of Proceedings, Cmd. 2768, 1926, p. 20.

according to traditional usage, an appropriate term to use in connection with international labor conventions. "Accession to" or "consent to", it is suggested, would be more appropriate. However, the Constitution of the International Labor Organization provides for "formal ratification" of the draft conventions, and they are also, by their own terms, made specifically subject to "ratification." The system by which international labor conventions come into existence and enter into force is itself unique. The above departure from traditional usage of the term "ratification" is, therefore, no more an innovation than the system in connection with which it is used. The practice of "ratifying" international labor conventions, moreover, is now well established.

QUESTIONS OF LEGISLATIVE COMPETENCE

In order to carry out the obligations assumed by ratification of the above conventions, the Dominion Parliament proceeded (without the assent or coöperation of Provincial legislatures) to enact certain measures which in substance gave effect to the conventions. The Weekly Rest in Industrial Undertakings Act²² received royal assent April 4, 1935, to come into force three months after assent. The Limitation of Hours of Work Act²³ received assent July 5, 1935, to come into force three months later. The Minimum Wages Act²⁴ received assent July 28, 1935. Certain sections of the Act giving effect to the convention were to come into force when proclaimed by the Governor-General in Council. The operative clauses of all three Acts are preceded by preambles which recite that the purpose of the statutes is to discharge the obligations assumed by Canada under the Treaty of Versailles and under the conventions relating to the respective subjects covered by the statutes. Since these preambles are practically identical in form, that of the Weekly Rest in Industrial Undertakings Act may be quoted as typical of the form adopted:

Whereas the Dominion of Canada is a signatory, as Part of the British Empire, to the Treaty of Peace made between the Allied and Associated Powers and Germany, signed at Versailles, on the 28th day of June, 1919; and whereas the said Treaty of Peace was confirmed by the Treaty of Peace Act 1919; and whereas by Article 23 of the said Treaty the signatories thereto each agreed that they would endeavour to secure and maintain fair and humane conditions of labour for men, women and children, both in their own countries and in all countries to which their commercial and industrial relations extend, and by Article 427 of the said Treaty it was declared that the well-being, physical, moral and intellectual, of industrial wage-earners is of supreme importance; and whereas a Draft Convention respecting the application of the weekly rest in industrial undertakings was agreed upon at a General Conference of the International Labour Organisation of the League of Nations, in accordance with the relevant Articles of the said Treaty, which said Convention has been ratified by Canada; and whereas it is advisable to enact the necessary legislation to enable Canada to discharge the obligations assumed under the provisions of the said Treaty and the said

²² Statutes of Canada, 25-26 Geo. 5, 1935, c. 14.

²³ *Ibid.*, c. 63.

²⁴ *Ibid.*, c. 44.

Convention, and to provide for the application of the weekly rest in industrial undertakings, in accordance with the general provisions of the said Convention, and to assist in the maintenance on equitable terms of interprovincial and international trade: Therefore His Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows: . . .

When the House of Commons and Senate had before them the resolutions for ratifying the conventions and the measures for giving effect to them, the jurisdiction of Parliament to deal with these matters was seriously questioned. Long and, at times, heated debate occurred on this point, with Mr. Lapointe leading the opposition.²⁵ Prime Minister Bennett, however, who moved the expediency of Parliamentary approval and who led the debate on behalf of the Government, declared that there was "no question at all" as to the jurisdiction of Parliament.²⁶ Nevertheless, the Minister of Justice on October 31, 1935, submitted to the Privy Council of Canada a report in which he observed that doubts existed as to the jurisdiction of the Canadian Parliament to enact the Weekly Rest, Minimum Wages, and Limitation of Hours Acts and that it was expedient to refer these questions to the Supreme Court of Canada for judicial determination. Following this recommendation by the Minister of Justice, the Governor-General in Council exercised the powers conferred in the Supreme Court Act ²⁷ and referred to the Supreme Court the question: "Are The Weekly Rest in Industrial Undertakings Act, The Minimum Wages Act, and The Limitation of Hours of Work Act, or any of the provisions thereof and in what particular or particulars or to what extent, *ultra vires* of the Parliament of Canada?" The Supreme Court was evenly divided on the question, three of its members answering in the negative and three in the affirmative. Appeal was, therefore, taken by special leave to the Judicial Committee of the Privy Council, and an opinion was rendered January 28, 1937, declaring the above three Acts *ultra vires* of the Parliament of Canada.

In order to understand clearly the Provincial and Dominion contentions, and also the judgments of the Supreme Court and of the Judicial Committee, it is necessary to recall certain provisions of the Canadian Constitution rela-

²⁵ Canada, House of Commons, Debates, 1935, Vol. I, pp. 635-655.

²⁶ *Ibid.*, p. 635.

²⁷ Revised Statutes of Canada, 1927, c. 35. Sec. 55 of this Act empowers the Governor in Council to refer to the Supreme Court for hearing and consideration certain enumerated questions of law or fact touching, among other things, "the powers of the Parliament of Canada, or of the legislatures of the Provinces, or of the respective governments thereof, whether or not the particular power in question has been or is proposed to be exercised." It is further provided that the Court shall certify to the Governor in Council, for his information, its opinion upon each question thus submitted and its reasons for the answers given. This opinion "shall be pronounced in like manner as in the case of a judgment upon an appeal to the Court; and any judge who differs from the opinion of the majority shall in a like manner certify his opinion and his reasons. . . . The opinion of the Court upon any such reference, although advisory only, shall, for all purposes of appeal to His Majesty in Council, be treated as a final judgment of the said Court between parties."

tive to the power of the Dominion to give effect to treaties binding on Canada, and also provisions concerning the distribution of powers between Dominion and Provincial authorities. Section 92 of the British North America Act, 1867,²⁸ assigns to the Provincial legislatures exclusive authority to make laws in relation to certain enumerated classes of subjects, which include: "13. Property and civil rights of the Province," and "16. Generally all matters of a merely local or private nature in the Province." Section 91 of the British North America Act gives to the Dominion Parliament authority to make laws "for the peace, order, and good government" of Canada in relation to "all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces."²⁹ This section also enumerates certain classes of subjects which are *not* deemed to be matters of a local or private nature, and which are, therefore, assigned exclusively to the Dominion Parliament. The matters assigned by these two sections exclusively to the Dominion Parliament include telegraphs and trade and commerce, etc. The only provision in the British North America Act relative to treaties is found in Section 132, which states:

The Parliament and Government of Canada shall have all powers necessary or proper for performing the obligations of Canada or of any Province thereof, as a part of the British Empire, towards Foreign Countries, arising under Treaties between the Empire and such Foreign Countries.

The controversy concerning the competence of the Dominion Parliament to give effect to international labor conventions—a controversy which has now lasted more than fifteen years and, judging from recent outbursts in the Canadian Parliament, is not yet settled definitively—centers about these three sections of the Constitution. Throughout the controversy, Section 132 has been relied on by the supporters of the Dominion authority, while the Provinces contend that it does not confer the wide authority claimed. Ex-Prime Minister Bennett has expressed the former view in its most extreme form. He asserts that it is the treaty obligation alone which, under Section 132, creates the jurisdiction of the Dominion Parliament; if the Dominion accepts a treaty responsibility in the exercise of a discretion, "then the power is conferred by that Section 132. It is so simple."³⁰ If the question be considered in the light of the historical development of Canadian treaty-making power, Mr. Bennett's argument is a strong one. Section 132, when enacted

²⁸ An Act for the Union of Canada, Nova Scotia and New Brunswick, and the Government thereof; and for purposes connected therewith. Cited as the British North America Act, 1867, 30-31 Vict. 1867, c. 3.

²⁹ This section is comparable to the Tenth Amendment of the United States Constitution. In this case, however, the residual powers are assigned to the central government, while the United States Constitution leaves all powers not delegated to the Federal Government and not prohibited to the States within the competence of the States.

³⁰ Canada, House of Commons Debates, 1935, Vol. I, p. 655.

in 1867, was not intended to give the Canadian Government power to make treaties on all subjects nor, as a matter of fact, upon any subjects. The self-governing colonies were ordinarily included automatically in all British treaties, commercial and otherwise, or a treaty relating to a particular colony was made by the Imperial authorities in London. It was for the purpose of giving the necessary legislative effect to such treaties in Canada that Section 132 was adopted. The fact that, by constitutional development of the British Empire, treaty-making power in respect of Canada has been transferred from the Imperial Government to the Dominion Government should not, it is argued, alter the meaning of Section 132. The existence of a binding treaty obligation should still create the power of legislation. Why, it is asked, should the power given to the Dominion Parliament to implement an Imperial treaty be denied to the Dominion in the case of her own treaties? ³¹

From the Provincial point of view, however, the obligations which Canada assumed under the labor conventions did not arise under treaties between the British Empire and foreign countries; these obligations are not binding on Canada "as a part of the British Empire"; and Section 132, therefore, does not apply. It is interesting to observe the effect which this argument had upon the form in which the Weekly Rest, Hours of Labor, and Minimum Wages Acts were drafted. A careful attempt is made in the preambles of the Acts to show that the obligations to which legislative effect is being given arose from a treaty between the Empire and foreign countries and are binding on Canada as a part of the British Empire. The emphasis on this point appears in the following language, common to all the preambles:

Whereas, the Dominion of Canada is a signatory, as a Part of the British Empire, to the Treaty of Peace made between the Allied and Associated Powers and Germany . . . ; and whereas by Article 23 of the said Treaty the signatories thereto each agreed that they would endeavour to secure and maintain fair and humane conditions of labour . . . ; and whereas a Draft Convention . . . was agreed upon at a General Conference of the International Labour Conference of the League of Nations, in accordance with the relevant articles of the said Treaty . . . ; and whereas it is advisable to enact the necessary legislation to enable Canada to discharge the obligations assumed under the provisions of the said Treaty and the said Convention. . . .

Despite this very obvious attempt to bring the above labor legislation within the scope of Section 132, the Judicial Committee (and all the members of the Supreme Court as well) rejected the contention based on this section. The Judicial Committee declared: ³²

The obligations are not obligations of Canada as a part of the British Empire, but of Canada by virtue of her new status as an international person, and do not arise under a treaty between the British Empire and foreign countries. This was clearly established by the decision in the

³¹ See *Historicus*, "The Privy Council and Canada," *The Fortnightly*, April, 1937, pp. 472-473.

³² 1937 A. C. 326, at 349-350.

Radio case ([1932] A. C. 304), and their Lordships do not think that the proposition admits of any doubt. It is unnecessary, therefore, to dwell upon the distinction between legislative powers given to the Dominion to perform obligations imposed upon Canada as a part of the Empire by an imperial executive responsible to and controlled by the Imperial Parliament, and the legislative power of the Dominion to perform obligations created by the Dominion executive responsible to and controlled by the Dominion Parliament. While it is true, as was pointed out in the *Radio* case [*supra*], that it was not contemplated in 1867 that the Dominion would possess treaty-making powers, it is impossible to strain the section so as to cover the un contemplated event. . . .

It was this passage of the judgment, particularly the reference to treaties negotiated by an "Imperial Executive", which on April 5, 1937, drew fire from the Canadian Parliament. This bitter attack was led by Mr. Cahan, Secretary of State in the late Conservative Ministry of Mr. Bennett, which was responsible for enactment of the legislation. It was maintained that in respect of treaties between His Majesty and foreign states there is no "Imperial Executive" known to any law of the Commonwealth.³³ Mr. Cahan charges that the Judicial Committee has indulged in "persistent perversions" of the Constitution, that it has forsaken the judicial arena, and has sought to enunciate principles of high political policy. If the Committee is unaware of constitutional developments since the war, he suggests, then it "should be so informed forthwith in no uncertain terms," because such "perversions" as in the recent case can only "hasten and ensure" the dissolution of the present British Empire.³⁴

The further view, noted above in the preambles and pressed also in the arguments, that the Canadian obligations to enact the labor legislation arose ultimately *under* the Treaty of Versailles—which is without question a treaty between the British Empire and foreign countries—was likewise rejected by the Judicial Committee. There arose no obligation to legislate on any of the matters in question "until the Canadian executive, left with an unfettered discretion of their own volition, acceded to the convention, a *novus actus* not determined by the treaty." The obligation to enact legislation, then, in the opinion of the Judicial Committee, arose under the international labor conventions alone; these conventions were not, within the meaning of Section 132, treaties between the Empire and foreign countries; and the obligations assumed under the conventions are not binding on Canada as a part of the British Empire. For these reasons legislative competence is not to be found in Section 132.

With Section 132 thus eliminated, the validity of the legislation could depend only on Sections 91 and 92 which, as mentioned above, arrange the distribution of legislative powers between the Dominion and the Provinces. It was argued for the Dominion that the legislation could be justified under

³³ Canada, House of Commons, Debates, April 5, 1937, Vol. 73, pp. 2773-2798.

³⁴ *Ibid.*, pp. 2777-2778.

the general, or residuary, powers given to the Dominion Parliament, by Section 91, to make laws "for the peace, order, and good government" of Canada in relation to all matters not assigned exclusively to the Provinces. It had finally to be admitted, however, even by Chief Justice Duff, of the Supreme Court of Canada, who maintained the validity of the labor legislation, that normally this legislation came within the classes of subjects which, by Section 92, are assigned exclusively to the legislatures of the Provinces, *i.e.*, property and civil rights.³⁵

The constitutional validity of the labor legislation was sought to be established also on the ground that the matters dealt with had attained such importance as to "affect the body politic," that they have ceased to be merely local or provincial and have become "matters of national concern." The Judicial Committee considered this point as finally settled, however, by the cases cited, and on the constitutional principles declared by Chief Justice Duff in the *Natural Products Marketing Case* decided June 17, 1936.³⁶ Lord Watson's opinion in 1896 on the power of the Dominion to enact the Canadian Temperance Act is cited as authoritative on the point. He declared:

If it were once conceded that the Parliament of Canada has authority to make laws applicable to the whole Dominion, in relation to matters which in each province are substantially of local or private interest, upon the assumption that these matters also concern the peace, order, and good government of the Dominion, there is hardly a subject enumerated in section 92 upon which it might not legislate, to the exclusion of the provincial legislatures.³⁷

Lord Watson recognized, however, that certain matters originally local and Provincial might attain such dimensions as to affect the whole body politic and to be matters of national concern in such sense as to remove them from the scope of Section 92 and to place them within the legislative jurisdiction of the Parliament of Canada. Yet great caution, he warned, must be exercised in distinguishing that which is Provincial and that which has become national in the above sense. Viscount Haldane, following this rule in 1922 and again in 1925, likewise admitted that "In special circumstances, such as those of a great war,"³⁸ or "an epidemic of pestilence," or "some extraordinary peril to the national life of Canada,"³⁹ matters normally local might conceivably become of such paramount importance as to place them outside Section 92 and, therefore, within the jurisdiction of the Dominion Parliament. These opinions were cited by Lord Atkin in the recent case⁴⁰ to show how far the

³⁵ 1936 S. C. R. 461, at 472-473.

³⁶ The Privy Council, Record of Proceedings, Appeal No. 103 of 1936, p. 65 ff. In this case Chief Justice Duff was not considering legislation to fulfill treaties.

³⁷ 1896 A. C. 348, at 361.

³⁸ The Board of Commerce Act, 1919, and the Combines and Fair Prices Act, 1919, [1922] 1 A. C. 191, at 197.

³⁹ *Toronto Electric Commissioners v. Snider*, 1925 A. C. 396, at 412.

⁴⁰ 1937 A. C. 326.

circumstances under consideration were removed from the conditions which, according to the above standards, are necessary in order to override the normal distribution of legislative authority. The question which had to be faced, therefore, was whether the conclusion of conventions with foreign countries operates to exclude the subject-matter of the conventions from Section 92, when such subject-matter prior to the conventions admittedly came within those classes of subjects assigned exclusively to the Provinces.

COMPARISON WITH *MISSOURI v. HOLLAND*

The judgment of the Judicial Committee on this question is analogous in several respects to the decision rendered by the United States Supreme Court in *Missouri v. Holland*,⁴¹ 1920, although precisely opposite conclusions were reached in the two cases. The case of *Missouri v. Holland* arose out of the attempts by Congress to regulate the killing of certain migratory birds in the United States. In 1913 Congress passed an Act authorizing the Department of Agriculture to make certain regulations in this respect. This Act was held unconstitutional by the lower courts in four separate instances, though the Supreme Court never passed upon the validity of the measure. Following these unfavorable decisions, a Convention for the Protection of Migratory Birds was concluded between the United States and Great Britain in 1916.⁴² An Act of July 3, 1918,⁴³ was passed by Congress to give effect to the convention. This Act of Congress prohibiting killing, capturing or selling of any migratory birds included within the terms of the convention. The Act also authorized the Secretary of Agriculture to execute the law and to make the necessary regulations. The State of Missouri brought suit against Holland, a game warden of the United States, to prevent enforcement of the Migratory Bird Treaty Act and the regulations of the Secretary of Agriculture in pursuance of that Act. Missouri objected that the Federal law was unconstitutional in that it dealt with a matter falling within the scope of the Tenth Amendment to the Constitution, which expressly reserved to the States all powers not delegated to the Federal Government nor prohibited to the States. The Supreme Court rejected this contention and held that the rights of the several States of the United States were not unconstitutionally infringed by the Migratory Bird Convention and the Act of Congress giving effect to the

⁴¹ 252 U. S. 416. The two cases must not be regarded as completely analogous, because of the special position given to treaties by the United States Constitution. All treaties made "under the authority of the United States" are declared to be "the supreme Law of the Land."

⁴² U. S. Treaty Series, No. 628, 1922. The convention was signed at Washington Aug. 16, 1916; it was ratified by the President Sept. 1, 1916, and by Great Britain Oct. 20, 1916. Ratifications were exchanged at Washington Dec. 7, 1916, and the convention was proclaimed Dec. 8, 1916. United Kingdom Treaty Series, 1917, No. 7, Cd. 8476. His Majesty the King is the high contracting party on one side and the United States of America is the high contracting party on the other side.

⁴³ 40 Stat. at L. 755; Comp. Stat., Sec. 8837a.

Convention. Mr. Justice Holmes, in delivering the opinion of the court, summarized the principal argument against the Act as follows:

It is said that a treaty cannot be valid if it infringes the Constitution, that there are limits, therefore, to the treaty-making power, and that one such limit is that what an act of Congress could not do unaided, in derogation of the powers reserved to the States, a treaty cannot do.

In rejecting this argument, Mr. Justice Holmes declared:

Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States. It is open to question whether the authority of the United States means more than the formal acts prescribed to make the convention. We do not mean to imply that there are no qualifications to the treaty-making power; but they must be ascertained in a different way. It is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could, and it is not lightly to be assumed that, in matters requiring national action, "a power which must belong to and somewhere reside in every civilized government" is not to be found. . . . When we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago. The treaty in question does not contravene any prohibitory words to be found in the Constitution. The only question is whether it is forbidden by some invisible radiation from the general terms of the Tenth Amendment. We must consider what this country has become in deciding what that Amendment has reserved.⁴⁴

The above reasoning of Mr. Justice Holmes presents a sharp contrast with that of Lord Atkin upon a somewhat similar set of circumstances. The Canadian labor legislation, unaided, was generally agreed to be in derogation of the powers left exclusively to the Provinces, just as the Migratory Bird Act, unaided, was agreed to be in derogation of the powers left exclusively to the several States. Likewise, corresponding to the issue in the American case, the question before the Judicial Committee was whether or not such acts, otherwise void, are validated by the fact that they purport to give legislative effect to an agreement between Canada and foreign countries. Upon this issue Chief Justice Duff, with the concurrence of two of his colleagues,⁴⁵ took the point of view, similar in some respects to that of Justice Holmes, that:

The exclusive authority of the Dominion to give the force of law to an international agreement is not affected by the circumstances alone that,

⁴⁴ *Missouri v. Holland*, 252 U. S. 432-434; this JOURNAL, Vol. 14 (1920), p. 459.

⁴⁵ Justices Davis and Kerwin.

in the absence of such agreement, the exclusive legislative authority of the provinces would extend to the subject matter of it.⁴⁶

The Judicial Committee and three members of the Canadian Supreme Court⁴⁷ held otherwise. The Judicial Committee declared:⁴⁸

It would be remarkable that while the Dominion could not initiate legislation however desirable which affected civil rights in the Provinces, yet its Government not responsible to the Provinces nor controlled by Provincial Parliaments need only agree with a foreign country to enact such legislation: and its Parliament could be forthwith clothed with authority to affect Provincial rights to the full extent of such agreement. Such a result would appear to undermine the constitutional safeguards of Provincial constitutional autonomy. . . . In other words, the Dominion cannot merely by making promises to foreign countries clothe itself with legislative authority inconsistent with the constitution which gave it birth.

This conclusion of the Judicial Committee shows a conspicuous absence of any tendency on the part of their Lordships to consider conventions and legislative acts giving effect to them "in the light of our whole experience" or to consider "what this country has become"—as Justice Holmes had done in the American case in 1920. The Judicial Committee considered, instead, merely what was said in the Canadian Constitution seventy years ago. In following the language of 1867 the Judicial Committee, some have argued, departs entirely from the intention of the framers of the Canadian Constitution. The framers of the Canadian Constitution deliberately planned to avoid the source of weakness which was showing itself so tragically in the Union to the south. For this reason residuary powers were left with the Dominion Government rather than the Provinces.⁴⁹ The framers of the Constitution, it is claimed, would not sanction the recent interpretations by the Judicial Committee.

How far a tribunal may go in considering what the developments of the day have made desirable and in neglecting to consider what the fundamental law stipulates—without destroying the whole system of government under law—is certainly one of the most crucial questions of modern government.⁵⁰ Fundamental law cannot stand indefinitely against the tide of social changes. To attempt to keep it so is merely to invite the most serious of consequences. Obsolete constitutional or fundamental laws should be changed no less than ordinary statutory laws. The people both of Canada and of the United

⁴⁶ 1936 S. C. R. 499; 1936 D. L. R. 699.

⁴⁷ Justices Rinfret, Cannon, and Crocket.

⁴⁸ 1937 A. C. 326, at 352.

⁴⁹ Attention is frequently called to the fact that while the United States began with a Constitution emphasizing States' rights, the Supreme Court has shifted the emphasis decidedly in the opposite direction. The Canadian Constitution, which, on the other hand, was deliberately intended to form the basis of a strong national government, is now (as a result of judicial interpretation in the opposite direction) a bulwark of Provincial rights.

⁵⁰ Professor C. H. McIlwain, "Government by Law," *Foreign Affairs*, Jan., 1936, p. 185; and "The Reconstruction of Liberalism," *ibid.*, Oct., 1937, pp. 173-174.

States today are demanding changes in their fundamental laws to meet developments which could not be foreseen three-quarters of a century ago or a century and a half ago. There are, happily, a few persons left who believe that it is not the function of the judiciary to make these changes, who believe that American and English courts are not, and should not be, endowed with constituent powers, and who believe with Lord Bacon that the office of judges is "*jus dicere* and not *jus dare*." If this opinion were more widely accepted, fewer aspersions would be cast upon the honesty or competence of judicial bodies and less pressure would be brought upon them to give more "liberal" interpretations.⁵¹ If the opposite view is taken and if the Dominion Government may, by entering into agreements with foreign Powers, invade the sphere reserved for the Provincial authorities, then where is the line to be drawn? Is there any limit whatsoever to what may be done in the name of the treaty power? Mr. Justice Holmes would not say that there are no limits. He gave no formula, however, by which we may determine where those limits should be drawn. There may be, according to Mr. Justice Holmes, "matters of the sharpest exigency for the national well being" with which an Act of Congress could not deal but with which a treaty, followed by such an Act, could deal. Is this to be our test: If a matter is of the "sharpest exigency for the national well being," then it cannot be considered to fall within the powers reserved to the States or to the Provinces in Canada? If this is the best test which can

⁵¹ Dr. O. D. Skelton has said: "Courts may modify, they cannot replace. They can revise earlier interpretations, as new arguments, new points of view are presented, they can shift the dividing line in marginal cases; but there are barriers they cannot pass, definite assignments of power they cannot reallocate. They can give a broadening construction of existing powers, but they cannot assign to one authority powers explicitly granted to another, or modify the provisions of the B. N. A. Act regarding the organization of the executive and legislative branches of the Dominion." House of Commons (Canada), Report of Special Committee on B. N. A. Act, Ottawa, 1935, p. 24. Quoting this statement with approval, W. P. M. Kennedy adds: "Those are wise words and it is time that they were heeded. It is not the function of the courts to change a statute so as to bring it into line with modern demands; and too many Canadians have been deceived in argument and frustrated in hope because—wilfully or ignorantly—they looked on the Judicial Committee as though it possessed constituent powers—the stream of omnipotence flowing from the 'footsteps of the throne!' . . . Such a process [amendment], however, is not for our courts and we have no right whatever to expect them to turn a mid-nineteenth century statute into an instrument of modern government." The Canadian Bar Review, Vol. XV, No. 6, special Constitutional number, June, 1937, p. 398. Commenting upon the position in which the Dominion of Canada finds itself as a result of the recent opinions of the Judicial Committee of the Privy Council, Professor A. Berriedale Keith says: "It is natural that, when circumstances arise which obviously are very difficult, if not impossible, to deal with under the terms of a constitution on the basis of the traditional interpretation, there should be a strong feeling that it is the duty of the courts to adapt the interpretation to accord with the new circumstances. . . . Prima facie it would seem that some alteration (in the B. N. A. Act) is requisite to meet the emergence of new conditions which could not be conceived by the framers of the constitution, but that is a work for the statesmen and the people of the Dominion, and not for any court." *Ibid.*, pp. 428, 435.

be found, this does not answer the question: Where shall the limits of treaty power be drawn in its invasion of Provincial powers?

The matter needs clarification. If the Dominion Government is to fulfill its treaty obligations and if it is to have authority to adopt social legislation on a national scale—admittedly the only satisfactory method of dealing with these pressing problems—then it must be given authority which is now denied to the Dominion Parliament by the Judicial Committee. The adoption of an amendment to the British North America Acts would appear to be much preferable to any attempted dictation to the Judicial Committee or the Supreme Court of Canada. At the same time, if the powers of the Provinces are to be safeguarded, such amendment, in order to have the slightest chance of adoption, must set up some formula for determining the limits to which the Dominion may go in this direction. A suggestion made by C. Wilfred Jenks in this regard is worth noting here. The normal distribution of legislative power designed for municipal purposes, he argues, "should be qualified for the purpose of making possible effective participation in international affairs by the existence of a special power to implement properly assumed treaty commitments."⁵² The existence of multilateral conventions, such as the international labor conventions, he suggests, would be the best of evidence that the treaty commitments are "properly assumed" and not made merely for the purpose of invading Provincial rights. His argument on the desirability of thus enabling the Dominion Government to participate in the ever-growing number of subjects "proper" for international agreement is particularly strong.⁵³ If Canada were drafting a new constitution, or amending the present one, the incorporation of such provisions might be admittedly desirable. This fact, however, does not eliminate the question as to whether it is proper, under the existing Constitution, for the Dominion to assume such powers on its own authority and whether the Supreme Court of Canada and the Judicial Committee of the Privy Council—as judicial bodies—should sanction the assumption of such powers.

AËRIAL NAVIGATION AND RADIO CONVENTIONS

The Canadian labor legislation of 1935 is not the first instance of the Dominion performing obligations under treaties by legislating in relation to matters otherwise within the domain of property and civil rights in the several Provinces. Two previous judgments of the Judicial Committee—the *Aëronautics*⁵⁴ and *Radio*⁵⁵ cases of 1932—have been cited in particular as

⁵² C. Wilfred Jenks, *Journal of Comparative Legislation and International Law*, Vol. XVII, 1935, pp. 27-28.

⁵³ Some persons think it absurd that a matter which is of such general importance or interest as to become the subject of international agreement should still be regarded as a matter of a "private and local nature."

⁵⁴ *In re Regulation and Control of Aëronautics in Canada*, 1932 A. C. 54.

⁵⁵ *In re Regulation and Control of Radio Communication in Canada*, *ibid.*, 304.

supporting this legislation. Analogous legislation of still earlier years may also be recalled. The Act of 1911,⁵⁶ for example, which gave statutory effect to the International Waterways Treaty of 1909, deals with matters which, according to Chief Justice Duff, otherwise "would indisputably have come, at the date of the statute (1911), within the exclusive spheres of the provincial legislatures."⁵⁷

The Japanese Treaty Act of 1913⁵⁸ is cited to the same effect. This Act, in conformity with obligations under the Japanese Treaty, provides national or most-favored-nation treatment in certain respects for Japanese subjects residing in Canada. Notwithstanding the above treaty and statute, British Columbia in 1921 prohibited the employment of Chinese or Japanese in connection with government contracts. In two separate cases the Judicial Committee held this legislation of British Columbia, as respects Chinese,⁵⁹ to be a valid exercise of Provincial legislative authority in the management of the property of the Province, but as respects Japanese subjects,⁶⁰ to be invalid because it conflicted with the Japanese Treaty Act.

In the recent case, however, chief reliance was placed upon the Radio and Aëronautics precedents. In the latter case the Supreme Court had declared unanimously that the Parliament and Government did not have exclusive legislative and executive authority for performing the obligations of Canada under the Convention Relating to the Regulation of Aërial Navigation, 1919.⁶¹ The Judicial Committee reversed this decision and declared:

Their Lordships . . . consider the governing section to be section 132, which gives to the Parliament and Government of Canada all powers necessary or proper for performing the obligations toward foreign countries arising under treaties between the Empire and such foreign countries . . . it is not necessary for the Dominion to piece together its power under section 91 in an endeavour to render them co-extensive with its duty under the Convention when section 132 confers upon it full power to do all that is legislatively necessary for the purpose.⁶²

In the Radio case the Judicial Committee, in affirming the decision of the Supreme Court of Canada⁶³ and upholding Dominion regulation and control of radio communication, declared:

This idea of Canada as a Dominion being bound by a convention equivalent to a treaty with foreign powers was quite unthought of in 1867. It is the outcome of the gradual development of the position of Canada vis-à-vis to the mother country Great Britain, which is found in these later days expressed in the Statute of Westminster. It is not, therefore, to be expected that such a matter should be dealt with in ex-

⁵⁶ Statutes of Canada, 1-2 Geo. 5, 1911, c. 28.

⁵⁷ 1936 S. C. R. 481.

⁵⁸ Statutes of Canada, 3-4 Geo. 5, 1913, c. 27.

⁵⁹ Brooks-Bidlake v. A. G. for B. C., 1923 A. C. 450.

⁶⁰ A. G. for B. C. v. A. G. for Canada, 1924 A. C. 203.

⁶¹ 1930 S. C. R. 663.

⁶² 1932 A. C. 54, at 74, 77. The latter part of the above statement was declared by Lord Atkin in the recent case to be "clearly obiter."

⁶³ 1931 S. C. R. 541.

plicit words in either section 91 or section 92. The only class of treaty which would bind Canada was thought of as a treaty by Great Britain, and that was provided for by section 132. Being, therefore, not mentioned explicitly in either section 91 or section 92, such legislation falls within the general words at the opening of section 91 which assign to the Government of the Dominion the power to make laws "for the peace, order, and good government of Canada in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the Provinces." In fine, though agreeing that the Convention was not such a treaty as is defined in section 132, their Lordships think that it comes to the same thing.⁶⁴

The Judicial Committee did not regard either of the above cases as laying down any principle under which the 1935 labor legislation might be upheld. The *Aéronautics* case concerned legislation to perform obligations under the Convention Relating to the Regulation of Aërial Navigation signed at Paris October 13, 1919. This was a treaty between the Empire and foreign countries, His Majesty being represented by Prime Minister Lloyd George as general plenipotentiary and also by separate plenipotentiaries for Canada, Australia, South Africa, New Zealand, and India.⁶⁵ In this instance, then, Section 132 was clearly applicable. The International Radiotelegraph Convention, 1927,⁶⁶ was not a treaty between the British Empire, as such, and foreign countries. It is not a treaty between states or heads of states but is, rather, an agreement (convention) expressly concluded among the various contracting governments. Canadian representatives were appointed and authorized to sign on behalf of Canada by Orders in Council, and ratification on behalf of Canada was effected by an instrument signed by the Secretary of State for External Affairs without any intervention of the Crown.⁶⁷

Despite their assertion that this convention "comes to the same thing" as a treaty between the Empire and foreign countries, the Judicial Committee declared that the "true ground" of the decision in the *Radio* case was that this convention dealt with matters which "did not fall within the enumerated classes of subjects in Section 92 or even within the enumerated classes in Section 91."⁶⁸ That part of the *Radio* Convention which deals with broadcast-

⁶⁴ 1932 A. C. 304, at 312.

⁶⁵ Convention for the Regulation of Aërial Navigation, Oct. 13, 1919, United Kingdom Treaty Series, 1922, No. 2, Cmd. 1609. The Irish Free State was not in existence as a separate Dominion at the time the convention was concluded.

⁶⁶ Printed in Supplement to this JOURNAL, Vol. 23 (1929), p. 40.

⁶⁷ See Vincent C. MacDonald, "Canada's Power to Perform Treaty Obligations," *The Canadian Bar Review*, Vol. XI, 1933, p. 665.

⁶⁸ 1937 A. C. 326, at 351. Professor W. Ivor Jennings interprets this opinion of the Judicial Committee to mean that the International Radiotelegraph Convention "comes to the same thing" as a treaty between the British Empire and foreign countries which imposes obligations upon Canada "as a part of the British Empire," *because* there are no Provincial powers over radio, *i.e.*, *because* the matters dealt with in the Convention "did not fall within the enumerated classes of subjects in section 92 or even within the enumerated classes in section 91." If Professor Jennings' interpretation is correct, then the Judicial Committee

ing might possibly be included within an enumerated class of subjects, *i.e.*, "Interprovincial Telegraphs", a class enumerated in Section 92 for the express purpose of exclusion from the jurisdiction of the Provinces. For these reasons, both cases were discarded by the Judicial Committee as a basis for holding that legislation to perform a Canadian treaty is exclusively within the power of the Dominion Parliament.

The judgment in the Radio case, long before there was occasion to cite it in support of the International Labor Convention Acts, was severely criticized from two quite opposite points of view. It was attacked, on the one hand, for bringing the subject-matter of a treaty, not within Section 132, within Dominion legislative powers.⁶⁹ Here it is admitted that if a treaty is made by the British Empire, then Section 132 confers on the Dominion Parliament legislative jurisdiction over everything necessary for the implementation of such a treaty. If, however, the treaty is made by the Dominion, it is maintained that her Parliament has implementing power only so far as she is given it by Section 91 of the Constitution. On the other hand, it is argued that the decision in the Radio case gives too narrow an interpretation of the Dominion's treaty powers. Professor MacDonald, in his article in *The Canadian Bar Review*,⁷⁰ contends that Section 91 has no relevance, that Section 132 should not be subject to limitations arising out of other sections of the Constitution, and that with proper construction all Canadian treaties without exception fall within Section 132. Others argue that the power of the Dominion under Section 132 must be interpreted before it is possible to determine the extent of the powers reserved to the Provinces.

When the Constitution was formulated in 1867, treaties bound Canada as a part of the British Empire because treaties made by Her Majesty were automatically binding on Canada as a part of her territory. Even down to 1919 the only way treaty obligations could be imposed on Canada as a part of the British Empire was by a treaty made in the name of the Crown, whether concerning the whole Empire or whether, as in various boundary treaties with the United States, relating particularly to Canada. There was, however, no such thing as a treaty made by the "British Empire" with foreign countries. The phrase "treaties between the Empire and such foreign countries" was not strictly accurate but merely embodied the idea that a treaty made by the King was applicable automatically to all parts of his realm. For this reason, it is contended that the phrase "as a part of the British Empire" was merely descriptive of the treaty-making authority of the Empire, *i.e.*, His Majesty the King, and was not intended to be in any sense restrictive in its application.⁷¹

deserves far less criticism than it has received on the score that its opinion on the international labor conventions involves a complete reversal of its position in the Radio case.

⁶⁹ See John S. Ewart, "The Radio Case," *The Canadian Bar Review*, Vol. X, 1932, pp. 298-303.

⁷⁰ Vincent C. MacDonald, "Canada's Power to Perform Treaty Obligations," *loc. cit.*, pp. 581-599, 664-680.

⁷¹ *Ibid.*, p. 598.

Strictly speaking, the "British Empire" has been a party to treaties very few times and only for the very short period between the years 1919 and 1926. The British Empire appears as one of the contracting parties to the Treaty of Versailles in 1919 and to the other Treaties of Peace.⁷² This form was followed also in a number of other treaties from 1919 to 1926 when, as a result of a decision of the 1926 Imperial Conference, the practice was abandoned and a reversion was made to the older heads-of-states formula. In the light of the above circumstances, it is argued that Section 132, "properly construed," is the sufficient and sole source of Canada's power to perform any and all Canadian treaties without exception, whether they are binding on Canada as a part of the British Empire or otherwise. This view is now specifically rejected by the Judicial Committee in connection with the international labor conventions, which are held not to be binding upon Canada as a part of the British Empire and, therefore, not to confer upon the Dominion Parliament jurisdiction to give them legislative effect. Is Canada, by virtue of this decision, incompetent to legislate in performance of treaty obligations? The Judicial Committee answers in the negative. In the totality of Dominion legislative powers and Provincial legislative powers taken together, Canada is said to be fully equipped. If, however, the Dominion, in exercising new functions derived from a new international status, incurs treaty obligations dealing with Provincial classes of subjects, it must secure the coöperation of the Provinces in order to give effect to such obligations. "While the ship of state now sails on larger ventures and into foreign waters she still retains the water-tight compartments which are an essential part of her original structure." In consequence, certain treaty obligations can be dealt with only by the totality of legislative powers, Dominion and Provincial combined.⁷³

⁷² These various treaties are collected and printed in convenient form by the Carnegie Endowment for International Peace in *The Treaties of Peace 1919-1923* (1924). 2 vols.

⁷³ See F. R. Scott, "The Privy Council and Mr. Bennett's 'New Deal' Legislation," *The Canadian Journal of Economics and Political Science*, May, 1937, pp. 234-241. As a result of the opinion of the Judicial Committee on Jan. 28, 1937, Mr. Scott concludes, there are three categories of treaties which must now be distinguished: "First, 'Empire Treaties' falling under section 132: Dominion legislation implementing these is fully competent no matter how much it interferes with property and civil rights. Second, Canadian treaties or conventions whose subject matter falls within a specified head of section 91 (such as trade and commerce) or at least outside section 92 (like the Radio Convention): Dominion legislation implementing these is also valid though it interfere with property and civil rights. Third, treaties or conventions whose subject matter falls within the provincial powers enumerated in section 92: here the implementing of the treaty requires provincial legislation, and it may be that the negotiation of the treaty requires provincial executive action as well, since the Privy Council expressly refused to decide the question whether the Dominion had any authority even to perform the executive act of entering into the treaty. As a party to a British Empire treaty Canada is therefore a unitary state; as an independent country she is composed of nine (or is it ten?) sovereign states whose assent is required before the obligations of certain treaties can be fully performed. The logical political consequence of this is that plenipotentiaries from the provinces will have to attend at the negotiation of treaties of this third category in order to insure their adoption and enforcement; which is equivalent to saying that Canada is practically incompetent to make any such treaties at all."

INTERNATIONAL RESPONSIBILITY FOR COMMITMENTS

Questions were raised, in arguments before the Judicial Committee, as to whether the executive power in Canada must be exercised in the name of the King in order to bind the Dominion and whether, by constitutional usage or otherwise, the prerogative of making treaties in respect of Canada is now vested in the Governor-General in Council or his ministers. The Judicial Committee decided the case upon the issue of legislative competence alone, and its only reference to the above questions was for the specific purpose of emphasizing that it expressed no opinion on these matters. The Judicial Committee did recognize, however, that along with Canada's accession to international status the Dominion's executive has become "clothed with the power of making treaties." The making of treaties⁷⁴ by the Dominion executive is not only in accordance with recognized constitutional usage but, as some would say, it is now crystallized into a rule of constitutional law, expressly declared at the Imperial Conference in 1926.⁷⁵

This point of view, however, is not universally accepted. It has been argued in the recent case that the Dominion Government has no power to ratify international labor conventions and that this lack of power vitiated the ratifications which were in fact made in connection with the three above-mentioned conventions. Justice Rinfret, of the Canadian Supreme Court, declares that, both by the force of the British North America Act and also by a proper interpretation of Article 405 of the Treaty of Versailles, these three international labor conventions were not "properly and competently ratified" and, further, that these conventions could not be so ratified without the consent of the legislature in each of the several Provinces.⁷⁶ Justice Crocket likewise agrees that the ratification of these conventions was "null and void."⁷⁷ With all deference to these opinions of the learned justices, it may be observed that ratification did in fact occur, following the regular procedure now recognized not only by the British Commonwealth but by foreign states as well. The conventions were approved by resolutions of both Houses of Parliament, and instruments of ratification were executed under the signature of the Secretary of State for External Affairs and deposited "in good and due form" with the Secretary-General of the League of Nations. The Dominion of Canada must, therefore—from the point of view of international law at any rate—be considered to have ratified the conventions properly and completely.

Justice Cannon argues that foreign Powers, when dealing with Canada, must always keep in mind that neither the Governor-General in Council nor Parliament can, by an agreement with a foreign Power, invade the sphere reserved to the Provinces, and that before accepting any agreement with Canada as binding, foreign Powers must take notice that the Dominion is a

⁷⁴ In the generic sense.

⁷⁵ Others would deny that constitutional conventions established so recently as 1923 and 1926 have already become constitutional law.

⁷⁶ 1936 S. C. R. 461, at 513.

⁷⁷ *Ibid.*, at 538.

federal and not a legislative union.⁷⁸ How far is this true? That is, just how far must foreign Powers be presumed to know of Canada's internal structure and to what extent, if any, does her *federal* Constitution relieve her of the responsibility of carrying out treaty obligations in the present instance?⁷⁹

Foreign nations are certainly expected to know what organs are authorized by the Constitution to conclude international agreements. They are presumed to know, and are entitled to demand proof, of the constitutional competence of any agents assuming to make agreements on behalf of Canada, or any other Power, before exchanging ratifications.⁸⁰ Once a Minister who is entrusted with the foreign affairs of his country communicates a decision of his government to a foreign state, such foreign state must accept his assertions as final, and the decision is binding upon the country to which he belongs.⁸¹ The present treaty commitments were made by the Department of External Affairs, of which the Prime Minister himself is the official head. This is the organ which is competent to deal with foreign Powers, and no irregularity of procedure can be charged.⁸² It may be observed, also, that the determination of the subject-matter of a treaty is a political and not a legal question and is always left to the discretion of the treaty-making organ.⁸³ Failure to secure approval of the competent authorities is recognized generally by international law and specifically by the Constitution of the International Labor Organization as a valid excuse for non-ratification of agreements. Once ratification has been made, there is an entirely new situation. Failure of a legislative organ to pass measures necessary to give effect to the ratified treaty cannot be offered as an excuse for avoiding the responsibilities incurred.⁸⁴ If, for example, the treaty requires an appropriation of money or any other act which can be done only by legislation, the treaty is nevertheless binding, and it is the duty of the contracting Power to enact the necessary laws. If this

⁷⁸ 1936 S. C. R. 522.

⁷⁹ C. Wilfred Jenks, "The Present Status of the Bennett Ratifications of International Labour Conventions," *Canadian Bar Review*, Vol. XV, No. 6, June, 1937, p. 464.

⁸⁰ See Quincy Wright, *The Control of American Foreign Relations*, New York, 1922, pp. 38-56.

⁸¹ See, for example, the case involving the Legal Status of Eastern Greenland and the legal finality of the Ihlen Declaration. P. C. I. J., Series A/B, No. 53, April 5, 1933, p. 71.

⁸² An Act of the Dominion Parliament of 1912 relative to the Department of External Affairs provides: "The Minister (the Prime Minister, who is Secretary of State for External Affairs), as head of the Department, shall have the conduct of all official communications between the Government of Canada and the Government of any other country in connection with the external affairs of Canada, and shall be charged with such other duties as may be assigned to the Department by order of the Governor in Council in relation to such external affairs, or to the conduct and management of international or intercolonial negotiations so far as they may appertain to the Government of Canada." Statutes of Canada, 1912, c. 22, s. 5; Revised Statutes of Canada, 1927, Vol. 2, c. 65, s. 5.

⁸³ Harold W. Stoke, *The Foreign Relations of the Federal State*, Baltimore, 1931, p. 114.

⁸⁴ Quincy Wright, *op. cit.*, p. 63.

duty is not performed, as Dana says, the result is a breach of the treaty "just as much as if the breach had been an affirmative act by any other department of the government."⁸⁵

Federal governments have occasionally attempted to excuse their delinquencies on the basis of their constitutional inability to carry out certain obligations. Such excuses, however, have not been generally admitted. The United States has at times been charged with failure to meet the prevailing standards of international law in providing protection for resident aliens. While denying direct responsibility for the fault of State authorities, the American Government has nevertheless, as a matter of grace, paid suitable indemnity to the relatives of the injured. In connection with the lynching of Italians at New Orleans in 1891, Mr. Blaine, when tendering indemnity, observed that while the injury "was not inflicted directly by the United States, the President nevertheless feels that it is the solemn duty, as well as the great pleasure, of the National Government to pay a satisfactory indemnity."⁸⁶ The Italian Government strongly contended that the national government was responsible internationally, regardless of its internal organization, and this contention may be said to embody the correct principle of international law.⁸⁷

In determining the extent to which one party to treaty negotiations is presumed by international law to know of the constitutional provisions of the other with regard to treaties, then, we must draw a distinction between: (1) those municipal requirements which are essential in order to make treaties binding, and (2) those municipal requirements which are necessary for the application and enforcement of treaties by and within the state.⁸⁸ With respect to the former provisions, foreign states may be presumed to be aware of these requirements, and the treaty is not internationally binding unless these requirements have been fulfilled. If, for example, a state's constitution requires parliamentary approval for the assumption of treaty obligations, then treaties cannot be considered internationally binding until they have received such parliamentary approval. With respect to the second class of provisions, however, foreign nations cannot, under international law, be presumed to have any knowledge, and the existence of these municipal provisions does not affect the binding force of treaties duly entered into. In Great Britain⁸⁹ it is a well-established principle that treaties do not operate automatically to alter existing law. A treaty involving an alteration in the law administered by British courts may, nevertheless, be internationally binding on Great Britain even in

⁸⁵ Dana's *Wheaton*, Sec. 543, Note 250; 5 Moore 230.

⁸⁶ 6 Moore 840; U. S. *Foreign Relations*, 1891, pp. 727-728.

⁸⁷ See League of Nations, Conference for the Codification of International Law, *Responsibilities of States*, C.75.M.69.1929.V, pp. 121-124.

⁸⁸ See Ralph Arnold, *Treaty-Making Procedure*, London, 1933, Introductory Note by Arnold D. McNair, pp. 1, 4, 15.

⁸⁹ And in the British Commonwealth generally.

the absence of legislation required to change the law. By reason of this fact a provision is not infrequently inserted in the instruments of ratification of British treaties stipulating that the undertakings contained in the treaty shall not take effect until legislation necessary for their fulfillment has been agreed to by Parliament and has received royal assent. This, needless to say, is a judicious safeguard against assuming international obligations which cannot be met. Following the above principles, therefore, Canada cannot properly plead that the Dominion Government is unable to carry out the stipulations of the treaties; in international law it may rely only upon the argument that under its Constitution the Provinces must give their assent to treaties which deal with matters reserved to the exclusive authority of the Provinces. Clearly no such provision exists.

Since the war it has been recognized both by Great Britain and by foreign states that Canada is capable of contracting agreements with foreign states through its Department of External Affairs and without any intervention either by the British Government or by the King himself. The Dominion Government must accept the international responsibilities which such agreements create, regardless of the internal distribution of powers necessary to discharge these duties. It follows, therefore, that Canada cannot excuse its present delinquencies on the basis of its Constitutional limitations. Once obligations are created, they bind the Dominion as against other contracting parties. Parliament may, it is true, refuse to perform obligations undertaken by the executive. Or, as in the present instance, Parliament may find itself incompetent to perform such obligations. The international consequences are the same in either event, and the Dominion is thereby left clearly in default.

REMEDIES FOR PRESENT POSITION

Two alternatives have been put forward as providing a way out of the present dilemma, neither of which is easy or simple. Many who dislike the recent decision are asking for abolition of appeals to the Judicial Committee.⁹⁰ Others prefer amendment of the Constitution.⁹¹ The Government of the United Kingdom has long since declared its willingness that questions affecting judicial appeals should be determined only in accordance with the wishes of that part of the Empire primarily affected. Nor would the Imperial Government offer any objection to Constitutional amendment. Strong opposition exists in Canada, however, to either of the above proposals. In the Provinces—particularly Quebec—the right of appeal to the Privy Council is considered the best, and perhaps only, safeguard for Provincial rights. It is very doubt-

⁹⁰ During the discussions in the Canadian House of Commons, April 5, 1937, Mr. J. T. Thorson declared: "The time has come, Mr. Chairman, for us to face an important decision, and I submit that appeals to the Judicial Committee of the Privy Council should be abolished." House of Commons Debates, Vol. 73, 1937, p. 2780.

⁹¹ See W. P. M. Kennedy, "The Constitution of Canada," *Politica*, June, 1937, p. 356.

ful, moreover, whether or not the abolition of appeals would provide a solution to the present problem. On the validity of the labor legislation of 1935 the Supreme Court of the Dominion were evenly divided, and those who upheld the Dominion contention did so on the supposition that they were following doctrines already laid down by the Judicial Committee, the correctness of which supposition the Judicial Committee itself now denies. In the *Aëronautics* case the Judicial Committee conceded to the Dominion powers which had been unanimously denied to it by the Supreme Court. Of the six opinions rendered January 28, 1937, concerning the legislative competence of the Dominion Parliament, not one reversed a previous holding of the Supreme Court.⁹² The cases which have been decided in recent years do not, therefore, warrant the assumption, now so frequently made, that abolishing appeals to the Judicial Committee as a tribunal of last resort in all respects⁹³ would result in interpretations favorable to the extension of Dominion authority.

As regards the second proposal, it may be noted that the British North America Act is unique as a federal Constitution in failing to provide within itself a procedure for amendment. No such provision was deemed necessary, because Canada's Constitution is also a statute of the Imperial Parliament at Westminster. Today, as in 1867, the Imperial Parliament alone is competent to change this Statute which it enacted. The British North America Act, almost alone among Imperial Acts, is left by the Statute of Westminster of 1931 beyond the power of the Dominion Parliament to alter. This procedure was retained in 1931 because, it is said, it permitted evasion of the problem of finding a satisfactory alternative method. The Parliament at Westminster would not now pass amending legislation except at the request of the Dominion—a request, moreover, in which the Provinces must be formally associated.⁹⁴

⁹² One judgment of the Supreme Court was altered in part. These are Appeals Nos. 100–105 of 1936: 1937 A. C. 326, 355, 368, 377, 391, 405. Only Appeal No. 100 of 1936 concerns legislative competence of the Dominion Parliament in connection with treaties. For this reason the other cases are not considered in the present discussion.

⁹³ Appeals to the Judicial Committee in Canadian criminal cases have already been abolished. *British Coal Corporation v. The King*, 1935 A. C. 500. The Irish Free State has abolished all appeals.

⁹⁴ The method of giving effect to agreements between the Dominion Government and the Governments of the Canadian Provinces and of altering the British North America Act may be illustrated by the form of the Act of July 10, 1930, to confirm and give effect to certain agreements entered into between the Government of the Dominion of Canada and the Governments of the Provinces of Manitoba, British Columbia, Alberta, and Saskatchewan respectively. (This Act is cited as the British North America Act, 1930, United Kingdom, Public General Acts and Measures, 20–21 Geo. 5, 1929–30, c. 26.) The form of the Act is as follows: "WHEREAS the agreements set out in the Schedule to this Act were entered into between the Government of the Dominion of Canada and the Governments of the Provinces of Manitoba, British Columbia, Alberta, and Saskatchewan respectively subject, however, in each case to approval by the Parliament of Canada and the Legislature of the Province to which the agreement relates and also to confirmation by the Parliament of the United Kingdom:

Under present circumstances this request would be difficult to secure. The Provinces desire to acquire and hold as much power as possible. The conviction is widespread, particularly in Quebec, that the maintenance of Provincial power is essential for the protection of its minority rights of language and religion. Finally, it has been pointed out,⁹⁵ the extension of Dominion jurisdiction is opposed by those economic and industrial interests hostile to federal regulation of labor conditions. These interests are charged with using the cry of Provincial rights to oppose any changes in the status quo. The above factors indicate the difficulties which will be encountered in any attempt to give the Dominion Government power to enact labor legislation and so to fulfill its obligations under the international labor conventions which it has already ratified or which it may wish to ratify in the future.

"And whereas each of the said agreements has been duly approved by the Parliament of Canada and by the Legislature of the Province to which it relates:

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"And whereas the Senate and Commons of Canada in Parliament assembled have submitted an address to His Majesty praying that His Majesty may graciously be pleased to give his consent to the submission of a measure to the Parliament of the United Kingdom for the confirmation of said agreements:

"Be it therefore enacted by the King's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

"1. The agreements set out in the Schedule to this Act are hereby confirmed and shall have the force of law notwithstanding anything in the British North America Act, 1867, or any Act amending the same, or any Act of Parliament of Canada, or in any Order in Council or terms or conditions of union made or approved under any such Act as aforesaid."

The view has been expressed that the British Parliament would doubtless pass any amendment requested by the Dominion Parliament alone, and that the refusal of the Parliament at Westminster to accept the action of the Dominion Parliament as representing the wishes of the Canadian people would be "an unwarranted interference in Canadian Affairs." See Royal Institute of International Affairs, *The British Empire* (London, 1937), p. 29.

⁹⁵ See *Historicus*, "The Privy Council and Canada," *loc. cit.*, p. 473.

ORIGIN AND DEVELOPMENT OF DENIAL OF JUSTICE *

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I

The legal aspects of denial of justice and its position in the framework of international law have been expounded in a number of important works.¹ Regarding the history of the doctrine, however, there appears to be no work of any importance, apart from the excellent observations of Charles De Visser.² This is not in any way surprising in view of the fact that the history of international law is a subject which does not receive the attention it deserves, and more particularly in view of the legend, which has been disproved in a convincing manner by James Brown Scott, that there was no system of international law prior to the days of Grotius. Yet the history of denial of justice is not only extremely interesting, but it also throws light on some of the most important institutions of modern international law.

The fact that the treatises of Grotius and Vattel are quoted in some of the modern arbitration awards concerning denial of justice by no means implies that the origin of this doctrine is to be found in the works of these two writers. It is one of great antiquity, traces of which may be found in periods immediately following the migration of nations, although it is true that it did not exist at the time of Roman law. In order to view these beginnings in their proper perspective we need only consult one of the current textbooks of those days. There we find that the doctrine of denial of justice as such is as unknown as the notion of delicts and illegality in international law. It is known merely in so far as it represents a condition precedent of what is now known as "reprisals". In fact, the terms "reprisals" and "denial of justice" were for a considerable time, with the exception of a very short period, linked to one another to such an extent that the latter was a necessary condition for the legality of the former.³ It was not until the term "illegality"

* See the article entitled "The Meaning of Denial of Justice in International Law," by Oliver J. Lissitzyn, this JOURNAL, Vol. 30 (1936), p. 632.—Ed.

¹ See, e.g., Dunn, *The Protection of Nationals* (1932), p. 147 *et seq.*

² In *Académie de Droit International, Recueil des Cours* (1935), II, p. 369 *et seq.* For the history of legal responsibility in international law, as it affects the matter under discussion, see Goebel, "International Responsibility of States for Injuries Sustained by Aliens," this JOURNAL, Vol. 8 (1914), p. 802 *et seq.*

³ Our thanks are due to Charles De Visser, *loc. cit.*, for having drawn our attention to the fact that the difficulties which we experience today in applying the appropriate terms is partly due to the lack of interest in the origin and historical importance of denial of justice. See also Stowell, *International Law* (1931), pp. 35, 161, 478 *et seq.* Therefore, there cannot

became known as an integral part of legal theory that it took the place of denial of justice as a condition precedent to the application of reprisals. Only then did denial of justice develop as a separate subject unconnected with what is now known as "reprisals". It is due to the long-lasting association of the terms "reprisals" and "denial of justice" that the origin of denial of justice is to be found in the law relating to reprisals. Like denial of justice, reprisals are not of Roman origin. Their beginning may rather be found in the idea of self-help and responsibility of individuals for acts committed by their co-nationals. These ideas were alien to Roman thought, and as long as there was a strong central government there was no need to have recourse to these measures. When the central government weakened, post-classical Roman law prohibited reprisals, and in later days it was the Church which upheld and even strengthened its rules.

Reprisals in their original form simply represented the association of two ideas: self-help and communal solidarity. In this form they are noticeable in all primitive legal systems, and also in those of the Teutonic tribes who brought them to the west and south of Europe at the time of the migration of nations. Whereas the history of that development has often been described, its legal aspect has been neglected, and this is one of the reasons why the importance of denial of justice has frequently been overlooked. In comparatively early days the idea that aliens must be accorded justice was associated with the idea of reprisals in the sense that where justice was denied to an alien the latter had a right to take reprisals against the judge who so denied it or against his co-nationals. Here we find traces of more accurate legal reasoning, inasmuch as reprisals are not allowed unconditionally and aliens have a right to be accorded justice.

The restriction of reprisals to cases of denial of justice may be found in numerous treaties of modern times and even in the early Middle Ages, and not, as is often held, as late as the 13th and 14th centuries.⁴ The earliest traces can be found in treaties signed in the 9th century between Italian sovereign territories. In a treaty made in 836 between Sicard of Benevent and the Neapolitans, the right to make reprisals is limited to denial of justice suffered by a subject of one party within the territory of the other. Reprisals against merchants are entirely prohibited.⁵ Another treaty signed in 840 is

be the slightest doubt that Holdsworth's assumption that special reprisals "have left hardly any trace in our modern law," is wrong. Holdsworth, *History of English Law* (1924), V, p. 38. See Hindmarsh, *Force in Peace* (1933), pp. 45, 54, for other examples to the contrary.

⁴ Butler-MacCoby, *The Development of International Law* (1928), p. 175, give the beginning of such restricted application of reprisals as late as the 15th century.

⁵ ". . . et si minime ei justitia fuerit facta (liceat) pignerare infra civitatem . . .," *Monumenta Germaniae Historica, Leg. IV*, p. 219, c. 8. The rules relating to procedure bear a certain resemblance to the law concerning letters of marque and to reprisals as they were used in the late Middle Ages. See G. Cohn, *Die Verbrechen im öffentlichen Dienst nach altdeutschem Recht*, Karlsruhe (1876), I, p. 96.

even more remarkable on account of the contracting parties. It is made by the Emperor Lotar I, on behalf of a number of cities of the Italian kingdom with the Doge Petrus Tradenicus of Venice, and includes, among other things, the right to make reprisals against judges of one territory who deny justice to the subjects of the other.⁶ One of the contracting parties, *i.e.*, the Italian cities, was subject to Imperial power; the other party, *i.e.*, Venice, was not. After the secession from Byzance, Venice conducted wars and made treaties on her own behalf, thus proving her independence. The above-mentioned treaty is the first document signed after this newly acquired independence.⁷

As is evidenced by these two treaties, it was even in those days regarded as an iniquity to deny justice to an alien. But earlier than that we find, in internal laws, reprisals in cases of denial of justice to aliens. These may conceivably be the origin of the ideas expressed in the two above-mentioned treaties. Towards the end of the 8th century a *Capitulare* promulgated in the first years of Pippin's reign as King of Italy contains a rule according to which execution may be levied on the property of a bishop who denies justice.⁸ Going farther back to the tribal laws, we find in absolute clarity not only the idea of reprisals, but also their connection with denial of justice. The preliminary step to connecting the two institutions was the punishment of judges who were guilty of denial of justice in general.⁹ Traces of this are to be found in post-classical Roman law.¹⁰ The next step was a penal provision inflicting punishment upon judges who failed to hear a complainant from another community.¹¹ If we connect this institution with that of reprisals we come to the modern idea of denial of justice. This modern notion can actually be traced back to one of the old laws we have referred to. The law of the Visigoths sanctioned reprisals against a judge who denied justice to individuals not domiciled within the jurisdiction. If there are no goods of the judge in the neighborhood, the reprisals may be employed against anybody who is living in the territory of the judge at fault.¹² The origin of this rule is unknown. There is no doubt, however, that it was of considerable influence on later treaties, in view of the close association of the Visigoths with the

⁶ *Mon. Germ. Hist., Cap. Reg. Franc.*, II, p. 133. Cohn, *op. cit.*

⁷ See Romanin, *Storia Documentata di Venezia*, I, 1853, pp. 176, 351-361; F. C. Hodgson, *The Early History of Venice*, 1901, pp. 91-2.

⁸ "... si . . . distulerit justitiam faciendam . . ." *Mon. Germ. Hist., Leg. Sect. II, Cap. Reg. Franc.*, I, 1, p. 192, cap. 6. Cohn, *op. cit.*, p. 95.

⁹ *E.g.*, *Lex Satica*, LVII, 1.

¹⁰ *Codex Theodosianus*, II, 1, 6.

¹¹ *Edictus Langobardorum, Liutprandi Leges de anno IX*, cap. 27 (721).

¹² *Lex Visigothorum* II, 2, 7. Since reprisals appear at first in the form of sanctions for the failure to accord justice to aliens and since this is their sole object in the Middle Ages, we may see in this law also the origin of reprisals as a distinct branch of international law. The fact that this origin is Germanic has often been mentioned by eminent writers, *e.g.*, Triepel, *Völkerrecht und Landesrecht*, 1899, p. 216. See also the suggestions in Mas Latrîe, *Du Droit de Marque, Bibliothèque de l'Ecole des Chartres*, 1866, pp. 534-5.

cultural orbit of the Mediterranean. There is also considerable influence on the law of Spain. In that country the law of the Visigoths survived for centuries, and among the numerous laws restricting the application of reprisals there are two decrees of King Alfonso IX of Leon (1188-1230),¹³ the spiritual father of the University of Salamanca. We find the same idea laid down again in 1225 in a resolution of the Cortes of Tortosa, sponsored by King Jayme I of Catalonia, which provided for the application of reprisals against foreign merchants exclusively in the case of denial of justice.¹⁴ With these laws, the law of the Visigoths leads us into the great number of those legal systems which, in the late Middle Ages, restrict reprisals. The fact that the idea of according justice to aliens and its association with reprisals had its origin in the law of the Visigoths, is by no means surprising since the majority of writers are today of opinion that the birthplace of the Visigoths was Scandinavia, where the idea of according justice to all, irrespective of their origin, was upheld in early times.¹⁵

In the 13th century, at the very latest, the restriction of reprisals to the case of denial of justice had become a fact, and reprisals had everywhere been recognized as a definite legal institution. In England developments had been somewhat similar. There it had become the accepted principle that individuals were liable for the acts of their co-nationals or fellows. The principles of that law may be found in the Law of the Dunsæte,¹⁶ the Englishry,¹⁷ and in the statutes of the Cambridge guild.¹⁸ From the 12th century onwards the customary law of the boroughs contained the unrestricted authorization, in certain parts of the country, to make reprisals against the "fellows" of a foreign debtor. In other parts the reverse was the case, and reprisals were prohibited altogether.¹⁹ The *Leges Quatuor Burgorum* (about 1270) restrict reprisals to cases of denial of justice: "No one ought to restrain his neighbours of another borough for the debt or trespass of another (of that other borough) unless he be the principal or a pledge, or unless the reeve (of that other borough) shall have failed to do him (the creditor) justice, which God forbid."²⁰

¹³ "If justice is denied or delayed to a citizen of another district he may make reprisals against the fellows who are living in the same district as the debtor." Eduardo de Hinojosa, *El Elemento Germánico en el Derecho Español*, Madrid, 1915.

¹⁴ A. Schaube, *Handelsgeschichte der Romanischen Völker*, 1906, p. 552.

¹⁵ It is doubtful whether collective liability as laid down in the law of the Visigoths supports the thesis that the medieval Spanish guilds are of Gothic origin. See Julius Klein, in *Facts and Factors in Economic History*, 1932, p. 166.

¹⁶ Goebel, *loc. cit.*, p. 803; Liebermann, *Gesetze der Angelsachsen*, I, 377; III, 214, *et seq.*

¹⁷ Goebel, *loc. cit.*, p. 804. Particulars regarding the importance of these institutions for present-day English law, *i.e.*, Coroners and Circuit Courts, will be found in this writer's article in *Revue Pénale Suisse*, 1936, p. 165.

¹⁸ "If one misdo, let all bear it, let all share the same lot."

¹⁹ See Bateson, *Borough Customs*, I, 1904, pp. 115-121.

²⁰ *Cap. 97*; Bateson, *op. cit.*, p. 121; similarly Leicester, 1268 (Merewether and Stephens, *History of the Boroughs*, 1835, I, p. 225).

During that period numerous royal charters were promulgated, either exempting the members of foreign communities from reprisals²¹ or restricting these measures to denial of justice.²² Whereas originally the individual default of a debtor resulted in reprisals, these shall in future only be applicable in the case of a community denying justice. This is made clear by a case before the Curia and Chancery of London.²³ The English plaintiff had claims against several merchants in Groningen and also against the community of that town. It was thought that Groningen was part of the power and dominion of the Bishop of Utrecht. After the debtors had been reminded several times of their duty to pay, the King of England requested the Bishop of Utrecht to accord justice to his, the King's subjects. "Yet the bishop has not cared to do justice." At that stage a writ was issued and the bailiff received orders to make reprisals against the men of Groningen to the value of the debt. The bailiff arrested some of the goods of the burgesses of Groningen. Thereupon the burgesses entered an appearance in the King's Chancery and demanded "that they or their goods for the default of the bishop of Utrecht in exhibiting justice ought not to be attached or arrested," on the ground that the township of Groningen was not under the dominion of the Bishop of Utrecht, the latter being possessed of spiritual jurisdiction only. They alleged that the King of Almain was their immediate lord "for which cause the bishop could not do justice" to the plaintiff. A jury of twenty-four Dutch and Almain merchants having found that this was so, the arrested goods were freed from sequestration.

The case is most instructive for various reasons. No mention whatsoever was made of contractual relations between the King of England and the township of Groningen and its alleged or actual lord. There is, therefore, no reason to suppose that it was due to contractual restrictions that reprisals could not be made unconditionally. In spite of that, the applicability of reprisals was made conditional upon a default in "exhibiting justice," on the part of the lord of the debtors. In order to make reprisals legal, more than mere *mora* or individual *culpa* of the actual debtor was required. It was not enough that he, the debtor himself, denied *jus*, but in order to make the debtor's "fellows" liable, the lord who possessed jurisdiction must have denied justice. This fact is borne out by the various unsuccessful requests made by the King. It follows that the basis of reprisals is no longer the default of individuals in denying justice, but the default of the lord or the magistrates in their capacity as representatives of the community. This practice of re-

²¹ Ypres, Ghent, Douai, London. *Hansa Teutonicorum, etc.* See H. Hall, *Select Cases concerning the Law Merchant*, II, 1930, pp. xci-xcii, 32-33, 84; Ch. Gross, *Select Cases concerning the Law Merchant*, I, 1908, pp. 9-10, *etc.*

²² A privilege granted by King Henry III to the burgesses of Amiens (1256) and Abbéville (1269); Augustin Thierry, *Recueil des Monuments inédits de l'histoire du Tiers État*, I, 1850, pp. 219-20; IV, 1870, pp. 35-6.

²³ *Wynand Morant v. Andrew Papyng and partners*, Hall, *op. cit.*, pp. 81-83.

stricting reprisals to the case of denial of justice was finally laid down in a statute passed in 1353 during the reign of King Edward III.²⁴ This statute, however, was not always strictly interpreted.

Even in earlier days we find in England traces of a practice in the law of the municipalities, replacing the liability of individuals, as we know it today, by the liability of the community. Different practices of imposing a duty to compensation within the community of the debtor and the "distressed" had led to this development. Whereas, according to older sources of law, liability was invariably imposed upon the debtor in default, the *Leges Quatuor Burgorum* went one step farther: "The neighbours of the distressed shall go to replevy him at their cost,"²⁵ which means, in effect, that the cause of reprisals, *i.e.*, denial of justice, is looked upon as a default of the community. Consequently the community has a duty to indemnify that member who has had to suffer for their default. The rights of that member are not, as was the case in the early days, confined to recourse against the original debtor whose inability or unwillingness to pay are made apparent by the proceedings in question. Going even a step farther, the community does not wait until execution has been levied upon the debtor. They satisfy the demands of the creditors, without any preliminary steps, "from the community's purse" and then collect the appropriate, or sometimes, the double amount from the actual debtor who, in the latter case, is thus punished for his default. This is the practice resorted to by some of the English boroughs in the 12th and 13th centuries.²⁶ This method dispenses with reprisals altogether. That this interpretation of the older borough charters is correct is borne out by a charter of later date.²⁷ According to this charter an indemnity is, as a rule, payable by the actual debtor, with the exception, however, that reprisals are made in cases of denial of justice. In a case of that kind, according to Bateson, no indemnity is payable: "Then each burgess must take his chance and could not recover from the principal." Consequently the default of the community must, in that case, be made good by that member against whom reprisals happen to have been made. Where, on the other hand, there is no default on the part of the community, the original debtor has to indemnify the "distressed".

We have seen that in England, as far back as the middle of the 14th century, reprisals in international relations had been restricted by statute to cases of denial of justice. This was not so in the case of Germany and Italy, owing to the entirely different political structure of these two countries. Innumerable treaties were made in both countries containing, apart from certain deviations, somewhat similar provisions. The two Italian treaties concluded in the 9th century were followed by a treaty between Venice and

²⁴ 27 Edw. III, stat. 2, c. 17.

²⁵ Cap. 51 (Bateson, *op. cit.*, I, 117).

²⁶ Preston, Grimsby (Bateson, *op. cit.*, I, pp. 126-7).

²⁷ Hereford, cap. 74, 1486 (interpolated; Bateson, *op. cit.*, I, 118-119; also *ibid.*, p. 119, n. 3; II, p. LVI).

the Bishop Grausa of Ceneda²⁸ in the year 1001 and later by a number of others. The result was that in the 13th century there were hardly any treaties of friendship which did not contain a restriction of reprisals. This development was not confined to Italy. It extended to the whole of the Mediterranean territory.²⁹ In Italy there were laws going beyond the liability of individual members of a defaulting community and leading to a liability of the latter. This was the case where treaties provided for the satisfaction of claims of foreign creditors by levying special customs duties,³⁰ or where, as was the case in some of the townships, there was a kind of insurance against damage suffered by individuals in consequence of reprisals, which damage was thus borne by the community.³¹ This is the origin of what became known later on as marine insurance. The way which leads from these ancillary measures to the liability of the community is a long one, and such liability was not practicable until the distinct legal personality of the community had been recognized in its proper perspective.

Whilst in France the problem of reprisals and denial of justice was not of paramount importance,³² owing to the centralization of government, its importance in Germany was considerable. This was due to constant controversies between the innumerable small states and their continuous disputes with the Emperor. As in the case of Italy, a great number of treaties were made restricting the application of reprisals to cases of denial of justice.³³ The rule was laid down for the first time in a privilege granted in 1173 by the Emperor Frederick I to a number of merchants.³⁴

Planitz³⁵ has compiled a series of later treaties. These bear reference not only to municipalities within Germany itself, but also to a number of foreign states. As regards their contents they do not differ. They mostly use the same phraseology "*justitiam facere denegare*". The old German documents showing what is meant by this phraseology are ambiguous. It seems, however, that sometimes it implies the refusal of a man to satisfy a judgment given against him.³⁶

²⁸ Ughelli, *Italia Sacra*, 1717, V, 179.

²⁹ See Doren, *Italienische Wirtschaftsgeschichte*, I, 1934, pp. 401-2, 413-14, 525-26, and the numerous treaties in Schaube, *op. cit.*, pp. 149-50, 559, 570, 607, 609, 611, 635, 655, 680, 697, 700, 708, 753-7.

³⁰ Schaube, *op. cit.*, pp. 751-2.

³¹ Levasseur, *Histoire de Commerce de la France*, I, 1911, p. 165.

³² With the exception of "Défence of the Fairs" in matters relating to markets and fairs. See P. Huvelin, *Droit des Marchés et des Foires*, 1897, pp. 427-29, 448-86. Apart from that, reprisals were prohibited by a number of privileges without exceptions even in cases of denial of justice. See, e.g., Collinet, *Études sur la Saisie Privée*, 1893, pp. 106-11.

³³ This rule of law may also be found in the municipal laws of numerous towns.

³⁴ "... illius loci mercatoribus, ubi negata est ei justitia, pignus auferat." Planitz, in *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Germanistische Abteilung*, Vol. 40, 1919, p. 181.

³⁵ *Loc. cit.*, pp. 178-80; see also Collinet, *op. cit.*, p. 109.

³⁶ See Planitz, *loc. cit.*, pp. 181-2.

Until the 18th century there were all over Europe treaties restricting reprisals to cases of denial of justice. As to this, see the quotations in Bynkershoek, *Quaestiones Juris Publici*

II

Such was the position in England, Italy, France and Germany when the lawyers first began to take any interest in the legal aspect of reprisals. From the beginning, reprisals were closely associated with denial of justice. They were only allowed in cases of denial of justice, and it may safely be said that they developed from a means of mere force to a legal institution by being made dependent upon denial of justice. They are permissible only "*quando civitas non vult reddere jus de cive suo*".³⁷ The theory is already fully developed in the works of Bartolus who wrote the first monograph on reprisals in 1354. Bartolus establishes the theory, accepted by later writers and by Grotius, that in Rome the subject-matter was of little or no importance since the centralization of power was sufficient to give redress.³⁸ After the collapse of centralized power, the Italian municipalities had, according to Bartolus, no access to a superior power which might have been able to give such redress. This lack of a superior power leads to the necessity of reprisals, provided there is a denial of justice. Then and only then are reprisals permissible before the forum of conscience. They are permissible before a civil forum where there is a just cause, and the most legitimate cause is that based upon the default of a community in dispensing justice. This is so according to *jus divinum* as well as *jus gentium*, since both of these hold "legitimate" wars to be permissible. It is there that we find the idea of justifying wars as well as reprisals. All the writers of early days reiterate the statement that if wars are permissible for a *justa causa*, then reprisals must also be permissible, provided there is a *justa causa*. Reprisals are a kind of war, and they can, therefore, only be made by the superior power within the community. Giovanni da Legnano, in a treatise written in 1360, bases his theory³⁹ on the works of Bartolus. He distinguishes between a judge who denies justice and one who does injustice. Denial of justice is the failure of the judge to remedy a prior wrong. Legnano goes as far as to blame a community which has no judge of appeal. He then goes on to discuss the effect of a rule equivalent to what is nowadays known as the Calvo clause: such a pact is, according to Legnano, of no legal effect if an injury is actually inflicted since, in that case, the door would be open to *dolus* (*Cap. CLV*). Like Bartolus, Legnano

Libri Duo, Bk. I, chap. XXIV; Manning, *Commentaries on the Law of Nations*, new ed., 1875, pp. 148-150; Butler-Maccoby, *op. cit.*, p. 176; Levasseur, *op. cit.*, p. 264; Nys, *Origines du Droit International*, 1894, p. 75; Mas Latrie, *op. cit.*, p. 575; Polson, *Principles of the Law of Nations*, 2nd ed., 1859, pp. 36-37; Grover Clark, "English Practice with regard to Reprisals by Private Persons", this JOURNAL, Vol. 27 (1933), pp. 709-11, *etc.*

³⁷ Cino de Pistoja, 1270-1337; see Alberto del Vecchio and Eugenio Casanova, *Le rapresaglie nei comuni medievali*, 1894, pp. XXI-XXII.

³⁸ The theory was not founded by Bynkershoek, as Butler-Maccoby, *op. cit.*, p. 173, seem to assume.

³⁹ *Tractatus de bello, de represaliis et de duello*, new ed. by James Brown Scott, 1917; see also A. Breyne, *Le Droit de Guerre selon Jean de Legnano (Thèse)*, Louvain, 1932.

advocates great care in the application of reprisals. This admonition is reiterated throughout the centuries until we reach the work of Grotius and Vattel.

Martinus Garatus⁴⁰ and Johannes Jacobus a Canibus,⁴¹ both Italians like their predecessors, do not go beyond these principles in their treatises on reprisals. Jacobus argues that reprisals are allowed, "because if a nation denies justice natural equity says that war might be declared against it, and in a war it is allowed to seize men and their goods." This is the same *argumentum a majore ad minus* used by Bartolus. The influence of Roman civil law in his deduction is unmistakable: the judge is the mandatary of the community, and if he denies justice, the community is liable in the same way as any other principal is liable for the defaults of his agent.

The old authorities invariably state that reprisals are justifiable and exist only for the purpose of replacing an appeal to superior jurisdiction which is nonexistent. Whether justice had actually been denied in a particular case was in those days purely a question of power. Once the community had authorized one of its members to make reprisals against members of another state on the ground that the other state was alleged to have denied justice, there was no impartial judge who might have been entitled to investigate the underlying facts. The legal-technical problem of the consequences of denial of justice becomes more important than the doctrine itself. The theorists were little concerned with the juridical analysis of the term since there was no independent judge to decide whether the facts in a particular case justified the assumption that denial of justice actually existed. It seems like an anachronism that in the latter part of the 15th century adventurers were able to bring a number of actions for the same cause, first in London, then before the court of the Duke of Burgundy, then before the French courts, and finally, on the ground that justice had been denied to them, before the Papal court in Rome.⁴² It was not until international justice⁴³ and diplomatic arbitration had developed to a certain extent that the importance of the term "denial of justice" became more prominent. This development has taken place only in recent times. At the present day special reprisals, originally consequential upon denial of justice, are only of historical interest. The underlying cause itself, however, occupies a prominent place in the system of international delicts, and consequential upon it is now another form of reprisals, a form which follows upon all international delicts.

Pursuing our study of the older literature, we now reach a climax such as is only reached once in a millennium: that is the Spanish School, revived and

⁴⁰ Died in 1450. *Tractatus illustrium Jurisconsultorum*, XII, 1584, pp. 279-81.

⁴¹ Died about 1494; *ibid.*, pp. 275-9.

⁴² Heyron v. Proute and others; as to this, see Leadam and Baldwin, *Select Cases before the King's Council*, 1918, pp. cxiv-vi, 110-14, 121-29.

⁴³ Today, even international justice might commit a "denial of justice"; see, e.g., F. Castberg, *Académie de Droit International, Recueil des Cours*, 1931, I, p. 381.

brought to our knowledge by James Brown Scott, who has thereby erected himself a *monumentum aere perennius*. Vitoria's observations on denial of justice and reprisals, although not very numerous, are most elucidating. Like the writers before him, he attaches great importance to the question as to when reprisals are permissible. After stating all possible objections, he eventually decides in favor of the legality of reprisals. In his endeavor to mitigate the existing practice, he insists on the payment of compensation by the guilty individual to the person upon whom reprisals have been inflicted.⁴⁴ This idea is not any more revolutionary than is the idea of not allowing reprisals unless a state is unwilling to give satisfaction for an injury.⁴⁵ Such an injury is, according to Vitoria, a failure of the state to remedy a prior wrong. Being a man of deep humanity and, therefore, on principle, hostile to the institution of reprisals in their entirety, Vitoria limits their applicability. In so doing he gives the example of forcible retaking of stolen property by the rightful owner.⁴⁶ In accordance with the etymology of the word *reprehendere* Vitoria regards reprisals merely as recuperation, i.e., natural restitution by which the *status quo* is restored. He conceives the following idea which, however, does not become universally acceptable until later, when the state alone has a right to make reprisals: "It is a question not of individual persons, but of a state."⁴⁷ The above-mentioned observations of Vitoria were, until recently, almost unknown. In 1933 they were brought to light by James Brown Scott, who had already analyzed some of the earlier and better known works of the same writer.⁴⁸ According to Vitoria, a condition precedent of reprisals is a "breach of duty" on the part of the state, i.e., a breach which constitutes neglect to vindicate the right against the wrongdoer. Being conversant with the theory of the liability of the state, Vitoria was able to see in reprisals nothing but the consequences of a tort committed by the state, or, in other words, denial of justice, which involved the duty of the state to accord justice to a foreigner.

The argument of Covarruvias (1512-1577), another great Spanish writer, is not unlike that of Vitoria. In two of his books he deals with reprisals and denial of justice.⁴⁹ He advocates humanity, and stresses, like Vitoria, the relationship between the two principles and the state: the state must suffer if it fails to punish wrongs committed by its nationals. Linking this theory

⁴⁴ *De Bello*, On St. Thomas Aquinas, *Summa Theologica*, *Secunda Secundae*, Quest. 40, sect. 15. Translated in James Brown Scott, *The Spanish Origin of International Law*, Part I, 1933, p. CXXIII.

⁴⁵ *Op. cit.*, p. CXXII.

⁴⁶ See also Frederico Puig Peña, *La influencia de Francisco de Vitoria en la Obra de Hugo Grocio*, 1934, pp. 213-14; also Camilo Barcia Trelles, *Académie de Droit International, Recueil des Cours*, 1927, II, pp. 309-311.

⁴⁷ Scott, *The Spanish Origin of International Law*, p. CXXIII.

⁴⁸ Relection on the Law of War, s. 41, reprinted in Vitoria's *De Jure Belli Relectiones*, ed. by James Brown Scott, 1917; Scott, *The Spanish Origin of International Law*, pp. 212-13, 232, 284; Spanish Conception of International Law and of Sanctions, 1934, p. 16.

⁴⁹ *Opera Omnia*, Antwerp, 1638, I, p. 492; II, p. 148.

with the theory of *justum bellum*, Covarruvias arrives at the conclusion that reprisals are allowed only under the same conditions as war.

Of those writers succeeding the great Spaniards and preceding Grotius, Gentili⁵⁰ develops new theories, whilst Ayala⁵¹ does not in any way advance the study of the subject. Gentili, like the others, admits the permissibility of reprisals on the ground that denial of justice even justifies war. He divides denial of justice into refusal to do (justice) and neglect in doing justice. This is the same as the distinction made by Legnano between *déni* and *défi de justice*, a distinction which appears time and again in modern books. When expounding his theory of the rule of local redress, Gentili distinguishes between wrongs originally committed by private individuals and wrongs committed by the community. The latter indicate the beginning of a new theory by which reprisals develop into a political means of force. Reprisals are no longer used for the purpose of executing private judgments, but for the purpose of settling all kinds of controversies concerning states. Simultaneously the term "denial of justice" loses the character of a failure of protective justice and becomes nothing but a name which covers complaints of a purely political nature with the cloak of law and tradition.

Hugo Grotius,⁵² although he regards reprisals as a kind of war, is the first to separate the problem of denial of justice and reprisals from that of *justum bellum*. Reprisals are resorted to for the purpose of enforcing the liability of the state. They are subsidiary to the liability of the state and not to that of the original debtor.⁵³ Reprisals are only taken in cases of denial of justice.⁵⁴ Like Gentili, Grotius distinguishes between *déni* and *défi de justice*. But he is the first to find for these terms the following well-known interpretation which proved to be of fundamental importance to their future development:⁵⁵ There is a denial of justice "where a judgment can not be obtained against a criminal or a debtor within a reasonable time," there is a *défi de justice* "where in a very clear case judgment has been rendered in a way manifestly contrary to law"; "in a doubtful case there is a presumption in favor of those who have been chosen by the state to render judgment." Foreigners as well as those owing allegiance are subject to territorial authority. The extent of that authority, however, differs in that nationals have to obey even an unjust judgment, whereas foreigners have a "right of compulsion," viz., of reprisals.

Zouche,⁵⁶ who is influenced to a considerable extent by both Gentili and Grotius, makes, like the former, a distinction between private and public in-

⁵⁰ *De Jure Belli Libri III*, 1598, new ed. by James Brown Scott, 1933, Bk. I, chap. XXI (Rolfé's translation).

⁵¹ *De Jure et Officiis Bellicis et Disciplina Militari Libri III*, 1582, new ed. 1912, by James Brown Scott, Bk. I, chap. IV, § 10 (Bate's translation).

⁵² *De Jure Belli ac Pacis*, Bk. III, chap. 2. ⁵³ *Ibid.*, § 3. ⁵⁴ *Ibid.*, § 4. ⁵⁵ *Ibid.*, § 5.

⁵⁶ *Juris et Judicii Fecialis, sive Juris inter Gentes, et Quaestionum de eodem Explicatio* (1650), new ed. by James Brown Scott, 1911, and translated by Brierly, Pt. II, sects. 5-6.

jury. This distinction, which in Gentili's works serves as the basis of the rule of local redress, is of a more substantial nature in the works of Zouche: "The goods of all subjects are liable in respect of debts owing by a civil society, or its head, whether owing primarily on their own account or because they have made themselves liable by not enforcing the debt of another."

Here we see that claims of a purely political nature are equivalent to those based upon a failure to do justice. Denial of justice is no longer the basis of reprisals. It is the international delict in general which becomes a condition precedent of the application of reprisals. In the works of Cornelius van Bynkershoek⁵⁷ we still find the original meaning of the term "denial of justice". Examples based upon contemporaneous diplomatic practice are given, and it is said that reprisals are not to be made, unless "justice has clearly been denied." Denial of justice presupposes "violence or injustice previously done to the subjects." Bynkershoek then goes on to say: "Thus an injury done by force and not rectified by the courts is rectified by force," and, dealing with unjust judgments as being a condition precedent of reprisals, he quotes an old law of Amsterdam, which "specifies that if any citizen of that place suffers wrong outside the domains of the state whether by force or by an unjust judgment . . ." Criticizing the wording of the statute, Bynkershoek says:

The law uses the phrase "by an unjust judgment", so that it does not suffice merely to pronounce judgment; it must also be just, and the magistrate is to be judge of the fairness, for this is a matter which is not usually submitted to the decision of others. . . . The plaintiff will readily interpret it even when a decision is given, but in an unfair way, and we may add that sovereigns will generally interpret all unfavorable decisions as unfair.

Bynkershoek's remarks show the chief flaw of the whole doctrine: Reprisals do not create a state of war, but they differ from it only in quantity and not in quality.⁵⁸

Christian Wolff⁵⁹ holds reprisals to be permissible "when another people does an injury to us or to our citizens, and, when asked, is unwilling to repair it within a proper time."⁶⁰ This statement proves that the term "denial of justice" loses more and more its original meaning. It no longer represents the failure to protect the rights of foreigners, but it becomes a collective term implying all those acts which are known as international delicts. It ceases to be a denial of justice on the part of judicial authorities of the state and becomes a denial of justice in respect of the claims of another state. By depicting denial of justice in that perspective, Wolff lays the foundation-stone of

⁵⁷ *Quaestionum Juris Publici Libri Duo* (1737), ed. by Scott, 1930 (Frank's translation), Lib. I, cap. XXIV, p. 133 *et seq.*

⁵⁸ "I believe that circumstances which permit a province to wage war, also permit it to issue letters of reprisal."

⁵⁹ *Jus Gentium methodo scientifica pertractatum* (1749, new ed. by James Brown Scott, 1934, with translation by Drake), cap. V, § 562 *et seq.*

⁶⁰ *Ibid.*, § 589.

the modern terms of "international delinquency" and "international delict". He then tries to distinguish accurately between war and reprisals. This distinction, however, can only be drawn with difficulty, since war and reprisals are the consequences of one and the same tort. They both are merely the specific consequences of an attitude infringing the rules of international law. But, whereas hitherto infringements of international law had differed at least quantitatively, Wolff now presents us with a monistic doctrine. The distinction between reprisals and war is put on a different basis, the criterion of the underlying legal cause which justifies the two measures being almost entirely replaced by the criterion of the kind of force applied:

Reprisals are a certain kind of war, but one which is more akin to private war. For by reprisals things are taken by force which belong to subjects of another nation, . . . or, . . . with the purpose that we may acquire the right which another nation refuses to give us, consequently we pursue by force our right against one who does not wish to give it to us. That is war. But when reprisals are made, the whole people is not assailed by force, but individuals contend with force.⁶¹

It is said, however, that a war is a measure subsidiary to reprisals so as to render a just cause of reprisals a just cause of war only if and when reprisals are expected to be unsuccessful and are deemed to be necessary in order to obtain satisfaction for an international delict. The causes justifying war are said to be the same as those justifying reprisals only.⁶² But even in those days it was deemed advisable to change that state of affairs which made hardly any distinction between war and reprisals. That this distinction was not clear-cut was mainly due to the fact that reprisals, which had originally been nothing but the legal consequences of denial of justice, in the sense of a failure of protective justice, had become a means of settling political controversies⁶³ and of replacing war.⁶⁴ Vattel, the man who helped to make Wolff's works known by bringing them into popular form, was the first to recognize the weakness of the above-mentioned theory.⁶⁵ According to Vattel, in common with earlier writers, denial of justice is a condition precedent of reprisals; it appears as the sole condition. Denial of justice is regarded as the failure to redress a prior wrong, and a distinction is made between the two wrongs as

⁶¹ *Jus Gentium methodo scientifica pertractatum* (1749, new ed. by James Brown Scott, 1934, with translation by Drake), cap. V, § 603. ⁶² *Ibid.*, § 606.

⁶³ See, e.g., the well-known dispute between Great Britain and Prussia in 1745, after the taking of prizes by Great Britain. Charles de Martens, *Causes Célèbres du Droit des Gens* (2nd ed. 1858), II, pp. 97-168.

⁶⁴ Gradually the right of carrying out reprisals was taken away from individuals and given to the state.

⁶⁵ E. de Vattel, *Le Droit des Gens, ou Principes de la Loi Naturelle*, 1758, Bk. II, Chap. XVIII, sec. 350, ed. by Scott, 1916, Fenwick's translation. Albert de Lapradelle, in his preface to this edition, draws particular attention to the way in which Vattel deals with the question of denial of justice and says that it is one of the examples which disprove the assertion that Vattel is lacking in originality.

regards the damage they inflict.⁶⁶ The distinction between war and reprisals is, in the first place, a formal one: war is to be the last resort where reprisals are unsuccessful. But then Vattel goes on to say, and this observation goes far beyond those of previous writers:

When the difference does not concern an act of violence or a civil tort, but concerns a contested right . . . it is a declaration of war which ought to follow and not the pretended application of reprisals, which in such cases would be real acts of hostility without declaration of war and would be contrary both to public faith and to the mutual duties of nations.⁶⁷

Westlake⁶⁸ has drawn our attention to this doctrine which proves that Vattel foresaw the present-day dilemma between war and reprisals and endeavored to avoid it. This, however, must not lead us to assume that Vattel's theory of denial of justice was a modern one in that he meant by this term the refusal to accord justice to foreign individuals. Although Vattel insists on the necessity of a prior wrong, the examples given by him clearly show that the wrong may not only be one committed against a foreign individual, but also against a foreign state.⁶⁹ It follows that the distinction between those circumstances justifying war and those justifying reprisals only is not equivalent to the distinction between political wrongs and wrongs which have originally been committed against an individual. More likely the basis of the theory is that in cases of doubtful claims arising between two states, the matter shall be settled by war, and in cases of infringements of rights firmly established by proof, reprisals shall be used in order to enforce restitution.⁷⁰

With regard to the requirement of local redress, Vattel states the rule which has been adopted by later practice, that it must cease where there is "good reason to think that the demand for it would be ineffectual."⁷¹

The dilemma between war and reprisals is particularly prominent in the works of writers after Vattel. The meaning of the term "denial of justice" is enlarged and acquires the character of a general international tort. Reprisals become a measure of self-help following upon a *déni* which one nation or one of its subjects has suffered at the hands of another nation or individual.⁷² Consequently, justice may be denied by an individual, and there may also be a denial of justice where there is an international delict which has little to do with the infringement of individual rights and the failure of their protection. This was the case in the controversy between Great Britain

⁶⁶ E. de Vattel, *Le Droit des Gens, ou Principes de la Loi Naturelle*, 1758, Bk. II, Chap. XVIII, sec. 349.

⁶⁷ *Ibid.*, § 354.

⁶⁸ Collected Papers, 1914, p. 594.

⁶⁹ *E.g.*, if a nation has taken possession of that which belongs to another, if it refuses to pay a debt, etc. Vattel, *op. cit.*, Chap. XVIII, § 342.

⁷⁰ *Ibid.*, § 343.

⁷¹ *Ibid.*

⁷² Gérard de Rayneval, *Institutions du Droit de la Nature et des Gens*, Vol. I, p. 312 (new ed., Paris, 1832).

and France which eventually led to an alliance between the latter country and the United States, and in which the English were accused of having constantly denied justice.⁷³ In an essay entitled "Reprisals and War,"⁷⁴ Westlake describes the developments of the 18th century theories⁷⁵ which are the main cause of our present-day inability to distinguish adequately between war and reprisals. Whilst, according to Westlake, reprisals were originally used to obtain satisfaction of contractual claims or redress of injuries, "the sum claimed being in either case capable of pecuniary statement," they came eventually to be used for the enforcement of all kinds of claims: "of State claims not of a pecuniary nature, of any claims, therefore, which might have been prosecuted by war if the State which makes them had chosen to take that course." With regard to § 354 of Vattel's book (*vide supra*) refuting the practice of his days, Westlake suggests that the British practice in the second part of the 18th century must have been in his mind.⁷⁶ Although it is true to say that the origin of modern reprisals occurs in this period, the fact that Westlake's distinction between pecuniary and political differences is entirely modern and was then unknown must not be lost sight of. Historical facts show that the old reprisals did not aim exclusively at the satisfaction of pecuniary claims. Originally denial of justice was a condition precedent of their application, denial of justice being the refusal to accord justice to a subject of a foreign state. Although these proceedings invariably concerned the money and goods of individuals, it must not be forgotten that the primary consideration was not the pecuniary claim, but the denial of justice: for centuries it was the one and only condition precedent of reprisals. Gradually, however, reprisals became detached from denial of justice and they came to be the consequence of international delicts in general, regardless of whether such delicts had been committed against individuals or others. The detachment of reprisals from denial of justice having taken place,⁷⁷ the definition of denial of justice gradually contracted, and the term came to mean again what it had originally meant: a failure of protective justice. In works on international law the law dealing with reprisals is now, as a rule, distinct from the law on denial of justice. Occasionally, however, denial of justice, which in modern terminology denotes only one type of delict, is still held to be a condi-

⁷³ Gérard de Rayneval, *Institutions du Droit de la Nature et des Gens*, Vol. II, p. 129. Rayneval, 1736-1812, a learned man of practice, took part in the negotiations, together with his brother, who was the first French ambassador to the United States. Parts of Rayneval's book are even today of considerable interest with regard to the diplomatic history of the treaty of alliance.

⁷⁴ John Westlake, *Collected Papers on Public International Law*, ed. by L. Oppenheim, 1914, pp. 590-606; also Charles Cheney Hyde, *International Law* (Boston, 1922), II, p. 174.

⁷⁵ We have seen that this development had been initiated by Gentili and Zouche.

⁷⁶ For particulars, see Westlake, *op. cit.*, pp. 594-5: "the object of such acts, *i.e.*, hostile acts in time of peace, was clear, namely to enforce the negotiations by the advantage gained by the show of determination."

⁷⁷ This was not the case until the 19th century.

tion precedent of reprisals.⁷⁸ Therefore, we find in Oppenheim's *International Law*⁷⁹ a refutation of the theory that reprisals are allowed only in cases of denial of justice.

As sanctions of international delicts, reprisals fulfil those functions which they and wars fulfilled at a time when the term *justum bellum* was still in use. This term, which has never altogether lost its meaning,⁸⁰ and the importance of which is often underestimated at the present time,⁸¹ signalizes a formalized resurrection in the modern law relating to the prevention of war.⁸² In earlier times just cause of war and denial of justice were complementary terms. They were both international delicts and as such resulted in the same sanctions, *i.e.*, reprisals or war. Qualitatively the two terms did not differ from one another. Quantitatively they only differed in that denial of justice was *in potentia* also a just cause of war. They could both exist side by side, as long as there were neither formal prohibitions of war⁸³ nor a complete *jus in bello*, and particularly as long as the term "denial of justice" still retained its clear-cut character. Later we find such disquieting features as the case of *The Boedes Lust*,⁸⁴ with regard to which Sir W. Scott said that an

⁷⁸ As to modern terminology, see Phillimore, *Commentaries*, 2nd ed., 1873, III, p. 18: reprisals are a reaction to "an injury done to the rights, *stricti juris*, of a State"; Klüber, *Droit des Gens*, 2nd ed., 1874, §234; Heffter, *Droit International*, 3rd ed., 1873, pp. 211-12; Hall, *International Law*, 1880, 7th ed., 1917, pp. 379-83. On the other hand, the following still regard denial of justice as a condition precedent of reprisals: Manning, *Commentaries*, new ed., 1875, p. 147; Creasy, *First Platform*, 1876, pp. 401-403; Lawrence's *Wheaton*, 1863, p. 506; Halleck, *International Law*, new ed., 1878, I, p. 423. Even more remarkable is Woolsey, *Introduction to the Study of International Law*, 5th ed., 1879, pp. 188-9: "Reprisals may be undertaken on account of any injury, but are chiefly confined to cases of refusal or even obstinate delay of justice." Similarly Rivier, *Principes du Droit des Gens*, 1896, II, pp. 191-2.

⁷⁹ Oppenheim-Lauterpacht, *International Law*, 5th ed., 1935, II, § 34.

⁸⁰ It is particularly the practice of states which have always regarded war as the sanction of illegal acts. (Métall, *Revue Internationale de la Théorie du Droit*, 1936, p. 327; also the instructive collection of declarations of war of the last eighty years, in Lauterpacht, *The Function of Law in the International Community*, 1933, pp. 364-5.) See also Kunz, *Kriegsrecht und Neutralitätsrecht*, 1935, pp. 1-2 and observations in Oppenheim-Lauterpacht, *op. cit.*, p. 184.

⁸¹ The term is sometimes regarded as having no practical value. On the other hand, see *Les Fondateurs du Droit International*, 1904, Pillet's introduction, pp. xxiii-iv.

In particular, only a just war was an effective *causa foederis*; as to this, see a Swiss treaty of the year 1352 (Redslob, *Histoire des Grands Principes du Droit des Gens*, 1923, p. 151, n. 3; for the whole doctrine see Grotius, *op. cit.*, II, 15, 23; Bynkershoek, *op. cit.*, I, 9, *etc.*).

⁸² See Brierly, *Law of Nations*, 2nd ed., 1936, p. 26; Fischer Williams, *Chapters on Current International Law*, 1929, pp. 71-73; Kunz, "The Law of Nations, Static and Dynamic", this *JOURNAL*, Vol. 27 (1933), p. 630 *et seq.*; Le Fur, *Précis de Droit International*, 2nd ed., 1933, pp. 275-76, 489-90.

⁸³ See in particular the observations of Strupp in *Académie de Droit International, Recueil des Cours*, 1934, I, p. 572.

⁸⁴ 5 C. Rob. 233. The case was decided in 1804. See James Brown Scott, *Cases on International Law*, 1922, p. 497; Oppenheim-Lauterpacht, *op. cit.*, pp. 120-21; Westlake, *op. cit.*

embargo on an alien's property was subject to two interpretations: if war had not followed, it would have been regarded as a successful reprisal; but as war did follow, it was retroactively treated as a hostile measure *ab initio*.

Although positivism banned the term *justa causa belli* from the law of war, the principle underlying it was strong enough to be resurrected as a condition precedent of reprisals. Since, however, war was in those days never declared without reference to some infringement of law, the difference between war and reprisals became apparent only in the intention of the Powers concerned. The inadequacy of such a distinction is well known in our present-day law relating to the prevention and prohibition of war, and it has led to such grotesque results as pacific measures accompanied by battles of varying importance.

The term "denial of justice" after having been severed from the legal consequence of reprisals, re-adopts its original meaning as a refusal to accord justice to a foreign subject. This restrictive interpretation is rivalled by another which includes in denial of justice every conceivable kind of international delict.⁸⁵ But since in the meantime, *i.e.*, in the course of the last hundred years, the conception of illegality in international law has acquired a definite meaning, the wide interpretation of the term "denial of justice" becomes superfluous. The question remains, however, whether the restricted interpretation according to which denial of justice is merely a refusal of protective justice becomes likewise superfluous. This question must be answered in the affirmative since, in course of time, other kinds of denial of justice besides the refusal to hear a case have become international delicts. Today the one and only important consideration is which particular kind of a failure to accord justice is in issue in a given case. The numerous controversies,⁸⁶ as *e.g.*, whether a judgment delivered in defiance of international law is a denial of justice, whether denial of justice comprises only those illegal acts which are preceded by a prior wrong, whether denial of justice can be committed by courts only, and many others, are immaterial, once everybody is agreed that the underlying acts are illegal and that they give a right to reclamation. Consequently, the term is not used by many eminent writers, among whom is Hall, the first writer on state responsibility in a modern sense.⁸⁷ It is likewise omitted from the awards in the Panama-United States arbitration.⁸⁸

The whole theory of international responsibility is based on a standard varying according to several circumstances of the act in question. The term

⁸⁵ In particular, Nielsen. See his statement in the Neer Case, this JOURNAL, Vol. 21 (1927), p. 560.

⁸⁶ See Fitzmaurice, British Year Book of International Law, 1932, p. 93 *et seq.*

⁸⁷ Responsibility of a state in respect of acts done by administrative agents, judicial functionaries, private persons. Hall, International Law, 1880, § 65.

⁸⁸ It is also omitted from Art. 9 of the preliminary draft of the third committee of the Hague Codification Conference; see Borchard, this JOURNAL, Vol. 24 (1930), pp. 533-5.

"denial of justice" does not convey the innate characteristics of that standard; for the latter is dependent not only upon the person who is responsible for the act in question, but also upon numerous other circumstances, such as the situation of the country as a whole: *e.g.*, it cannot be expected of a government that its treatment of aliens show the same degree of carefulness in a zone of military operations as in other circumstances.⁸⁹ The same applies to a country which finds itself in a serious internal crisis.⁹⁰ On the other hand, there are cases in which the standard must be raised: *e.g.*, as regards the protection of foreigners engaged in official functions. Sometimes the standard is also influenced by the type of official (*e.g.*, administrative) who exercises judicial powers.⁹¹

The fact that the term "denial of justice" enjoys such widespread recognition even today is largely due to its association with the practice of contesting the legality of certain acts by relying on a preceding denial of justice. The term being an offspring of the Law of Nature, can hardly be defined in a purely rationalistic way, and it is, therefore, particularly cherished by those who hope to derive benefit from its obscurity. It denotes, according to South American practice, the refusal of access to justice, and, according to the practice of others, every kind of international delict. All attempts at definition are arbitrary and in no way precise.⁹² Even the attempt of Borchard⁹³ to give the term a restricted meaning by confining it to acts or omissions occurring in the course of doing remedial justice has not remained unchallenged, since, as has been said by Dunn, the prosecution of criminals is not justice in its remedial sense.⁹⁴

One reason for the use of the term might have been the fact that other rules of international law refer to it. But all the references are made as if the meaning of the term were well known and clearly defined and did not require explanation. These references are contained in the rules regarding the Calvo clause and contract claims. As has often been said, the Calvo clause becomes ineffective in the case of a denial of justice. As a matter of fact this means that the clause has very little or no effect if one of the broader notions of denial of justice is applied. On the other hand, a contract claim justifies diplomatic reclamations only if a denial of justice occurs. In the era of justiciability of almost every question, it is not difficult to introduce a claim of denial of justice which allows the fictitious upholding of the Calvo clause and which, at the same time, makes the interposition in behalf of contract

⁸⁹ Chevreau Claim. See Hudson, *this JOURNAL*, Vol. 26 (1932), p. 804.

⁹⁰ Kaiser Case, General Claims Commission, U. S.-Mexico, *Opinions of Commissioners*, 1929, p. 84; see also Nielsen's statement in the Canahl Case, *Opinions*, p. 93.

⁹¹ Roper Case, General Claims Commission, U. S.-Mexico, *this JOURNAL*, Vol. 21 (1927), p. 777.

⁹² See Dunn, *op. cit.*, p. 153 *et seq.*

⁹³ In his commentary upon Art. 9, Harvard Research Draft, 1929, *Responsibility of States*, *this JOURNAL*, Spl. Supp., Vol. 23 (1929), p. 173.

⁹⁴ *Nemo prudens punit quia peccatum est, sed ne peccetur.* Seneca, *De Ira*, I, 16.

claims difficult. In truth, the former is disregarded, and the decision of the latter is brought into the discretionary power of the claiming government. The lack of clarity of the term is also responsible for its use in several treaties the parties to which reach an agreement without saying on what they are agreed and leaving the question open until a concrete controversy arises. It is a compromise in words, but actually it amounts to a postponement of the decision.

Taken as a whole, however, the development of denial of justice, if we look at it from its inception, presents a hopeful outlook. Whilst originally reprisals could be made without restrictions being imposed, they came to be a measure which in comparatively early days aimed at enforcing the right of foreigners to protective justice, and was not permissible unless there was a denial of justice. Later the underlying facts were severed from their legal consequences, and at the present time denial of justice does not lead to self-help on the part of the injured party, and, as a rule, not even to reprisals. It leads merely to a peaceful reclamation by the state and, in certain cases, the dispute is settled amicably by an arbitral award.*

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THE CAROLINE AND MCLEOD CASES

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There is probably no branch of international law which is so calculated to encourage the skeptic as that mass of contradictory precedents, dogmatic assertions, and vague principles which are collected under the common head of "intervention," and perhaps there is no more potentially dangerous ground of intervention than that which is variously described as "self-preservation" and "self-defence." It was in the *Caroline* case that self-defence was changed from a political excuse to a legal doctrine. At a time when the law has become once more fluid and is undergoing rapid change, a reconsideration of the *Caroline* controversy, and of McLeod's case to which it is so closely allied, may serve a useful end.

THE CAROLINE

The Facts. The case is not without topical interest, for it was precipitated by the assistance afforded by citizens of a third state to a rebellion against a constituted government. The occasion was the Canadian rebellion of 1837. Active sympathy with the rebels was aroused at various places within the United States, but especially along the Canadian border.¹ The United States Government took steps to maintain order and to restrain coöperation with the rebels, but, hampered as they were by the strong partisanship of a large proportion of American citizens, their efforts were not attended by success. After the main body of insurgents had been defeated, many of them sought refuge within the Union. The rebel leaders, McKenzie and Rolfe, appeared at Buffalo, where, at largely attended public meetings, they urged that a force be organized to assist them in their attempt to carry on the rebellion. Several hundred volunteers did, in fact, join their ranks, and arms and ammunition were openly supplied to them. The occurrences are thus described by the Mayor of Buffalo:²

Yesterday (13th) men were actively engaged in collecting arms and ammunition, and enrolling names, for the openly-expressed purpose of invading Canada. A handbill was posted up towards evening, calling upon the volunteers for Canada to meet in front of the theatre, for the purpose of taking up their line of march. A number met, armed and equipped. A large assemblage soon after gathered around the Eagle tavern, which had been the *depot* for arms through the day. A general

¹ The authority for the facts set forth in this résumé is the correspondence to be found in H. Ex. Doc. No. 74, 25th Cong., 2d Sess.

² Mr. Trowbridge to the President, Dec. 14, 1837, H. Ex. Doc. No. 74, 25th Cong., 2d Sess.

was duly appointed to take command of the invading army. About nine o'clock the people generally dispersed. The volunteers, with their friends and abettors, marched, with their arms and colors, out of the city, as was supposed for the night; about one o'clock this morning a portion of them returned and entered the court-house, and forcibly took from the sheriff two hundred stand of arms belonging to the State arsenal at Batavia. They also took from the gun houses two field-pieces, and then marched to Black Rock, where they are now quartered.

The force appears to have grown to about a thousand strong,³ and their activities are described as follows in a report of the Law Officers of the Crown:⁴

It appears that on the 13th of December last, a numerous Armed body, composed chiefly of American Citizens, had openly invaded and taken possession of Navy Island, a Part of the British Possessions. This Body was under the Command of an American named Van Rausselear, who, affected to establish in Navy Island, in conjunction with the Canadian Rebels, a Provisional Government for the purpose of revolutionising Canada. From the 13th to the 29th inclusive Van Rausselear and his followers kept possession of Navy Island, and were guilty of repeated Acts of Warlike aggression on the Canadian shore, and also on British Boats passing the Island. During all this time there was constant communication between the American Shore and Navy Island and a constant reinforcement of Men and Warlike Stores, was supplied from the State of New York and principally from Fort Schlosser. On the 29th two discharges of heavy Ordnance were made on a British Boat from the American Shore, near that Fort. On this same day the "Caroline" came down the river from Buffalo, and after landing at Navy Island several Men and Packages, which it is impossible not to see contained Stores of War, she made two Trips between Fort Schlosser and Navy Island, and transported from the former to the latter place a Six-Pounder and other warlike stores. Fort Schlosser itself appears to have been largely provided with Shot of Various descriptions, and other Ammunition. The Lieutenant Governor had on the 13th apprized⁵ the Governor of the State of New York of the Proceedings which had occurred, but no answer had been sent to that communication.

In these circumstances, Colonel McNab, commanding the British forces assembled across the river at Chippewa, judged that the destruction of the *Caroline* would serve the double purpose of preventing further reinforcements and supplies from reaching the island, and depriving the rebels of their means

³ H. Ex. Doc. No. 64, 25th Cong., 2d Sess.

⁴ Dated Feb. 21, 1838; see also note 15 below. All the Law Officers' Reports referred to in this article will be found in the Public Record Office in London, Vols. F. O. 83., 2207-2209.

For the benefit of readers unacquainted with the work of the Law Officers of the Crown in England, it may be explained that their functions include that of acting as legal advisors to the Government Departments. Requests for such advice are made in the form of "drafts" prepared by the secretary of the Minister at the head of the department concerned. The replies of the Law Officers are called "reports"; they usually repeat the substance of the draft, after which follows the opinion on the point in question.

⁵ Lieutenant Governor Head to Governor Marcy, Dec. 13, 1837, H. Ex. Doc. No. 302, 25th Cong., 2d Sess.

of access to the mainland of Canada. The plan was carried out by an expedition sent over on the night of the 29th, under the leadership of Captain Drew.

According to the deposition ⁶ of the master of the *Caroline*, after clearing from Buffalo on the morning of the 29th, he called first at Black Rock Harbor, where the American flag was run up. Soon after leaving that place, a volley of musketry was fired at the boat from the Canadian shore, but without causing injury. A further call was made at Navy Island, where some passengers disembarked and, "as this deponent supposes, certain articles of freight were landed." The *Caroline* arrived at Fort Schlosser at three o'clock in the afternoon, but between that time and dark two more trips were made to Navy Island. At about six in the evening she was finally docked at Fort Schlosser. The crew and officers numbered ten, but in the course of the evening "twenty three individuals, all of whom were citizens of the United States," came on board and requested the commander "to permit them to remain on board during the night, as they were unable to get lodgings at the tavern near by." The requests were granted. About midnight the commander was informed by one of the watch that several boats, filled with men, were making towards the *Caroline* from the river. He proceeded to give the alarm, but before he was able to reach the dock, the *Caroline* was boarded by some "70 or 80 men, all of whom were armed," who "immediately commenced a warfare with muskets, swords, and cutlasses, upon the defenceless crew and passengers of the *Caroline*." The vessel was abandoned without resistance, for the only effort made by either crew or passengers appears to have been "to escape slaughter." "Immediately after the *Caroline* fell into the hands of the armed force who boarded her, she was set on fire, cut loose from the dock, was towed into the current of the river, there abandoned, and soon after descended the Niagara falls." After the *Caroline* had been set adrift, beacon lights were seen on the Canadian shore near Chippewa, and loud cheering was heard from that point.

After the affray it was discovered that twelve of the thirty-three persons known to have been aboard the *Caroline* were missing, and it was thought that they had been in the boat when she went over the falls. However, it was subsequently established that only two people lost their lives: they were Amos Durfee, whose body was found on the quay with a ball through his head, and a cabin boy known as "little Billy", who was shot while attempting to leave the vessel. Two persons were taken prisoners into Canada: one, a mere lad of nineteen and an American citizen, was sent home after being provided with sufficient money to pay for the ferry across the river; the other was a Canadian fugitive. Even he seems to have been allowed to go at large after spending some time in the guard room at Chippewa.⁷

⁶ H. Ex. Doc. No. 73, 25th Cong., 2d Sess.

⁷ N. S. Benton to Hon. John Forsyth, Buffalo, Feb. 6, 1838, H. Ex. Doc. No. 302, 25th Cong., 2d Sess. Also dispatch from Governor Head to Henry S. Fox, *ibid*.

The Legal Argument. The first complaint of the destruction of the *Caroline* appears to have been a note⁸ addressed by Mr. Forsyth, the American Secretary of State, to Mr. Fox, the British Minister at Washington, saying that the incident had caused "the most painful emotions of surprise and regret" and would be made "the subject of a demand for redress." In reply to this Fox sent a letter⁹ dated February 6, 1838, which contains the following passage:

The piratical character of the steam boat "Caroline" and the necessity of self-defence and self-preservation, under which Her Majesty's subjects acted in destroying that vessel, would seem to be sufficiently established.

At the time when the event happened, the ordinary laws of the United States were not enforced within the frontier district of the State of New York. The authority of the law was overborne, publicly, by piratical violence. Through such violence, Her Majesty's subjects in Upper Canada had already severely suffered; and they were threatened with still further injury and outrage. This extraordinary state of things appears, naturally and necessarily, to have impelled them to consult their own security, by pursuing and destroying the vessel of their piratical enemy, wheresoever they might find her.

Thus, three defences were raised, being, in the order in which it will be convenient to consider them:

- (1) The "piratical character of the vessel";
- (2) The ordinary laws of the United States were not being enforced at the material time and their authority was publicly overborne;
- (3) "Self-defence and self-preservation."

The British Foreign Office, however, does not seem to have taken a really serious view of the situation created by the destruction of the *Caroline* until after the arrest of Alexander McLeod in 1840,¹⁰ on a charge of murder and arson in connection with the events of the night of December 29, 1837. The controversy was at once renewed in the correspondence and it was on April 24, 1841, that Daniel Webster, who had now taken the place of Forsyth, addressed to Fox a most important letter,¹¹ dealing with both the *Caroline* and McLeod cases, and to which it will be necessary to refer continually. This letter treats at some length of the charge of piracy which had been made by Fox, and in language which is not entirely without significance in relation to some of the problems which confront the international lawyer today:

Their offence, whatever it was, had no analogy to cases of piracy. Supposing all that is alleged against them to be true, they were taking a part in what they regarded as a civil war, and they were taking a part on the side of the rebels. Surely England herself has not regarded persons

⁸ Dated Jan. 5, 1838, H. Ex. Docs. 302 and 73, 25th Cong., 2d Sess.

⁹ H. Ex. Doc. 302, 25th Cong., 2d Sess.; Public Record Office, F. O. 5. 322.

¹⁰ See below at p. 93.

¹¹ British Parliamentary Papers, Vol. LXI, (1843); British & Foreign State Papers, Vol. 29, p. 1129.

thus engaged as deserving the appellation which Her Majesty's Government bestows on these citizens of The United States.

* * * It may be said that there is a difference between the case of a civil war arising from a disputed succession, or a protracted revolt of a colony against the mother-country, and the case of the fresh outbreak, or commencement of a rebellion. The Undersigned does not deny that such distinction may, for certain purposes, be deemed well founded. He admits that a Government called upon to consider its own rights, interests, and duties, when civil wars break out in other countries, may decide on all the circumstances of the particular case upon its own existing stipulations; on probable results, on what its own security requires, and on many other considerations. It may be already bound to assist one party, or it may become bound, if it so chooses, to assist the other, and to meet the consequences of such assistance.

But whether the revolt be recent or long continued, they who join those concerned in it, whatever may be their offence against their own country, or however they may be treated, if taken with arms in their hands in the territory of the Government, against which the standard of revolt is raised, cannot be denominated pirates, without departing from all ordinary use of language in the definition of offences. . . .

However, Webster goes on to say that: "The United States have thought, also, that the salutary doctrine of non-intervention by one nation with the affairs of others is liable to be essentially impaired if, while Government refrains from interference, interference is still allowed to its subjects, individually or in masses." There follows a panegyric of the United States Foreign Enlistment laws. Thereafter, nothing more is heard of piracy from either side.

The second charge made by Fox, namely, that the ordinary laws of the United States were not being enforced at the material time, is properly not a true defence at all, but merely *evidence* that the third postulate of self-defence was applicable in the circumstances.¹² But the tenor of dispatches from the British Foreign Office seems to indicate that the Ministers imagined that this fact *in itself* was sufficient to justify the destruction of the *Caroline*; regarding "self-defence and self-preservation" as a political rather than a strictly legal formula of justification, of which the only prerequisite was a sufficient provocation.¹³ Such an attitude on the part of the Foreign Office would explain

¹² The actual fact alleged would certainly seem to have been established. Cf. a letter from a Mr. Lyman to Governor Marcy, in which, having examined the situation himself, he reports that "the laws of the United States . . . have been, and are, openly violated." Cf. also a letter from the Mayor of Buffalo to the President, saying that "The civil authorities have no adequate force to control these men, and unless the General Government should interfere, there is no way to prevent serious disturbances." H. Ex. Doc. No. 74, 25th Cong., 2d Sess.

¹³ Cf. the letter from Fox to Palmerston, Jan. 13, 1838, containing the first mention of self-defence: "But I am persuaded that when the whole case is examined, it will receive a full justification; if not according to strict law as applicable to ordinary cases, at least upon the principle of self-defence and self-preservation." (Record Office, F. O. 5. 322.)

Cf. also a remarkable dispatch which Palmerston addressed to Fox, Dec. 15, 1838, where,

why the Law Officers felt called upon to add to their report of March 25, 1839,¹⁴ the following footnote with its unusual note of emphasis:

We feel bound to suggest to your Lordship that the grounds on which we consider the conduct of the British Authorities to be justified is that it was absolutely necessary as a measure of precaution *for the future* and not as a measure of retaliation *for the past*. What had been done previously is only important as affording irresistible evidence of what would occur afterwards. We call your Lordship's attention to this distinction as it is very important to be alluded to in any communication which your Lordship may make to the American Minister.

But it was under the head of "self-defence and self-preservation" that the destruction of the *Caroline* was ultimately justified. The case had been twice submitted to the Law Officers for their opinion, and it is clear from their reports that they regarded that defence as being entirely applicable. The first report is dated February 21, 1838,¹⁵ and at the outset they say:

In obedience to your Lordship's Commands, We have taken the Papers into consideration, and have the honour to report that, although it is much to be regretted that any act of hostility should have occurred within the limits of the Territory of the United States, We think the conduct of Captain Drew and his men, in capturing the steam boat "*Caroline*" was, under the circumstances, perfectly justifiable by the Law of Nations.

Thus, although the Law Officers regarded the incident as justifiable, they seem to suggest that an apology, or at least a note of regret that the capture should have taken place on American territory, would not have been out of place. Perhaps when it is remembered that Lord Palmerston was Foreign Secretary at the time, it will be better understood why that apology was not made until it was almost too late. After giving a résumé of the facts,¹⁶ the Law Officers conclude: "Under the Circumstances We are of opinion that the place where the '*Caroline*' was moored was not justly entitled to the privileges of a neutral territory,¹⁷ and that the British Forces, with a view of self-preservation,

discussing a hypothetical case of a rebel descent from United States territory into Canada, he says: "It is possible H. M.'s forces, after having defeated and dispersed those Bands, as they would certainly do, might be obliged, with a view to their more complete destruction, to pursue them for a short way across the Frontier." This proposed invasion Palmerston euphemistically described as "some little overstepping of the boundary of the Union for the purpose of more effectually abating a danger which the authorities of the United States would in such a supposition have been unable to control." (Record Office, F. O. 5. 321.)

Webster, in his letter to Lord Ashburton, July 27, 1842, found occasion to complain of this same attitude: "The act of which the Government of The United States complains is not to be considered as justifiable or unjustifiable, as the question of the lawfulness or unlawfulness of the employment in which the *Caroline* was engaged, may be decided the one way or the other. That act is of itself a wrong, . . ." (British & Foreign State Papers, Vol. 30, at p. 193.) ¹⁴ Signed by J. Dodson, I. Campbell, R. M. Rolfe. F. O. 83. 2207. ¹⁵ *Idem*.

¹⁶ Quoted above at p. 83.

¹⁷ The use of the term "neutral" in connection with a civil war is somewhat irregular, for it properly applies only to a war between states. Nevertheless, it is employed extensively in

were fully justified in attacking the 'Caroline' and treating her as a Belligerent Vessel."

The second report is dated March 25, 1839, and was occasioned by a note from Mr. Stevenson, the American Minister in London, renewing the demand for redress. In answer to this the Law Officers merely stated that they saw no reason to depart from the opinion expressed in their earlier report, and added the footnote which has already been noticed.¹⁸

This plea of self-defence was also dealt with by Webster in his letter of April 24, 1841, but it will be convenient to discuss this under the following head.

THE WEBSTER-ASHBURTON SETTLEMENT

There were other questions outstanding between the United States and Great Britain, notably that of the Northeastern boundary.¹⁹ In 1841 the condition of Anglo-American relations was such that the desultory correspondence must be replaced by a determined effort for a peaceful settlement if war was to be averted. Late in that year the British Government announced that they had decided to send Lord Ashburton to Washington, as a special minister charged with the task of effecting an agreement on the boundary question and other subjects which remained outstanding, including the *Caroline* and McLeod cases.²⁰ Circumstances were, indeed, now more favorable to a settlement than heretofore; Lord Ashburton had lived in the United States for some time in the earlier part of his life, and he had married the daughter of Senator Bingham of Pennsylvania. There had also been a

the correspondence relating to the Canadian Rebellion. Cf. a letter from Mr. Scoville to Mr. Benton, H. Ex. Doc. No. 74, 25th Cong., 2d Sess., where he says: "There is a general feeling here in favor of the radical cause, and it may become difficult to prevent violations of the laws of neutrality." Cf. also, the letter from N. Garro to the President, H. Ex. Doc. No. 64, 25th Cong., 2d Sess.; also, Webster's letter to Fox, April 24, 1841, British & Foreign State Papers, Vol. 29, at p. 1136.

¹⁸ See note 14.

¹⁹ It seems that some members of Congress believed that the Canadian trouble might be exploited with profit in connection with the boundary dispute. Thus, in a letter to the Foreign Office, Feb. 1, 1838, Fox reports:

"I further inclose the printed copy of a speech, upon the above subjects, reported as having been delivered in the Senate of the United States, by Mr. Smith, Senator from Maine, upon the discussion of the President's message to Congress of the 5th of January, respecting the preservation of neutrality on the frontier. The object of this speech is to recommend that the state of affairs in Canada should be taken advantage of by the United States, as a favourable occasion for forcing upon Great Britain a settlement of the Boundary Question. I am informed that Mr. Smith did not deliver his speech in the Senate, but only uttered a few remarks which were indistinctly heard. He has since published in the Washington 'Globe', the administration newspaper, for the benefit of his constituents, the speech which I have now the honour to enclose." (Record Office, F. O. 5. 322.)

²⁰ For a history of the Webster-Ashburton negotiations see Callahan, *American Foreign Policy in Canadian Relations*, pp. 185-214; E. D. Adams, "Lord Ashburton and the Treaty of Washington," in *American Historical Review* (July, 1912), Vol. XVII, p. 764.

change of Presidency, and the new President only desired a swift and equitable settlement of a matter which had arisen during the term of office of a predecessor.

On July 27, 1842, Webster sent a note ²¹ to Lord Ashburton, also enclosing a copy of the letter of April 24, 1841, which had originally been addressed to Fox, "as such communication is considered a ready mode of presenting the view which this Government entertains of the destruction of that vessel" [the *Caroline*]. It was this same letter which contained the first elaboration of self-defence. It was natural that the elaboration of that concept should come from the American side, for elaboration meant limitation, and made it no longer possible for the British to talk vaguely of self-defence and self-preservation as if the mere utterance of the words excused any and every sin. Webster, in a formula which has become famous, called upon the British Government to show a

necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation. It will be for it to show, also, that the local authorities of Canada, even supposing the necessity of the moment authorized them to enter the territories of The United States at all, did nothing unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it. It must be shown that admonition or remonstrance to the persons on board the *Caroline* was impracticable, or would have been unavailing; it must be shown that day-light could not be waited for; that there could be no attempt at discrimination between the innocent and the guilty; that it would not have been enough to seize and detain the vessel; but that there was a necessity, present and inevitable, for attacking her in the darkness of the night, while moored to the shore, and while unarmed men were asleep on board, killing some and wounding others, and then drawing her into the current, above the cataract, setting her on fire, and, careless to know whether there might not be in her the innocent with the guilty, or the living with the dead, committing her to a fate which fills the imagination with horror. A necessity for all this, the Government of The United States cannot believe to have existed.

There can be little doubt indeed that when Webster demanded that Her Majesty's Government should show an overwhelming necessity for all that, and that nothing was done in excess of that necessity, he imagined that he was demanding the impossible. Perhaps the most remarkable phase of the dispute is the way in which Lord Ashburton, in his ingenious reply,²² was able neatly to fit the facts into that framework of law prepared by Webster. Lord Ashburton began his argument with the proposition that, the insurgent forces having been organized in American territory without effective steps being taken by the authorities to prevent them, it became necessary to acquire

²¹ Parliamentary Papers (1843), Vol. LXI; British & Foreign State Papers, Vol. 30, p. 193.

²² Lord Ashburton to Mr. Webster, July 28, 1842. Parliamentary Papers (1843), Vol. LXI; British & Foreign State Papers, Vol. 30, p. 195.

the *Caroline*, "the important means and instrument by which numbers and arms were hourly increasing."

I might safely put it to any candid man, acquainted with the existing state of things, to say whether the military commander in Canada had the remotest reason, on the 29th day of December, to expect to be relieved from this state of suffering by the protective intervention of any American authority. How long could a Government, having the paramount duty of protecting its own people, be reasonably expected to wait for what they had then no reason to expect? . . .

Assuming that the *Caroline* must be acquired, he then proceeds to show how the method of accomplishing this end could be reconciled completely with the requirements of Webster's own formula. Since, almost up to the last minute, the British commander had expected to find the *Caroline* moored in British waters,²³ there had been no time for deliberation: "I mention this circumstance to show also that the expedition was not planned with a premeditated purpose of attacking the enemy within the jurisdiction of The United States, but that the necessity of so doing arose from altered circumstances at the moment of execution." He continues:

Some importance is attached to the attack having been made in the night, and the vessel having been set on fire and floated down the falls of the river, and it is insinuated, rather than asserted, that there was carelessness as to the lives of the persons on board. . . . The time of night was purposely selected as most likely to ensure the execution with the least loss of life, and it is expressly stated, that the strength of the current not permitting the vessel to be carried off, and it being necessary to destroy her by fire, she was drawn into the stream for the express purpose of preventing injury to persons or property of the inhabitants of Schlosser.

This explanation has the appearance of an ingenious attribution of altruistic motives to acts of a doubtful character. Nevertheless, it would seem to be corroborated by the report of Captain Drew,²⁴ where he says:

As the current was running strong, and our position close to the falls of Niagara, I deemed it most prudent to burn the vessel; but, previously to setting her on fire, we took the precaution to loose her from her moorings, and turn her out into the stream, to prevent the possibility of the destruction of any thing like American property.

²³ Webster's authority for this proposition is presumably the letter from Captain Drew to Hon. A. N. McNab, Dec. 30, 1837, where Drew reports: "about eleven o'clock P.M., we pushed off from the shore for Navy Island, when, not finding her there, as expected, we went in search, and found her moored between an island and the main shore." The position of the phrase "as expected" renders this passage somewhat ambiguous. But in the immediately preceding sentence Drew says: "I ordered a lookout to be kept upon her [the *Caroline*], and, at about 5 P.M. of yesterday, when the day closed in, Mr. Harris, of the royal navy, reported the vessel to me as having moved off Navy Island." Thus, it appears doubtful whether the whole passage was really intended to convey the meaning which Lord Ashburton found it convenient to attribute to it. Drew's letter will be found in H. Ex. Doc. No. 302, 25th Cong., 2d Sess.

²⁴ See note 23.

To this justification, however, Lord Ashburton added the long overdue expression of regret that the transaction should have necessitated a violation of American territory, and an apology that such regret had not been expressed earlier in the dispute. The letter closes on a highly conciliatory note and apparently satisfied Webster, for, in a letter of August 6, 1842,²⁵ while not actually admitting the incident to have been justified, he accepted the apology, after noting with satisfaction the agreement of the two governments on the importance of the principle of non-intervention and the narrow limits of the exceptions.

SELF-PRESERVATION OR SELF-DEFENCE?

Thus far no attempt has been made to differentiate between self-defence and self-preservation. Yet, there is a considerable difference between the two conceptions, for whereas self-defence presupposes an attack, self-preservation has no such limitation, and, broadly applied, would serve to cloak with an appearance of legality almost any unwarranted act of violence on the part of a state. But it is to be doubted whether this distinction, which appears so obvious to the modern lawyer, was at all appreciated in the earlier stages of the development of international law. Indeed, Vattel, in his *Droit des Gens*,²⁶ the diplomatists' *vade mecum*, speaks of self-protection (*droit de sûreté*) as the complement of a duty which every state owes to itself of self-preservation (*le soin de se conserver*). It is, therefore, probable that in arguing the *Caroline* case, the fundamental distinction between self-defence and self-preservation was not always fully appreciated. Fox continually uses the phrase "self-defence and self-preservation" as if the two were synonymous terms.²⁷ Even Webster, in his letter of April 24, 1841, the source of the formulation of the classic definition of self-defence, says: "It is admitted that a just right of *self-defence* attaches always to nations as well as to individuals, and is equally necessary for the *preservation* of both." (Our italics.)

It will be noticed that the reports of the Law Officers keep strictly to the term self-preservation. It would, indeed, be strange if the lawyers of the time had *not* thought in terms principally of self-preservation, for the textbook writers of a much later date still write in those terms. Wheaton,²⁸ like Vattel, thinks of self-defence as merely incidental to the right of self-preservation. Phillimore²⁹ actually states that the *Caroline* case was decided on the ground of "self-preservation" which, "if her [Great Britain's] version of the facts were correct, was a sufficient answer, and a complete vindication." Halleck,³⁰ Twiss,³¹ Hall,³² and even Oppenheim³³ speak not of self-defence but of self-preservation.

²⁵ Parliamentary Papers (1843), Vol. LXI; British & Foreign State Papers, Vol. 30, p. 201.

²⁶ *Droit des Gens*, Liv. II, Chap. IV (Washington, Carnegie Institution, 1916).

²⁷ E.g., in dispatch to Palmerston, Jan. 13, 1838; note to Forsyth, Feb. 6, 1838.

²⁸ *Elements of International Law* (1836), p. 81.

²⁹ *Commentaries upon International Law* (1854), Vol. I, Chap. X.

³⁰ *International Law* (1861), p. 91.

³¹ *The Law of Nations* (1861), pp. 12-13.

³² *International Law* (1880), pp. 226-239.

³³ *International Law* (1905), pp. 177-181.

Yet, although the Law Officers used only the term self-preservation, the expression "self-defence," whether inadvertently or by design, crept into the correspondence. In using that phrase the diplomatists were almost certainly not consciously attempting to introduce a new concept into the law. But once the phrase had been introduced, it was possible for lawyers of a later day to give it a legal content, so that we can perhaps now say with Professor Brierly, "the truth is that self-preservation is not a legal right but an instinct."³⁴

The *Caroline* was the first important case of intervention in self-defence where the intervention was suffered by a strong state. Consequently, the intervening state was not allowed to plead self-defence as a mere shibboleth. Some attempt was made to define the limits of self-defence and to examine its legal content. Most important of all, the conception was rescued from the Naturalist notions of an absolute primordial right of self-preservation, which still vitiated the doctrine of the writers, and was subjected to the limiting condition of necessity;³⁵ and necessity is nowhere more carefully defined than in Webster's letter to Fox. Nevertheless, throughout the dispute there does not seem to have been any disagreement as to the law involved;³⁶ paradoxically enough, this *locus classicus* of the law of self-defence, is a case which turned essentially on the facts. But the fact that both parties were agreed as to the law makes it all the more valuable as a precedent.

MCLEOD'S CASE

The First Phase. The destruction of the *Caroline* naturally aroused great indignation among the United States citizens in the border States. There seems at first to have been some danger of an attempt at armed retaliation.³⁷ There is a report by Dodson, the Queen's Advocate, as early as October 31, 1838, "relative to the persecution to which British Subjects, suspected of being concerned in the destruction of the Steam Boat 'Caroline' are exposed, if they venture to land on American Territory, and referring particularly to the case of Mr. Christie, who was seized at Buffalo on the 23rd. of August last, and was subjected to a vexatious course of Judicial Examination on a charge of having been concerned, with other British Subjects, in the attack upon the 'Caroline' on the night of the 29th. of December last, also enclosing a draft of the Despatch upon the subject which your Lordship proposes to address to Her Majesty's Minister at Washington." He continues: "In obedience to your Lordship's Commands I have taken these Papers into consideration, and

³⁴ The Law of Nations (2nd ed., 1936), at p. 256.

³⁵ Cf. Rodick, The Doctrine of Necessity in International Law.

³⁶ Cf. Lord Ashburton's letter, July 28, 1842: "Agreeing, therefore, on the general principle and on the possible exception to which it is liable, the only question between us is, whether this occurrence came within the limits fairly to be assigned to such exceptions. . ."

³⁷ Cf. letter from the District Attorney for Erie County to the President, H. Ex. Doc. No. 73, 25th Cong., 2d Sess. A Collector at Buffalo wrote, "The whole frontier is in motion, and God knows where it will end." (*sic!*)

have the Honour to report that the draft of the despatch which your Lordship proposes to address to Her Majesty's Minister at Washington, appears to me to be right and proper."

The dispatch to which reference is made bears the date November 6, 1838.³⁸ The relevant portion is as follows:

You will also point out that the attack upon the "Caroline" was a public act of persons in Her Majesty's Service, obeying the order of their superior authorities, and according to the usages of nations, that proceeding can only be the subject of discussion between the Two Governments, but cannot be made the ground of proceedings in the United States against the individuals who, upon that occasion, were acting in obedience to the authorities appointed by their Government.

This was the principle which was involved and finally established in McLeod's case. Alexander McLeod, a British subject, was ill advised enough to boast, while in New York territory, of the part which he alleged himself to have played in the destruction of the *Caroline*. He was taken at his word and arrested at Lewiston, November 12, 1840, on a charge of the murder of Amos Durfee, and of arson in connection with the burning of the *Caroline*. On November 18, he was committed to Lockport jail there to await trial at the February assizes. The following day McLeod communicated with the Canadian authorities, denying that he had been concerned in the affair of the *Caroline* and asking their intervention on his behalf. On December 13, Fox addressed a note to Forsyth, the language of which was obviously inspired by the dispatch which he had received from Palmerston in connection with Christie's case. Forsyth replied that:

The jurisdiction of the several States which constitute the Union is, within its appropriate sphere, perfectly independent of the Federal Government. The offence with which Mr. McLeod is charged was committed within the territory and against the laws and citizens of the State of New York, and is one that comes clearly within the competency of her tribunals. It does not, therefore, present an occasion where, under the constitution and laws of the Union, the interposition called for would be proper, or for which a warrant can be found in the powers with which the Federal Executive is invested; nor would the circumstances to which you have referred, or the reasons you have urged, justify the exertion of such a power if it existed.³⁹

However, in March, 1841, there was a change of administration at Washington, and Fox immediately demanded the release of McLeod, in a note of March 12, 1841,⁴⁰ arguing that:

With the particulars of the internal compact which may exist between the several States that compose the Union, foreign Powers have nothing

³⁸ Public Record Office, F. O. 5. 321.

³⁹ Report on the Commission of Claims, under the Convention of 1853, compiled by Edmund Hornby, the British Commissioner (London, 1856), at p. 430.

⁴⁰ British & Foreign State Papers, Vol. 29, p. 1126.

to do; the relations of foreign Powers are with the aggregate Union; that Union is to them represented by the Federal Government; and of that Union the Federal Government is to them the only organ. . Therefore, when a foreign Power has redress to demand for a wrong done to it by any State of the Union, it is to the Federal Government, and not to the separate State, that such Power must look for redress for that wrong. And such foreign Power cannot admit the plea that the separate State is an independent body over which the Federal Government has no control. It is obvious that such a doctrine, if admitted, would at once go to a dissolution of the Union as far as its relations with foreign Powers are concerned; and that foreign Powers, in such case, instead of accrediting diplomatic agents to the Federal Government, would send such agents not to that Government, but to the Government of each separate State.

The new administration took a more favorable view of the claim than had the previous administration. Webster,⁴¹ who had now replaced Forsyth, wrote to the Attorney General of the United States, communicating the President's instructions with regard to the trial of McLeod, and laying down the following principles by which the Government would be guided:

That an individual forming part of a public force, and acting under the authority of his Government, is not to be held answerable, as a private trespasser or malefactor, is a principle of public law sanctioned by the usages of all civilized nations, and which the Government of The United States has no inclination to dispute.⁴² . . .

It seems that there was also a possibility that the owner of the *Caroline* would proceed against McLeod in a civil action. With regard to this Webster adds:

But whether the process be criminal or civil, the fact of having acted under public authority, and in obedience to the orders of lawful superiors, must be regarded as a valid defence; otherwise, individuals would be holden responsible for injuries resulting from the acts of Government, and even from the operations of public war.

A copy of these instructions was sent to Fox. But while admitting that McLeod should be released, Webster assumed that Fox only required that McLeod should be released by judicial process: "Her Majesty's Government must be fully aware that in The United States, as in England, persons confined under judicial process can be released from that confinement only by judicial process. In neither country, as the Undersigned supposes, can the arm of the Executive power interfere, directly or forcibly, to release or deliver the prisoner."⁴³ Webster then went on to instance the entry of a *nolle prosequi* as an example of such "judicial process", and observes very truly

⁴¹ Webster had a very low opinion of the attitude which had been assumed by the Van Buren Administration. Cf. his speech before the Senate in defence of the Treaty of Washington, Webster's Works, Vol. V, p. 121 *et seq.*

⁴² Mr. Webster to Mr. Crittenden, Washington, March 15, 1841, British & Foreign State Papers, Vol. 29, p. 1139. ⁴³ Mr. Webster to Mr. Fox, April 24, 1841, *loc. cit.*

that this would be the machinery employed in England in a similar case. But there is a considerable difference between the common law *nolle prosequi* and the law which had to be applied by the Supreme Court of New York in the case of *The People v. McLeod*,⁴⁴ there being a New York statute⁴⁵ to the effect that it should not be lawful "for any district attorney to enter a *nolle prosequi* upon any indictment, or in any other way to discontinue or abandon the same, without the leave of the court having jurisdiction to try the offence charged, entered in its minutes." In English practice there is no such limitation on the power of the Attorney General.⁴⁶ When Fox, in a letter to Lord Palmerston of April 28, 1841,⁴⁷ expressed his dissatisfaction with Webster's attitude, and insisted that "what Great Britain demands is not that Mr. McLeod should be acquitted, but that Mr. McLeod should not be tried," he was asking for nothing more than could be brought about in any English court by the entry of a *nolle prosequi*. The misunderstanding seems to have arisen from a gratuitous assumption on the part of both diplomats that the English and American law were similar.

The Supreme Court of New York refused leave to enter the *nolle prosequi*, and likewise rejected an application on a writ of *habeas corpus*, for it was held that "one duly committed upon a regular indictment for murder, cannot be discharged upon *habeas corpus*, by proving his innocence merely, however clear the proof may be; but must abide trial by jury." It was then proposed to appeal to the Federal court, but McLeod objected to the delay and requested a trial by jury on the actual indictment, and the request was granted. At the trial there was found to be a lack of evidence even to show that he had been present at the destruction of the *Caroline*. He was finally acquitted in October, 1841, after having suffered almost twelve months' incarceration.

As has already been shown in connection with the *Caroline* case, a copy of Webster's letter of April 24, 1841, was sent to Lord Ashburton on July 27, 1842.⁴⁸ By this time McLeod had been released, and Lord Ashburton in his reply of July 28, 1842,⁴⁹ contented himself with an inquiry whether "the Government of The United States is now in a condition to secure in effect and in practice, the principle which has never been denied in argument, that individuals acting under legitimate authority are not personally responsible for executing the orders of their Government." In reply,⁵⁰ Webster again acknowledged the principle asserted by Great Britain, and again sought to excuse the delay in releasing McLeod on the ground that "persons arrested on

⁴⁴ 1 Hill (N. Y.), p. 375.

⁴⁵ 2 R. S. 609, par. 54 (2d ed.).

⁴⁶ *Regina v. Allen* (1862), 1 B. & S., p. 850:

"I do not express an opinion whether, after a *nolle prosequi* has been entered, the prosecutor can proceed with a fresh indictment. But the power of determining whether the prosecution of an indictment shall go on or not, is entrusted to the Attorney General, who is the great law officer of the Crown; and whether he is right or wrong this Court cannot interfere."

Per Blackburn, J., at p. 856.

⁴⁷ British Commissioner's Report, p. 435.

⁴⁸ See note 21.

⁴⁹ See note 22.

⁵⁰ See note 25.

charges of high crimes can only be discharged by some judicial proceeding," but also assured Lord Ashburton that the matter had been brought to the attention of Congress, adding: "I have to say that the Government of The United States holds itself, not only fully disposed, but fully competent, to carry into practice every principle which it avows or acknowledges, and to fulfil every duty and obligation which it owes to foreign Governments, their citizens or subjects."

On August 29, 1842, Congress did, in fact, enact a statute which provided for immediate transfer of jurisdiction to the courts of the United States in all cases where any persons, citizens, or subjects of a foreign state, and domiciled therein, should be held in custody on account of any act done under the commission, order, or sanction of any foreign state or sovereignty.⁵¹

The Second Phase. The second phase of the case is concerned with the efforts made by McLeod to obtain personal compensation for his imprisonment and trial.⁵² An Anglo-American Claims Commission was set up under a convention of February 8, 1853.⁵³ McLeod having urged the British Government to prefer his claim before that tribunal, the Foreign Office sought the advice of the Law Officers on the merits of the claim. There is a report of Harding, the Queen's Advocate, dated May, 1853,⁵⁴ from which it appears that McLeod, "instead of bringing his case before the American Tribunals, made an application in the years 1842-45 to the Canadian Government to indemnify him for his losses and sufferings; and that this application on being referred home, was refused by Her Majesty's Government on the ground that he could not lay claim to compensation from Great Britain in as much as he had unquestionably not been aggrieved by Her Majesty's Government although he might consider himself aggrieved by the Government of the United States." No further application had been received from McLeod since the year 1845. Harding came to the conclusion that "if no demand for indemnity or any representation to the effect that indemnity would be demanded on behalf of Mr. McLeod has hitherto been addressed by Her Majesty's Government to the Government of the United States, I am of opinion that the lapse of time has been such as to preclude Her Majesty's Government from now making any representation on his behalf to the Government of the United States for the first time." However, Harding inferred from the correspondence submitted to him that some demand for indemnity *had* been made, and asked to be referred to the documents in question if such were the case. "Apart from the question of the lapse of time," he continues, "it appears to me that there did

⁵¹ The full text of the act is reproduced in *British & Foreign State Papers*, Vol. 30, pp. 202-203.

⁵² *Moore's Arbitrations*, Vol. III, pp. 2419-2428; Report on the Commission of 1853, compiled by Edmund Hornby, British Commissioner (London, 1856), pp. 428-455; Report on the Commission of Claims of 1853, transmitted to the Senate by the President (Washington, 1856), pp. 314-327.

⁵³ *Moore's Arbitrations*, Vol. V, pp. 4743-4746.

⁵⁴ F. O. 83. 2208.

exist some grounds which would have justified a demand for indemnity to Mr. McLeod, from the Government of the United States."

As Harding suspected, representations had, in fact, early been made by the British Government. As early as December 13, 1840, Fox had addressed a note on the subject to Forsyth. But there is a dispatch from the Earl of Aberdeen to Mr. Fox, dated November 18, 1841, which reveals why the British Government did not immediately press for compensation for McLeod:

Her Majesty's Government are fully alive to the necessity of such measures being adopted by the Legislature of The United States, as shall correct the admitted anomaly in their constitution, and as may also indemnify the individual who has suffered great injury in consequence of this want of authority on the part of the Federal Government. At the same time, we should feel most reluctant to embarrass the President by any premature demand, when we have great reason to trust that everything we desire may be the spontaneous act of his own wisdom and justice. I have, therefore, to instruct you to communicate confidentially with Mr. Webster upon this subject. You will represent to him, on the most friendly terms, the expectations of Her Majesty's Government, and our desire to take no step which might in any manner impede rather than facilitate the course that we are persuaded he is himself disposed to adopt.⁵⁵

Harding's point of the lapse of time being thus disposed of, Mr. Hannen, the Agent for British claims under the convention, prepared a case for presentation before the tribunal. The case was, however, first submitted to the Law Officers, asking for their opinion on three questions stated by Mr. Hannen. The report ⁵⁶ on this draft is dated November 20, 1854, and the relevant portion is as follows:

In obedience to your Lordship's commands, we have taken this case into consideration and have the honour to report,

That, with respect to the first question, whether Mr. McLeod was entitled to compensation from the United States Government on account of his imprisonment and prosecution in 1841, we are of opinion that Mr. McLeod is entitled to compensation from the United States Government on account of his imprisonment and prosecution in 1841.

The principle of International Law—that an individual doing an hostile act authorised or ratified by the government of which he is a member cannot be held individually answerable as a private trespasser or Malefactor, but that the act becomes one for which the State to which he belongs is in such case alone responsible, is a principle too well established to be now controverted; indeed, it is distinctly admitted by Mr. Webster in his instructions to the Attorney General of the United States of March 15th 1841.⁵⁷

In direct violation of this principle Mr. McLeod was imprisoned for 12 months and brought to trial as a criminal, notwithstanding the most

⁵⁵ Earl of Aberdeen to Mr. Fox, British Commissioner's Report, p. 437.

⁵⁶ Signed by J. D. Harding, A. E. Cockburn, Richard Bethel. F. O. 83. 2209.

⁵⁷ See note 42.

distinct intimation to the Government of the United States by the Government of this Country that the act in respect of which Mr. McLeod was called upon to answer had been done by the authority of the British Government. It is clear therefore that a British Subject has received a very grievous wrong at the hands of the authorities of the United States. And it is immaterial whether the United States Government had or had not the ability to release and protect Mr. McLeod. A criminal prosecution must necessarily be taken to be the act of the State in which it occurs, and if the Executive Powers of such a State either are or feel themselves to be unable to prevent its subjects from using the law which is administered in its name and on its behalf so as to outrage the rights of a Subject of another State, it is clear that the Party injured has a right to redress from the State, from the application of whose municipal laws in contravention of the Law of Nations, he has suffered injury.

With respect to the Second point viz., "whether the claim of Mr. McLeod can properly be considered as one which yet remains unsettled within the meaning of the Convention of February, 1853," we are of opinion that the claim is properly to be considered as one yet remaining unsettled within the meaning of the Convention of 1853.

With respect to the third point "whether Her Majesty's Government are precluded by any circumstances of the case from presenting and supporting Mr. McLeod's claim before the commissioners appointed under the said convention?"—We are not aware of any circumstances of the case by which Her Majesty's Government are so precluded.

The whole of the argument before the Claims Commission revolved around the second point adverted to in the above report, viz., whether the claim was one "which yet remained unsettled" within the meaning of Article I of the Convention of 1853, and in view of the settlement reached in 1842 by Webster and Lord Ashburton.

The American Commissioner, Mr. Upham,⁵⁸ was of opinion that in the Webster-Ashburton negotiations, the *Caroline* incident had been used as a set-off against McLeod's claim, and that the adjustment of 1842 had, accordingly, resulted in the extinction of both claims. He seems to have been somewhat unduly impressed by a piece of rhetorical verbiage taken from the peroration to Lord Ashburton's letter of July 28, 1842,⁵⁹ where he expressed the hope that "all feelings of resentment and ill-will, resulting from these truly unfortunate events, may be buried in oblivion."

The British Commissioner, Mr. Hornby, was of the contrary opinion:

The attack on the "Caroline" was justifiable, but it being made on the territory of The United States, the British Government apologized for this apparent act of hostility.

The arrest, detention, and trial of M'Leod, whether guilty or not, was, however, unjustifiable, and admitted to be so by The United States' Government. From a defect, however, in the Constitution, the Federal Government was unable to perform the obligation it owed to foreign nations, and was compelled to allow the law to take its course. Fortu-

⁵⁸ The whole of the argument of the American Commissioner is reproduced in Moore's *Arbitrations*, Vol. III, pp. 2419-2424.

⁵⁹ See note 22.

nately the acquittal of M'Leod deprived the political question of its chief interest, and the prevention of a similar proceeding in future by the action of Congress on the subject, together with the disavowal by Mr. Webster, settled the international grievance; but the private injury to M'Leod remained unredressed, and The United States' Government is, therefore, in my opinion, liable upon every principle of justice to make him such redress as it has the power to render.⁶⁰

Since the Commissioners were unable to agree, the decision rested with the Umpire, Joshua Bates, and he rejected the claim: ⁶¹

It appears by the diplomatic correspondence that the affair of the *Caroline*, the death of Durfee, who was killed in the affray, and the arrest of the claimant, were all amicably and finally settled by the diplomatic agents of the two governments in 1841 and 1842.

The question, in my judgment, having been so settled, ought not now to be brought before this commission as a private claim. I therefore reject it.

⁶⁰ British Commissioner's Report, p. 442.

⁶¹ Moore's Arbitrations, Vol. III, pp. 2424-2425.

EDITORIAL COMMENT

USE OF FORCE AND DECLARATION OF WAR

During the World War, 1914–1918, declarations of war were general and it was officially made known when peace was reestablished. In many of the more than fifty declarations of war the day, hour, and minute when war would begin was made known. For France the official period of the war was from “6.45 p.m. on August 3, 1914,” to “4.15 p.m. on January 10, 1920.” Thus the legal relations of foreign states as regarded France and the opposing belligerents, as well as of neutrals, could be determined. Hague Convention III of 1907 stated in the preamble that it was important “that hostilities should not commence without previous warning” and that “the existence of a state of war should be notified without delay to neutral Powers.” The discussions at The Hague in 1907 fully supported this statement.

In the Treaty of Versailles, 1919, such expressions as “external aggression,” “threat of war,” “dispute likely to lead to rupture,” “resort to war,” “act of war,” etc., occur. Other later agreements have introduced such phrases as “recourse to war,” “disputes or conflict of whatever nature or origin,” “event of war,” “virtual state of war,” etc. All of these words leave many possibilities of difference of interpretation, as has been evident in discussions upon liability under insurance contracts. When does liability begin, for what acts does the liability run, and when does it terminate? An answer could be found in such a case as France: from “6.45 p.m. on August 3, 1914” to “4.15 p.m. on January 10, 1920.” On the other hand, uncertainty as to the legal rights of all parties during and after the use of force without declaration of war has prevailed. Confusion as to the extent and nature of jurisdiction in certain areas still exists, giving rise to economic, geographical and diplomatic problems likely to create friction. This may be further aggravated when third parties attempt to proclaim that relations between those involved in the use of force constitute war even in advance of, or in absence of, any such declaration by either party to the controversy.

Hague Convention II, 1907, aimed to prevent by general agreement “armed conflicts of a pecuniary origin arising from contract debts,” thus removing one of the grounds often advanced for hostilities. It was thought at the time that resort to the use of force might become less frequent through international agreements gradually eliminating, one by one, the causes of war rather than through the more ambitious schemes for the complete prohibition of war except on the undefined ground of self-defense.

As is evident since the World War, the use of force without declaration of war gives rise to apprehension before, uncertainty during, and undetermined status after the use of force has ceased; all of which Hague Convention III, 1907, relative to the Commencement of Hostilities, had aimed to prevent.

The Brussels conference on affairs in the Far East adjourned on November 24, 1937, after giving much attention to the use of force without declaration of war. At the closing session, referring to agreements in "numerous international instruments," the conference declared:

It must be recognized that whenever armed force is employed in disregard of these principles the whole structure of international relations based on safeguards provided by treaties is disturbed. Nations are then compelled to seek security in ever-increasing armaments. There is created everywhere a feeling of uncertainty and insecurity. The validity of these principles cannot be destroyed by force, their universal applicability cannot be denied and their indispensability to civilization and progress cannot be gainsaid.

GEORGE GRAFTON WILSON

OBSERVATIONS OF FOREIGN GOVERNMENTS UPON SECRETARY HULL'S PRINCIPLES OF
ENDURING PEACE

The statement issued on July 16, 1937, by Secretary Cordell Hull, setting forth the position of the United States "in regard to international problems and situations with respect to which this country feels deep concern" has already been the subject of editorial comment.¹ As the statement was communicated to all foreign governments with the request for an expression of opinion upon the principles enunciated, a closer examination of the replies would seem to be of interest.²

One may begin profitably with the memorandum of the Portuguese Government which seems to have been carefully prepared and is the most lengthy and detailed of all. A mild reproof is voiced against the attitude of the great nations, "on the one hand to consider themselves immune and on the other hand, to maintain themselves alien to effective coöperation, truly useful in the international field." The memorandum warns against the "abstract and generalizing tendency of jurists," and cites as causes for failure the insufficient study of the causes of world unrest and the desire to find a single formula for the solution of international problems which shall be applicable *urbi et orbi*. The memorandum continues:

On general grounds, it also seems that no objection can be raised against the assertions, advices, or wishes as a whole of the Secretary of State: everyone desires peace, everyone proclaims the sanctity of treaties and the faithful compliance therewith, everyone desires that there be less difficulties in international trade, and everyone wishes to have the burden of armaments removed or lightened. Difficulties begin only when it is sought to pass from the field of intentions into that of action, or, more concretely, what is to be done so that the events—in the development of which it is very difficult to establish individual or national responsibilities—will not contradict the good intentions.

¹ George A. Finch in this JOURNAL, Vol. 31, October, 1937, pp. 688-693.

² The replies are collated in International Conciliation, November, 1937, No. 334, pp. 734-797, from texts supplied by the Department of State in Press Releases of August and September, 1937.

As Secretary Hull advocated abstention from interference in the internal affairs of other nations, the memorandum takes occasion to point out that such interference is now conducted principally in the form of revolutionary agitation and that "soviet mysticism" has been adopted to gain political and economic ends from within. "Foreign intervention, although it is maintained effective, thus tends to lose its character in some countries, being merged in international aspirations against which strong nationalism alone can triumph."

The recent *coup d'état* in Brazil, a country with which Portugal has the closest cultural and economic ties, made the reply of Portugal assume especial importance. The statement of President Vargas of Brazil issued on November 13, 1937, in connection with his assumption of greater powers under a new régime was a striking realization of the forecast that strong nationalism develops from the desire to combat internal forces set in motion by initiative from abroad. Curiously enough, the reply of Brazil did not anticipate by its terms the present political situation there. It confined itself to an expression of Brazil's full agreement and complete support of the principles enunciated by Secretary Hull. Other Latin American countries which likewise gave express approval to the declared principles were Argentina, Bolivia, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Paraguay, Peru, Uruguay and Venezuela. It is necessary to add that Argentina annexed to its approval a request for consideration of the proposed convention giving an universal application to the right of asylum, upon which the Argentine Government lays stress as "an element of pacification in pursuance of the line of conduct which should be followed by the American countries." Bolivia expressed the hope that the declarations of Secretary Hull might have an important influence in the settlement of the still pending Chaco conflict. Nicaragua connected its approval of Secretary Hull's commercial policies with a request to the other Central American States to cease the tariff war which it alleged is being waged against it, claiming that without a real tariff union among these states, "it will not be possible to establish the peace of the Isthmus."

Outside the American Continent, a large number of nations subscribed categorically or in substance to the declaration of principles. Among those making reply in this sense were the following: Albania, Austria, Belgium, China, Czechoslovakia, Denmark, Egypt, Estonia, Finland, France, Germany, Great Britain, Irish Free State, Luxemburg, Norway, Rumania, Sweden, Switzerland (with a reservation of its historic neutralization), Turkey and Yugoslavia.

Bulgaria expressed its concurrence with the principles set forth, while emphasizing the fact that it "feels most acutely the injustices wrought by the peace treaties, but rather than to seek to upset them by force of arms, it retains its faith in the tenets of the League of Nations to provide a remedy for the evils which afflict Europe."

Hungary considered the principles from the point of view of the peculiar problems of Hungary and the Danube Valley. It insisted that "the principle of the sanctity of agreements does not exclude, should the need therefor arise, the modification of certain treaty provisions." The Hungarian Government, the reply continued, "has never made it a secret that it does not consider as final the situation created in the Danube Valley by the peace treaties, and that it is aiming at the just and equitable change thereof." It intends to carry out this aim by peaceful means and by recourse to the means expressly guaranteed by Article 19 of the Covenant. The Hungarian Government asserts that the states which benefited by the Treaty of Trianon failed from the beginning to respect those international agreements by which they were called upon to insure the rights of the Hungarian minorities living in former Hungarian territories turned over to them by the treaty. Continuing:

The very same States consecutively sabotaged and even sabotage today the few provisions of the Treaty of Trianon which are favorable to Hungary as for instance Article 250 which was intended to protect by means of courts of arbitration the material interests of Hungarian citizens in the territory of the succession States.

It will be remembered that it was upon the alleged violation of these agreements that the Pajzs, Csáky, Esterházy case was brought before the Permanent Court of International Justice. It was decided against Hungary by a majority vote of eight to six.³ A very significant part of the reply of Hungary is that which points out that until now Hungary has not followed the example of Austria and Germany, which, the reply states, have unilaterally declared null and void those provisions of the Peace Treaty which restricted their armaments. Hungary points out that it did not wish to complicate the "already overheated international atmosphere," although Hungary claims that upon principle it has already regained a free hand because of the "fiasco of the Disarmament Conference" and rearming, on a grand scale, particularly of the countries of the Little Entente.

Contrasting with the position of Bulgaria and Hungary as thus disclosed, the Greek Government, while agreeing in general with Secretary Hull's declared principles, desired to elucidate the point referring to the modification of treaties. Accordingly, the Greek Prime Minister pointed out that the territorial status in the Balkans as established by the treaties of peace and the Balkan Pact is "definitive and unalterable," and considered as a mutual guaranty of the frontiers of the Balkan States.

The replies of Italy and Japan may be considered together. They are alike brief and in general terms. The reply of Italy is contained in an oral statement of the Italian Minister for Foreign Affairs in which he declares that "the Fascist Government appreciates at their high value the principles enunciated by Secretary of State Hull"; it refers to certain fundamental principles which

³ Judgments, Orders and Advisory Opinions, Ser. A/B, No. 68. See particularly the able dissenting opinion by Judge Manley O. Hudson, pp. 66-84.

the Fascist Government has "repeatedly and publicly" proclaimed and which "the Duce has recently reconfirmed in the interview which he granted the American publisher Simms." The statement continues:

The Fascist Government favors everything which may conduce to the pacification and to the political and economic reconstruction of the world. Therefore it regards with sympathy every initiative which tends to achieve that end by means of the limitation of armaments, by means of economic understanding among nations, non-intervention in the internal affairs of other countries and any other means which may now or in the future appear responsive to this objective.

The observations of Japan are contained in the following statement by the Japanese Ambassador:

The Japanese Government wishes to express its concurrence with the principles contained in the statement made by Secretary of State Hull on the 16th instant concerning the maintenance of world peace. It is the belief of the Japanese Government that the objectives of those principles will only be attained, in their application to the Far Eastern situation, by a full recognition and practical consideration of the actual particular circumstances of that region.

The replies of Italy and Japan may profitably be compared with that of Soviet Russia, which is drawn in the form of a personal communication from Mr. Litvinov to Mr. Hull. The declaration of principles is declared to be in accord with the general position of the Soviet Government and specifically approves of non-intervention in the internal affairs of other nations. The statement emphasizes the fact that the Soviet Government presented at Geneva, as far back as a decade ago, a plan for complete general disarmament, a proposal for partial reduction in armaments and the organization of "a permanent peace conference within the framework of which the coöperative efforts mentioned in Mr. Hull's statement could be exerted."

The reply of the Spanish Republic has a distinctly pathetic ring after these high-sounding phrases of totalitarian states. The Spanish note points to the principles of the Constitution of 1931, which renounces war as an instrument of national policy, and incorporates the principles of the Covenant.

The Government of the Republic has never deviated from the course indicated by its Constitution, which permits it to point to a complete coincidence both in doctrine and in practice with the principles defended by Mr. Hull in his statement which, under present circumstances when the Spanish people are the victims of a foreign invasion and suffer the sorrow of a war in defense of their independence, has a singular importance and inspires a gratifying hope for the reestablishment of peace and law among the nations.

The Union of South Africa replied by a remarkable statement on the part of its Prime Minister, which approved of the principles so far as the Union is concerned, "under present circumstances." The statement then continued as follows:

. . . I cannot help feeling that if the Union had been in the position of a State laboring under wrongs confirmed or perpetuated by agreement at the point of the bayonet, such agreement could have little claim to any degree of sanctity; and certainly to none when the agreement had been obtained in a manner violating the established usage of war, or contrary to the dictates of international consciences.

While the statement is couched in somewhat cryptic terms, it can scarcely be read in any other sense than that the Prime Minister calls for a revision of the peace treaties and that such revision could well be insisted upon by any state "wronged," prior to its approval of the principle of the sanctity of treaties. A statement of this nature would not be expected from one of the British Dominions which had taken a most active part in the war. It is not without great significance from the point of view of British imperial politics. Curiously enough, an echo, much wilder in tone, is found in the reply of Canada. While laudatory of the statement of Secretary Hull, the Canadian note draws the conclusion that emphasis should be laid "upon the task of studying immediately wherein all may try by agreement to modify the barriers and rigidities, both economic and political, which may be claimed to deny to peoples or nations equality of opportunity or treatment; for naturally, it is by such wise anticipations that revolutionary and catastrophic events are to be forestalled."

An analysis of the replies calls forth the inquiry whether the statement of principles was justified in the light of apparently irreconcilable differences both in Europe and the Far East. Contestants who have cast the die of armed intervention, or who are determined to seek their purposes in more subtle ways by "boring from within," are not likely to give serious consideration to the most sincere appeals to reason, if not concretely connected in some way with a solution of their claims or differences. We may say that they insist upon an applied rather than a pure science of diplomacy. Some of the replies are quite explicit in this respect. Again, many will urge that when the blood is up, it is futile to expect any sincere conformity to a declaration of general principles. We are living in an age of evident resurgence of Machiavellian methods of statecraft. It would be a mistake, however, to regard as merely naïve the sincere effort of Secretary Hull to obtain a consensus of opinion in favor of more orderly processes and higher moral standards. When an effort was made to apply the declared principles at the Brussels Conference called under the Nine-Power Treaty in November, 1937, an American critic exclaimed that "moral suasion is impotent in the world today, even when it is American."⁴ And yet, so far as the declared principles were concerned, Secretary Hull announced that he was well satisfied with "the solidarity of attitude and aspiration" revealed by the replies of the foreign governments. Taken at their face value, this is undoubtedly true, although some of them were ambiguous, others assertive of special interests, or diplo-

⁴ Edwin L. James in the New York Times, November 21, 1937.

matically critical. At all events, the record has a value in itself in disclosing the policy of the particular government.

In drawing conclusions from the observations taken as a whole, three points may be emphasized. First, that there was a manifest solidarity of the nations of the Western Hemisphere in specific acceptance of the principles. Second, that the problem of intervention in international law has become complicated by the fact that the respective dominant political parties of certain countries assume to extend their sphere of action beyond the territory of their own state, thus engendering a conflict of ideologies without being guilty of intervention in the hitherto accepted sense. Third, that too much reliance must not be placed upon the acceptance of general principles and that the actual and factual elements of international differences must be explored to their foundations if any real contribution is to be made to the maintenance of international peace.

ARTHUR K. KUHN

RECOGNITION OF BELLIGERENCY

During the course of the past summer a discussion, having some of the features of a debate, on the recognition of belligerency took place in the columns of the *London Times* in which a number of well-known English jurists and scholars participated. The discussion was started by a letter published by Mr. Noel-Baker, M.P., in the issue of July 5 which was followed by another one by him in the issue of July 10, in both of which he defended, on grounds of policy and of international law, the policy of the British Government in declining to recognize the belligerency of the Spanish insurgents.

Recognition of belligerency of the Spanish insurgents, aided as they are by large contingents of German and Italian troops, he asserted, would be "to legitimize by implication what everyone agrees to be a covenant-breaking invasion." No one denied, he went on to say, that the action of the German and Italian Governments "in dispatching those troops and armaments was a flagrant violation of the Covenant and the Kellogg Pact." And he added: "If we granted belligerent rights to General Franco's forces, *i.e.*, to these Germans and Italians, the political interpretation placed on that concession by other Powers would inevitably be that we condoned the violation of the most important and the most solemn of all treaties." Moreover, a recognition of their belligerency would carry with it the duty of neutrality on the part of the recognizing state, but, as had once been asserted in a famous British Government White Paper, no member of the League of Nations is ever justified in adopting a policy of neutrality toward a state which is violating the Covenant. If, therefore, the British Government were to recognize the belligerency of Franco's military forces, including the German and Italian troops arrayed with them against the legitimate government of Spain, "it would be yet another blow at that 'rule of law' on which, as the Foreign Secretary has said, our hopes of peace depend."

There were in addition, he argued, reasons based upon international law

why recognition of belligerency in this case was not justifiable. Citing Dana, Hall and Sir Alexander Cockburn in support of his view, he declared that insurgents have no legal right to be recognized as belligerents and, adverting to the past practice of the British Government, he asserted that its "traditional policy" had been to refrain from recognizing the belligerency of insurgents, because "the *prima facie* reasons against that policy [recognition] are both in principle and practice very strong." The traditional policy of non-recognition was, moreover, "in full accord with the practice of other states and the rules of international law." He admitted, however, the *right* of the British Government to accord recognition in any case where the Government considered it "necessary to protect British interests or to promote [to use the language of Westlake] 'the general political good of the world.'" But the reasons which would justify recognition must amount to *necessity*. The mere convenience or interests of the insurgents themselves would not justify it.

Sir John Fischer Williams replied in two letters (*The Times* of July 10 and 13), in one of which he said he found it difficult to follow Mr. Noel-Baker's conclusion that a recognition of belligerency in the present Spanish situation "would be to legitimize by implication what everyone agrees to be a covenant-breaking invasion," since recognition of belligerency emphasizes the duty of impartiality and neutrality on the part of the recognizing state *vis-à-vis* both contestants rather than indicates any expression of approval, condonation or condemnation of the cause of either or any intention of favoring either side at the expense of the other. Adverting to Mr. Noel-Baker's statement that it was the traditional policy of the British Government—which policy, he said, was in accord with the practice of other states and with the rules of international law—to refrain from recognizing the belligerency of insurgents, Sir John stated that he could not accept this statement of British policy as correct. In fact, he asserted, it had always been the policy of the British Government to regard itself as free to recognize or to refuse to recognize a state of belligerency as it might judge to be in its own interests and, in the language of Westlake, 'the general political good of the world.' The wiser policy of the British Government—and of all governments, he thought—was to keep a free hand and judge each case on its own merits rather than allow its decision to be hampered "by any general bias (which is what is apparently meant by a 'traditional policy,' real or supposed), in favor of one line of conduct or the other."

Professor Zulueta, of Oxford University, in two letters to *The Times* written in reply to Mr. Noel-Baker's, said he was willing to argue on the assumption that the Spanish insurgents had no legal right to recognition as belligerents. Nevertheless, he believed that insurgents under certain conditions had a right to be treated as belligerents, and he thought Hall, whom Mr. Noel-Baker had quoted in support of the contrary view, "was inclined to admit a moral right to recognition in proper circumstances and that he would have regarded refusal of recognition in a case such as the present as hardly conceivable."

He believed that Westlake also was inclined to the same view. While he was willing to admit for the sake of argument that insurgents had no legal right to recognition, he preferred "as being more in accordance with principle and the sound development of international law, an older view, that, provided a certain state of facts exists (as it admittedly does in the present case), insurgents have a legal as well as a moral right to be accepted as belligerents," and consequently the British Government was under a duty to accord recognition in the existing case. This followed logically from the British duty of non-intervention in the Spanish struggle. If, therefore, the facts of the present case were taken into account it was as "plain as day" that the refusal of the British Government to recognize the belligerency of the Spanish insurgents—that is, its refusal to accept the position of a neutral, in the technical sense—was inconsistent with real non-intervention and had "forced us into open, positive and natural acts of serious interference with military operations." There was, in consequence, a "glaring conflict between un-neutrality and non-intervention."

On this latter point, Mr. Alexander P. Fachiri (*The Times*, July 22) took issue with Professor Zulueta, who had identified the effects of recognition and non-intervention. Mr. Fachiri distinguished between the policy of neutrality and the policy of non-intervention. Recognition of belligerency, he said, is usually the act of a foreign state acting alone and in isolation, whereas the policy of non-intervention as pursued in the present case involves the joint action of foreign states for the purpose of preventing either side from obtaining outside assistance. The policy of neutrality, which would follow from the recognition of belligerency, would not insure the stoppage of supplies from abroad since, unless expressly forbidden, individuals would still be free to furnish them. The policy of joint non-intervention, as it had been sought to carry it out in the present struggle, goes further therefore than the policy of simple neutrality which was all that recognition of belligerency implied. For this reason he thought it was preferable to the latter policy and to this extent he was in agreement with Mr. Noel-Baker.

Professor H. A. Smith, of the University of London, on the other hand (*The Times* of July 26), criticized the policy of the British Government—and the others which had coöperated with it in the non-intervention scheme—not for their refusal to recognize a state of belligerency, but for their failure to accept the implications which flow from recognition. (In fact the British Government had recognized in various ways the existence of a war, and by necessary consequence the belligerency of the insurgents who, on their side, were carrying it on, but it had not pursued the matter to its logical consequences by a concession of the exercise of belligerent rights on the high seas as well as in Spanish territorial waters, i.e., they had conceded only partial belligerent rights.¹ The non-intervention agreement, he thought, was itself equivalent

¹ This point is further developed by Professor Smith in his article "Some Problems of the Spanish Civil War", in the *British Year Book of International Law* for 1937, p. 26 ff.

to a collective declaration of neutrality. If it did not recognize the existence of war, it was singularly misnamed and was an unfriendly act toward a country which was at peace with all the Powers concerned.

Professor Smith was supported by Mr. P. A. Landon, of Cambridge University (*The Times* of August 30), who asserted that in declining to recognize a state of belligerency the British Government had not only denied "the existence of circumstances which are perfectly obvious to the whole world, but has also departed from all precedent. What the precedents show is that there is a clear principle upon which recognition of belligerency must depend; and that principle is that where a large part of the country is in the hands of the insurgents or where they exercise command of the sea, in such a way as to involve neutral interests, recognition should follow as a matter of course." And he added:

It is a paramount principle of international law that neutral governments (as distinct from neutral individuals) must not render assistance to either belligerent. When our navy is used to prevent the capture of merchantmen on the high seas carrying contraband to the ports of the Valencia government we are, as a nation, as guilty of a breach of this fundamental principle as if we had sunk the cruisers of the Franco party. We have deprived the insurgents of the weapon which we used with such effect against the Central Powers throughout the Great War.

Parenthetically Mr. Landon [denied that there is any such thing in international law as a "grant" of belligerent rights. Those rights, he asserted, cannot be granted or withheld at the discretion of neutral Powers; they follow automatically from the existence of a *de facto* state of war and when that stage is reached in the course of an armed struggle neutrals are bound to submit to the relevant rules of international law,] including those, of course, which govern the capture and condemnation of contraband on the high seas. [If this be true, insurgents have a right to be recognized whenever the struggle in which they are engaged has reached the proportions of war.]

An opinion along the same line was expressed by Sir Francis Lindley (*The Times* of July 13) who, while admitting that the recognition of belligerency is a matter falling within the discretion of neutral governments, thought the British Government had committed a "serious blunder" in not recognizing a state of belligerency in the present case as soon as it was apparent that it was faced with a "regular civil war on the lines of the American Civil War of the last century." Had that been done "we should have known where we stood and our navy would have been spared a number of difficulties and absurdities."

The policy of non-recognition, however, found a defender in Lord Parmoor (*The Times*, July 17), who thought the granting of belligerent rights to the Spanish insurgents would be "reactionary and little calculated to promote peace either in Spain or in the larger areas which profess to a Christian rule in international disputes."

It may be remarked in passing that the reasons given by the British Gov-

ernment for refusing to recognize a state of belligerency in Spain were, as stated by Lord Plymouth, Chairman of the Non-Intervention Committee, at its meeting on July 16 (*The Times*, July 17), were the following: In the first place, (the existence of the non-intervention agreement provided the machinery whereby arms and munitions were to be prevented from reaching either party from the outside and consequently rendered unnecessary to that extent the exercise by either party of the belligerent right of search at sea.) In the second place, the presence of large numbers of foreign troops fighting on both sides made it "impossible for all the governments concerned to regard the combatants in Spain as being sufficiently independent of foreign ties and commitments to be treated in accordance with normal international principles as parties to a civil war in which other governments are neutral." In the third place, he said, "so long as the four naval powers were exercising jointly and by agreement naval patrol duty off the coast of Spain, it was reasonable to hope that the difficult naval situation which is always liable to exist when two naval forces are at war could be prevented by joint action from leading to dangerous consequences." He was forced to admit, however, that at the time he spoke the machinery referred to above was not adequate to prevent the shipment of contraband to Spanish ports, the German and Italian warships having withdrawn from the naval patrol, and it was therefore necessary to adopt a different policy. In these circumstances the British Government proposed to recognize the belligerency of both parties provided the foreign "volunteers" who were fighting in Spain were withdrawn. The French Government agreed to accord recognition subject to the same condition. But, no satisfactory agreement with General Franco for the withdrawal of the "volunteers" having been reached, neither the British nor French Government was willing to accord recognition.

With the merits of the action of the British and other governments in refusing to recognize a state of belligerency in Spain, so far as the reasons therefor are based on considerations of policy or expediency, we are not here directly concerned. But it may not be out of place to offer a few observations on some of the legal aspects of recognition which were touched upon by the authors of the letters referred to above. The traditional conception that recognition is from the legal point of view merely a "concession of pure grace," to use the language of Hall, which neutral states are entirely free to grant or withhold in their discretion, and that consequently insurgents have no right to demand recognition, was challenged by several of those who participated in the *Times* debate.

Dana was cited by Mr. Noel-Baker in support of his view that insurgents have no right (he does not distinguish between legal and moral right) to recognition and consequently neutrals are under no duty to accord recognition unless it is "necessary" for the protection of their own rights or the promotion of the "general political good of the world." Dana says:

The reason which requires and can alone justify this step [accordance of belligerent rights] by the Government of another country is that its own rights and interests are so far affected as to require a definition of its own relations to the parties. Where a parent Government is seeking to subdue an insurrection by municipal force, and the insurgents claim a political nationality and belligerent rights which the parent Government does not concede, a recognition by a foreign State of full belligerent rights, if not justified by necessity, is a gratuitous demonstration of moral support to the rebellion and of censure upon the parent Government.²

This somewhat narrow view, both as to the right of insurgents to recognition and the right of neutrals to accord it may perhaps be explained by the fact that Dana wrote in 1866 and that he had been an ardent supporter of the Government of the United States which had protested against British recognition of the belligerency of the Southern Confederacy as premature. He may therefore have been less inclined to admit that insurgents have any rights than he would have been had his opinion been expressed in different circumstances. Nevertheless, it will be noticed that Dana speaks of the "reason which requires" recognition and he admitted that recognition was justified "when the state of things between the parent state and insurgents amounts in fact to a war, in the sense of international law."

Hall, who was likewise cited by Mr. Noel-Baker in support of his position, while adopting the view that recognition is, "from the legal point of view a concession of pure grace," nevertheless admitted that humanity may require that insurgents be treated as belligerents and, he added: "if so there must be a point at which they have a right to demand what confessedly must be granted."³ For this reason Hall was also cited by Professor Zulueta in support of his position as an author who was "inclined to admit a moral right to recognition in proper circumstances." Both writers also invoked the high authority of Westlake⁴ in support of their opposing views. While admitting that foreign states are free to consult their own interests and the "general political good of the world" in deciding to recognize an insurrection as war, and that while "the right of insurgents to claim the recognition of their belligerency, as distinct from the recognition of their independence, has not yet become a legal one, either by the consent of approved authorities or by custom," Westlake thought "much may be said for it on the ground of reason when even those who deny its legal character can represent the consequences which might follow from its refusal as being inhuman."

The writer of the present note ventures to offer the following conclusions which he believes are justified not only on considerations of reason and sound policy but are supported by some of the best juristic opinion and practice:

[First, recognition of belligerency is nothing more than recognition of the fact of the existence of war. It does not involve recognition of any govern-

² Dana's Wheaton, edition by Wilson, p. 29, n. 15. ³ International Law, 3rd ed., p. 34.

⁴ International Law (1910), Part I, pp. 54-55.

ment or political régime, nor does it involve any expression of approbation or disapprobation or indicate any sympathy for or prejudice against the cause for which either side is fighting nor does the refusal to recognize carry any such implications.]

[*Second*, recognition is a matter entirely within the discretion of foreign states in the sense that they are free to judge for themselves whether the struggle has attained the proportions of a war, and, if so, whether they can recognize it as such without impairing their own rights or prejudicing the general interests of the community of states. But there are certain generally accepted tests by which the existence of a state of war are to be determined, and recognition prior to this stage is premature and may justly be regarded by the parent state as an unfriendly act. For the refusal to accord recognition, however, non-recognizing states cannot be held responsible by the insurgent organization should it come into power, even though it be admitted that the insurgents had a moral right to be recognized as belligerents.] Dana's view that recognition by a foreign state is never justified unless its own rights and interests are so affected as to require a definition of its own relations to the parties would seem to be too strict, since it does not take into sufficient account the possible rights and interests of the insurgents.

[*Third*, whenever an insurrectionary struggle reaches certain proportions in respect to its magnitude, its area of control, the strength of its military forces and the character of its governmental organization, it would seem that the insurgents have at least a moral right to be treated as belligerents by foreign states, and, if so, the latter are under a moral duty to recognize them as such, although neither the right nor the duty may in the present state of the law be said to be a legal one.⁵]

[*Fourth*, the situation in which a material state of war exists on a large scale but which other Powers refuse to recognize as war and the parties to which will not be treated as belligerents, must be admitted to be highly anomalous.] In normal circumstances recognition ought to follow as a matter of course. Lord Plymouth in his statement referred to above explaining the reasons why the British Government had not recognized a state of belligerency in Spain, admitted that for some months the Spanish struggle had been of a "stature and nature which would have justified the recognition of the two parties as belligerents in normal circumstances." But, he added, the circumstances had

⁵ As to the question of legal right there is little controversy among the better known writers on international law. McNair in a recent article entitled "The Law Relating to the Civil War in Spain" (Law Quarterly Review, Oct., 1937, p. 471 ff.), expresses the opinion that those who maintain that insurgents who fulfill certain tests have a legal right to be recognized as belligerents "have not made out their case" and that the balance of evidence is against their view. As to whether they have anything in the nature of a moral right to be recognized, he expresses no opinion. Other writers, Hyde, Oppenheim, Lauterpacht, and Wilson, for example, do not discuss the question of right, apparently assuming that recognition is entirely a matter of discretion on the part of foreign states.

not been normal. Secretary Eden remarked in the House of Commons on April 13 that "the natural thing to have done when the struggle had reached the large dimensions of the present war in Spain was to have recognized its belligerent character, and for those whose maritime interests were involved like ours to grant belligerent rights." (It is believed that unless the circumstances of the particular case are quite abnormal, or where recognition would affect prejudicially the recognizing state's own rights or would operate to the detriment of the general interests of the community of states, the withholding of recognition cannot be justified, assuming of course that the struggle has acquired the proportions of a war in the material sense. It is hardly necessary to add that the decision of the foreign government should not be influenced by its own sympathies or prejudices.)

JAMES W. GARNER

THE LIQUIDATION OF PERPETUAL LEASES IN JAPAN

Current discussion of "peaceful change" serves to emphasize the importance of the notes exchanged between the Japanese Government and eight other governments, during the months of March and April, 1937, "with a view to liquidating once and for all in a spirit of friendship and conciliation the system of perpetual leases" in Japan.

The perpetual leases had their origin at a time when aliens were not permitted to own lands freely in Japan, and when a number of foreign settlements existed there. Provisions for the residence of certain aliens were embodied in a series of Japanese treaties of 1858-1869. The treaty with the United States of July 29, 1858, was the first of the series, but the most explicit of such provisions were those in the treaty with Austria-Hungary of October 18, 1869 (Article 3).¹ Settlements were laid out to meet the needs of aliens in fulfillment of these treaty provisions, and within these settlements land was "held under governmental leases in perpetuity . . . subject to a fixed rate of rent

¹ Article 3 of this treaty provides in part: "The ports and towns of Yokohama (in the district of Kanagawa), Hiogo, Osaka, Nagasaki, Niigata, Ebisuminato on the island of Sado, Hakodate and the City of Tokei (Yedo) shall, from the day on which this Treaty comes into operation, be opened to the citizens of the Austro-Hungarian Monarchy, and to their trade.

"In the above ports and towns Austro-Hungarian citizens may permanently reside; they shall have the right, therein to lease land, to purchase houses, and to erect dwellings and warehouses.

"The place, where Austro-Hungarian citizens shall reside, and where they shall erect their buildings, shall be determined on by the Imperial and Royal Consular Officers in conjunction with the competent local Authorities; the harbour regulations shall be arranged in a similar manner.

"If the Imperial and Royal Consular Officers and the ~~Japanese~~ Authorities can not agree, the matter shall be submitted to the Diplomatic Agent and the Japanese Government." *Treaties and Conventions between the Empire of Japan and other Powers* (Tokio, 1884), p. 4. This provision has been said to "contain the sum of all privileges and immunities on the subject [of the leaseholds] granted by Japan under the Treaties of 1858-1869." *Case of Japan in the Japanese House Tax Case*, p. 13.

per *tsubo*"; this land was (or became) "the property of the State and in consequence exempt from taxation of all kinds."² The principal settlements were in Yokohama, Nagasaki, Hiogo, Osaka and Tokio. In presenting its case to a tribunal of the Permanent Court of Arbitration in 1904, the Japanese Government stated that 511,150.89 *tsubo* of land were held under perpetual leases in these settlements.³ Some lands in Hakodate were also held under perpetual lease, though no settlement was laid out there. While the holders of the leaseholds were of various nationalities, much of the lands, in recent times at least, were held by British subjects, the interests of American nationals being second in importance.⁴

Numerous taxation questions arose in connection with the perpetual leaseholds, but so long as extraterritorial jurisdiction existed in Japan it was not possible for the Japanese Government to effect the collection of taxes the levying of which it thought to be permitted. This situation was changed in some degree by the disappearance of extraterritoriality in 1899. The series of treaties which provided for the abolition of extraterritoriality contained provisions for the continuance of the leaseholds. The treaty concluded between Japan and Great Britain on July 16, 1894, the first treaty of that series, contained the following (Article 18):⁵

Her Britannic Majesty's Government, so far as they are concerned, give their consent to the following arrangement:

The several foreign Settlements in Japan shall be incorporated with the respective Japanese Communes, and shall thenceforth form part of the general municipal system of Japan.

The competent Japanese authorities shall thereupon assume all municipal obligations and duties in respect thereof, and the common funds and property, if any, belonging to such Settlements, shall at the same time be transferred to the said Japanese authorities.

When such incorporation takes place, existing leases in perpetuity under which property is now held in the said Settlements shall be confirmed, and no conditions whatsoever other than those contained in such existing leases shall be imposed in respect of such property. It is, however, understood that the Consular authorities mentioned in the same are in all cases to be replaced by the Japanese authorities.

All lands which may previously have been granted by the Japanese Government free of rent for the public purposes of the said Settlements shall, subject to the right of eminent domain, be permanently reserved

² Case of Japan in the Japanese House Tax Case, pp. 15-16. The *tsubo* is the equivalent of 3.305785 square meters, *id.*, p. 17; an acre is about 1225 *tsubo*.

³ *Id.*, p. 67. See, also, Reischauer, "Alien Land Tenure in Japan," in Transactions of the Asiatic Society of Japan, 2d series, Vol. XIII.

⁴ On March 25, 1937, a Japanese "Foreign Office Spokesman" was reported to have said that "out of a total of 146,000 *tsubo* of land (about 119 acres) held under perpetual lease, 64,000 *tsubo* (about 52 acres) represents the land held by British and 32,000 *tsubo* (about 26 acres) by American nationals." 6 Contemporary Japan (June, 1937), p. 170. See also 16 Department of State Press Releases (March 6, 1937), p. 134; 6 Far Eastern Survey (May 12, 1937), p. 107.

⁵ 86 British and Foreign State Papers, p. 46. See also Arts. 1 and 3 of the same treaty.

free of all taxes and charges for the public purposes for which they were originally set apart.

Substantially similar provisions for the continuance of the leaseholds were incorporated in treaties concluded by Japan with the United States of America, November 22, 1894 (Article 17); with Russia, June 8, 1895 (Article 17); with Germany, April 4, 1896 (Article 19); with Belgium, June 22, 1896 (Article 17); with France, August 4, 1896 (Article 21); with Switzerland, November 10, 1896 (Article 12); with Spain, January 2, 1897 (Article 17); with Portugal, January 26, 1897 (Article 17); and with Austria-Hungary, December 5, 1897 (Article 20). Most-favored-nation clauses in certain treaties, notably in the treaties concluded by Japan with Denmark, October 19, 1895, and with The Netherlands, September 8, 1896,⁶ extended the benefit of these provisions to other states.

After the revised treaties came into force, the Japanese Government took the position that the exemption from taxation did not extend to improvements on the lands held under the leases. This view was controverted by the British, French and German Governments, and on August 28, 1902, these governments agreed with the Japanese Government to submit the question to an arbitral tribunal composed of three members of the Permanent Court of Arbitration. In its judgment in the so-called Japanese House Tax Case,⁷ on May 22, 1905, that tribunal decided, by a majority of votes, that the buildings as well as the lands were exempt from taxation.

Though the result of the arbitral judgment was accepted by the Japanese Government, questions of taxation continued to arise and to give difficulty, and it is easy to understand the desire of the Japanese Government to find an escape from the system altogether. When the British-Japanese Treaty of Commerce and Navigation of April 3, 1911, was being negotiated, it was agreed that "the contention of either Government regarding the position of the holders of leases in perpetuity in the former foreign settlements, which it was agreed between the two Governments should form the subject of a separate negotiation, was not in any way prejudiced by the omission of reference to that question in the Treaty."⁸ In succeeding years, attempts were made to settle the question, but active negotiations were discontinued in 1914. Meanwhile, in 1925, aliens were given extensive privileges of owning land in Japan, subject to certain restrictions.⁹

Recently the British Government took the lead in negotiating a settlement of the problem, and its lead was followed by other governments. On March

⁶ These treaties are collected in *Treaties and Conventions between the Empire of Japan and Other Powers* (Tokio, 1899).

⁷ Scott, *Hague Court Reports*, p. 77.

⁸ *Recueil des Traités et Conventions entre le Japon et les Puissances Etrangères* (1925), I, p. 745.

⁹ Reischauer, *op. cit.*, pp. 123-130; Yamada, in *McKenzie's Legal Status of Aliens in Pacific Countries* (1937), p. 211.

25, 1937, both the American and British Governments exchanged notes with the Japanese Government for the abolition of the "system of perpetual leases";¹⁰ the "understanding" embodied in these notes is to the effect:

(1) That the said system of perpetual leases shall come to an end on the first day of the fourth month of the seventeenth year of Showa, corresponding to the 1st day of April, 1942, when the leaseholds shall without compensation be converted into the rights of ownership in accordance with the provisions of Japanese laws and ordinances. Such conversion shall be effected free of registration taxes in respect of lands under perpetual leases and buildings thereon.

(2) That until the thirty-first day of the third month of the seventeenth year of Showa, corresponding to the 31st day of March, 1942, the present position as regards tax exemptions shall be maintained,¹¹ and no further claims shall be made by the Japanese authorities for arrears of such disputed taxes as may still be uncollected.

Similar notes were exchanged by the Japanese Government with the Governments of France and Switzerland on April 15, 1937, and with the Governments of Denmark, Italy, Portugal, and The Netherlands on April 30, 1937.¹²

In announcing the understanding with Japan, the Department of State of the United States said that "a coöperative attitude has thus far been manifested by American leaseholders, and it is confidently expected that, by accepting the terms of settlement, they will contribute to the promotion of friendly international relations."¹³ This statement does not imply a legal necessity for affirmative action of acceptance by the leaseholders.

MANLEY O. HUDSON

THE DEFENSE OF OPPRESSED PEOPLES

One hears currently much agitation in favor of action by the Government of the United States to assist peoples which are oppressed by foreign aggressors, by national governments or by domestic conflicts. Thus it is urged by some that the United States should do something to aid the Loyalists in Spain, chiefly on the ground that their enemies are being aided by Germany and Italy and that the Insurgents are waging cruel warfare. It is urged that the United States should do something to aid the Chinese against Japanese aggression. It was urged that the United States should do something to help the

¹⁰ U. S. Executive Agreement Series, No. 104; British Treaty Series, No. 29 (1937).

¹¹ Elaborating this expression, a second exchange of notes between the United States and Japan, also of March 25, 1937, provided that "until March 31, 1942, no taxes at present in force shall be collected other than those heretofore collected from the leaseholders, nor shall any taxes which may be introduced in the future be collected from the leaseholders if such taxes are directly connected with the perpetual leaseholds." It was also stipulated that "in the event of an American leasehold being transferred it . . . shall continue to be subject to the terms of the understanding" reached. U. S. Executive Agreement Series, No. 104.

¹² 26 (Japanese) Journal of International Law and Diplomacy, No. 6 (July, 1937).

¹³ 15 Department of State Press Releases (March 6, 1937), p. 134.

Ethiopians against Italian aggression. It has been urged that the United States should assist the Jews in Palestine; there is a long record of demands that minorities in many countries be helped.

From the moral or sentimental point of view, many of these demands are appealing. From the legal point of view, the United States would be justified in acting in some cases. It is not intended to discuss here the correctness of the assertion that states are justified in intervening on humanitarian grounds, but it may be said that a treaty right is a surer legal foundation for action. Thus the United States is within its legal rights in participating in the Brussels Conference convened in accordance with the Nine-Power Treaty. The United States probably has a legal right under treaties to concern itself with the British plan for the division of Palestine. If the Government of the United States desires to act in any of these cases, it clearly should find a legal basis on which to justify its action; one illegal act is not mended by the commission of another. Aside from the legal basis for action, however, there are grave questions of policy which must be considered by the responsible officials even though they are ignored by irresponsible though well-meaning private persons. It may be of value to recall in these days the manner in which a great Secretary of State, Elihu Root, dealt with certain cases of a comparable nature.

On November 16, 1905, with armed Japanese guards around his palace, the Emperor of Korea accepted the terms imposed by Japan which in effect ended Korea's existence as an independent state. The United States immediately acquiesced in accepting the situation created by the Japanese action. There was considerable hue and cry in the United States about the immorality of this action of the American Government and many persons expressed the opinion that the United States should not permit Japan to take Korea. There was a possible legal basis for action by the United States in that our treaty of May 19, 1883, with Korea provided, with ironically reciprocal obligations, that "If other powers deal unjustly or oppressively with either government, the other will exert their good offices to bring about an amicable arrangement." On the other hand, the treaties of February 23 and August 22, 1904, between Japan and Korea had placed the relations of the two countries on such a basis that the Japanese action in 1905 could be supported by legal argument. Practically, as Mr. Root pointed out many years later in private conversation, "There was nothing we could do except fight Japan; Congress wouldn't have declared war and the people would have turned out the Congress that had. All that we might have done was to make threats which we could not carry out." Mr. Root continued with a comment on the situation in the Belgian Congo in 1906:

The case of the Belgian Congo is a very conspicuous illustration of the difficulties which are created for diplomatists—the men handling foreign affairs in a democratic country—regarding matters of sentiment. The very people who are most ardent against entangling alliances insist most fanatically upon our doing one hundred things a year on humanitarian

grounds, which would lead to immediate war. That attitude practically put us into the war for Cuba. The Protestant Church and many good women were wild to have us stop the atrocities in the Congo. . . . People kept piling down on the Department demanding action on the Congo. We went the limit which wasn't far.

In this instance the United States was a party to the 1890 General Act of the Brussels Conference Relative to the African Slave Trade, but was not a party to the General Act of Berlin in 1885 under which the Congo Free State was set up. Secretary Root rejected the suggestions of Mr. Adee that the numerous delegations of persons interested in the Congo be turned aside with polite letters. He insisted upon seeing them. He made them realize his sincere desire to be helpful by showing them in strict confidence the correspondence he was conducting with our diplomatic missions in Europe. At the same time he realized the difficulties confronting the Belgian Government, as is indicated by a letter which he wrote to Congressman Edwin Denby on February 20, 1906: "If the United States had happened to possess in Darkest Africa a territory seven times as large and four times as populous as the Philippines, we, too, might find good government difficult and come in for our share of just or unjust criticism." Secretary Root succeeded in securing the good will of the persons active in the Congo Reform Association in the United States and, by working closely with the British Government, exerted such influence as the United States possessed in inducing the Belgian Government to adjust the situation. To John E. Parson, he wrote on April 15, 1908:

We have been doing everything which seemed to be possible to bring about a change of conditions. Unfortunately the United States is not a party to the Berlin Convention which gives the great powers of Europe a right of supervision over Congo affairs, so that we have the least ground for interference of any of the great powers. Nothing that could be done which seemed at all likely to do more good than hurt, has been neglected, and nothing will be omitted in the future. Of course, we can not send an army to the Congo to take possession of the country and administer it ourselves. It is only by moral pressure that we can accomplish anything. This we have been exercising in conjunction with England, but to do it publicly would result in complete disaster by creating resentment in Belgium against foreign interference.

One other instance may be cited. In 1905 and 1906 the persecution of the Jews in Russia reached unusually tragic proportions. There was considerable agitation in the United States in favor of some action which would compel the Russian Government to give adequate protection to her Jewish population. In sending a check to the relief fund which was being raised, Secretary Root wrote to Arnold Kohn on November 24, 1905:

I do not see how any one can fail to sympathize deeply with them in their suffering, and to hope that out of the present disorder and change in that country there may come a better day of security and freedom for them. We have little power to help them; but for some of the homeless and despoiled, money may be helpful, and for some who are in despair,

the knowledge that there is friendliness and sympathy in the world may be an encouragement; and the expression of abhorrence and condemnation by the civilized world for the cruelties which have been practiced may in time come to have some little restraining effect.

On June 23, 1906, Secretary Root wrote to President Roosevelt, submitting for his approval an instruction which he proposed to send to the American Ambassador in St. Petersburg with reference to making representations in behalf of the Russian Jews:

I think it may do some good, though I do not feel sure of it. I do not know how it will be received. It may merely give offense. I am sure that to go further would do harm. I am sure also that to publish here the fact that such a despatch has been sent would do harm, and serious harm, to the unfortunate people whom we desire to help. Any possible good effect must be looked for in absolutely confidential communication to the Russian Government. The publication that any communication has been made would inevitably tend to prevent the Russian Government from acting, to increase the anti-Jewish feeling and to make further massacres more probable.

In like vein he wrote on January 7, 1906, a letter to Robert R. Hitt, Chairman of the House Committee on Foreign Affairs, who had sent him copies of a resolution introduced in the House expressing sympathy for the Jews in Russia. The advice contained in Secretary Root's letter is of permanent value:

These resolutions do not appear to be the exercise of any legislative power conferred upon Congress by the Constitution, but to be merely an expression of opinion upon matters which, so far as they may be the concern of this Government, form a part of the foreign relations which the Constitution requires the President to conduct upon his own responsibility, or with the advice and consent of the Senate. The resolutions could not, therefore, if adopted, be regarded as responsible official action, and I cannot conceive that their adoption would accomplish any good purpose. I am rather inclined to think that they would tend, by producing irritation and antagonism, to aggravate the dangers of the unfortunate people whom they are intended to aid.

Government officials are not entitled to enjoy the luxury of expressing righteous indignation when their expressions may affect the international relations of their country. Private persons frequently feel free of such restrictions but often fail to realize that their own satisfaction is achieved at the expense of the cause which they sincerely desire to serve. They also frequently fail to realize that the only logical and effective result of the course of conduct which they advocate is a resort to war, which they oppose. Government officials need to weigh delicately the nice balance between the desirability of expressing "abhorrence and condemnation" of illegal or inhuman conduct and the undesirability of making ineffective gestures or threats which, in Mr. Root's words, "tend, by producing irritation and antagonism, to aggravate the dangers to the unfortunate people whom they are intended to aid."

PHILIP C. JESSUP

INTERNATIONAL LAW AND PROBLEMS OF RAW MATERIALS

The need on the part of industrial states for raw materials continues to have a central place in both technical and popular discussions. There has been some tendency toward over-simplification in terms of "haves" and "have nots", and, on the other hand, occasional suggestion that political demands with respect to raw materials may be but pretexts.¹ Especially since 1935, "the problem of the supply of raw materials, mixed up and confused as it has been in turn with colonial questions, migration questions, trade and monetary problems and considerations of defence and national prestige, has given rise and still gives rise to keen controversy."² Not merely a matter of public international discussion, but recently the occasion for popular petition to the Government in Great Britain,³ an alleged reason for Japan's current military adventure in China and for certain national policies with respect to Spain,⁴ and even offered in explanation of Brazil's fears which prompted her much publicized move to lease six over-age destroyers from the United States,⁵ the whole subject presents for students of international relations a variety of questions. Included is that of whether international law may figure at all in the solutions.

The question has been raised, in another connection, of whether there is not "a certain futility in interposing the lean and ascetic visage of the law in a situation which first and last is merely a question of power."⁶ To some, the problems connected with raw materials might seem to be purely matters of power-prestige politics. Indeed, the silence or non-existence in the past of international law for the control of economic forces that are at the foundation of international relations has sometimes been emphasized.⁷ But the mere fact of power is not the negation of law, and new ways of international life may be attended by the adaptation of old rules or the construction of new ones. By a well-known and realistic definition, rules comprising the law of

¹ Eugene Staley, *Raw Materials in Peace and War* (1937), p. 238: ". . . not all current political demands with respect to raw materials are due to genuine conflicts of interest that could be relieved by changes in the raw material situation. Some demands may be conscious pretexts, others a manifestation of economic and social insecurities, which are projected by an irrational psychological process into the raw material field."

Less technical is the reported statement of Bernard M. Baruch that "The story of access to raw materials is the biggest hokum in the world. What they really want is something for nothing." *New York Times*, Sept. 7, 1937, p. 14.

² Report of M. Komarnicki to the Council of the League of Nations, *Official Journal*, February, 1937, p. 106.

³ *Manchester Guardian Weekly*, July 23, 1937, p. 79.

⁴ *New York Times*, Aug. 15, 1937, IV, 4, 5; Sept. 3, 1937, p. 4. The latter reference is to a report of agreements said to have been drawn up between Italy and Germany, respectively, and General Franco, whereby the latter would pay for war materials and military assistance with certain raw materials.

⁵ *New York Times*, Aug. 8, 1937, I, 12. See also Press Releases, U. S. Department of State, Aug. 21, 1937, pp. 162-163.

⁶ Julius L. Goebel, *The Struggle for the Falkland Islands* (1927), p. 468.

⁷ See, for example, E. M. Borchard in *Proc. Amer. Soc. Int. Law*, 1923, pp. 69-70.

nations are those deduced, as consonant to justice, from the *nature* of the society existing among independent nations.⁸ To place upon its present legal system the blame for the failure of the community of nations so far to solve the problems identified with raw materials may be to confuse instrument with will and purpose. If the instrument is inherently incapable of functioning in a subject-matter that requires control, a different situation presents itself.

It is obvious that existing international law might be involved in many specific matters of jurisdiction, diplomatic protection, state responsibility, and the like, but it is proposed here to consider only the larger question of the adaptability of this law in general to the handling of situations claimed to have resulted from unequal distribution of, and denials of access to, raw materials. Phases of the larger question relate to the possibility of having a customary international law on this subject-matter, the possible narrowing of the list of questions "solely within the domestic jurisdiction" so as to take from that category regulations with respect to raw materials under some conditions, and the possible use of treaties on a wider scale authorizing types of international commodity control.

The development of customary rules on such a subject-matter would naturally be a slow process. It might conceivably be given impetus through the substitution of a new initial hypothesis for the theory of consent, with the result of marking out for international law a more pervasive rôle in international relations—particularly economic relations—than it has had under the influence of positivist doctrine. A new emphasis upon duties, which would at least limit states in their imposition of trade or monetary restrictions for the sole or principal purpose of putting pressure upon other states, might be a consequence.⁹ Proponents of a new basic theory as a way of escape from what is criticized as an essentially negative legal system, have utilized the doctrine of the abuse of rights.¹⁰ But the application of this would not be without practical difficulties, especially in the absence of a general obligatory jurisdiction. There arises the question of whether a change in fundamental theory would have to precede or follow the effective organization of the will of the larger community. At a time when economic self-sufficiency is widely proclaimed as an ideal, and when the continued existence of the foundations essential for a community of states under law is being questioned,¹¹ requisites for the putting into effect of the new principle

⁸ Henry Wheaton, *Elements of International Law* (R. H. Dana ed., 1866), p. 23.

⁹ See the report referred to in note 21, *infra*. The Committee, while feeling that each country had "first call" on its own resources for the benefit of its domestic industry, did not regard as "proper" the use of a power of prohibition or restriction, irrespective of the actual state of supplies of the commodity, simply for the purpose of putting pressure on another country (pp. 12-14).

¹⁰ H. Lauterpacht, *The Function of Law in the International Community* (1933), Ch. XIV.

¹¹ See, for example, W. Friedmann, "The Challenge to International Law", *Fortnightly Review*, Oct., 1937, pp. 432-440.

of community government might not easily be obtained. A system of legal controls operative at the will of less than a unanimity of states might be expected to encounter strong opposition.¹² Effective assertion, for the modern industrial state lacking what it considers adequate natural resources, of a right of development, might be thought to be at variance with other states' right of independence. In any case, it seems unlikely that solution of present problems pertaining to raw materials can be left to await the acceptance of a more logically perfect theory or the development of rules of customary international law.

A second question presented is that of whether there are compartments of economic activity which are permanently shut off from any except national direction. Certain pronouncements of the Permanent Court of International Justice have brought out that a state's assent to outside control of certain matters, for example, certain economic interests, cannot be presumed.¹³ But the same court has refused to consider the category of questions "solely within the domestic jurisdiction" as one fixed for all time.¹⁴ There is ever the possibility that, in their own best interests, states may assent to wider than national controls of some sort, however great a change this might be from the prevailing emphasis upon the right of individual state action and economic nationalism.

State policy with respect to minerals affords illustration of how states have regarded these raw materials within their jurisdictions as for the sole benefit of their respective peoples. State control of property in this form has been successfully asserted by metropolitan countries, as against competing private claims or those of outside states, and has sometimes taken the form of ownership.¹⁵ A method of assuring national control of mineral resources in states

¹² One writer on "Imperial Economic Development" has recently commented as follows: "Far-reaching adjustments . . . could only be effected, with any celerity, by some supernatural, or perhaps I ought to say some supernatural, body with all nations represented in it; and some international force for promoting collective trade to provide and to police some world trade agreement. The creation of such a body is beyond the bounds of practical politics. Much as we regret the position, we must accept it as a fact if we are realists." B. S. B. Stevens, in *International Affairs*, XV, No. 6 (Nov.-Dec., 1936), pp. 863, 870.

¹³ Publications of the Permanent Court of International Justice, Series A, No. 10 (A/B No. 22), ¶ 18; Series A/B No. 46, p. 162. These pronouncements can hardly be used to prove that a state may legally do anything that it has not agreed to refrain from doing. See H. Lauterpacht, *The Development of International Law by the Permanent Court of International Justice* (1934), pp. 103-104.

¹⁴ Publications of the Permanent Court of International Justice, Series B, No. 4 (A/B No. 3), p. 24.

¹⁵ Cf. C. K. Leith, *World Minerals and World Politics* (1931), p. 115: "The present world-trend toward nationalization is not entirely new in history, though it has taken on new aspects. In the early small beginnings of the use of minerals it was the rule rather than the exception for the crown to retain ownership of precious metals and stones, and later even of iron, copper, and other metals essential to military preparation. This is true of all the countries of Europe. Later this control became more or less separated from the crown in some countries by dispersion through the noble classes or by leases and concessions. Only in

under liberal government is illustrated in the Leasing Act of the United States, 1920,¹⁶ or the 1936 legislation relating to tin.¹⁷

This public control does not necessarily preclude all international coöperation in this field, if compensating advantages may come from such coöperation. Minerals are not in their nature, any more than are nationality decrees, outside the category of things to which international legal rights may attach. There has recently gone to the Permanent Court of International Justice a case between Italy and France in which the former state alleges that measures taken in connection with the discovery and working of phosphates in Morocco are inconsistent with the obligations of France under the General Act of Algeciras¹⁸ and the Franco-German Treaty of November 4, 1911,¹⁹ to which Italy has acceded. Involved in this case also are alleged vested rights of an Italian company.

There is, then, the possibility of the use of specific agreements for the purpose of securing adjustments. It is safe to assume that any very wide use of multilateral treaties would be a sequel to some investigation of the general subject-matter, such as was approved in principle by the spokesman for the British Empire before the Assembly of the League of Nations on September 11, 1935,²⁰ and such as has subsequently gone on under the auspices of the League. The use of multilateral treaties, as well as "autonomous action" or unilateral declarations, is envisaged in the resulting report.²¹ Taking a cautious view of its competence, the Committee did not regard as within its function the discussion of distribution of territories from which raw materials were drawn, or the restriction of raw material supplies in order to discourage aggression, or the adjustment of population to geographical and economic conditions, or the armaments policy of any particular state. While finding it impossible to defend "rigid restriction policy", the investigating body conceded that it might be necessary, for political or economic or social reasons,

England was this carried through to a stage of complete private ownership, and this principle was later the dominant one governing the disposition of mineral resources in all English-speaking countries. The major separation of minerals from state control went on during the period of the industrial revolution. At the same time many countries, particularly in Europe, never departed from the earlier form of control."

¹⁶ 41 Stat. 437-447, especially the provision respecting reciprocity as to aliens, at p. 438. On the latter point, there is also the Convention on Non-Application of the Most-Favored-Nation Clause in Respect of Certain Multilateral Economic Conventions, Sess. Laws, 74th Cong., 2nd Sess., Pt. II, pp. 843-848.

¹⁷ 49 Stat. 1140.

¹⁸ 99 British and Foreign State Papers, p. 141; this JOURNAL, Supp., Vol. 1 (1907), p. 47.

¹⁹ 104 British and Foreign State Papers, p. 948; this JOURNAL, Supp., Vol. 6 (1912), p. 62.

²⁰ League of Nations Official Journal, Spl. Supp. No. 138 (1935), pp. 43-46. Further action is recorded in *ibid.*, Spl. Supp. No. 157 (1936).

²¹ Report of the Committee for the Study of the Problem of Raw Materials, League Doc. A. 27. 1937. II. B., pp. 16, 17, 21. The Committee had the collaboration of experts from the United States, Brazil and Japan, but did not have the assistance of a German expert or the collaboration of an Italian expert.

to reserve certain forms of enterprise to nationals.²² It found that natural monopolies—such as that of helium gas in the United States—did not constitute real obstacles to the circulation of raw material. The general conclusions offered were that difficulties in regard to supply existed, but were not insuperable, and that difficulties in regard to payments vastly transcended in importance those in regard to supply.²³

The many-sided nature of the general problem does not require emphasis. The German contention has been that there should be territories under German management and within the German monetary system, and that there can be discussion of other questions, such as "sovereignty, army, police, law, the churches, international collaboration."²⁴ Assurance of some freedom of movement for the manufactured goods, after the raw materials have been acquired and converted, is properly a matter of concern.²⁵ More controversial, since it touches upon something traditionally very much within the scope of domestic jurisdiction questions, is the suggestion from a Japanese spokesman that it is of capital importance to have, through pacific means, freedom in the movement of labor and technicians necessary for the exploitation of raw materials.²⁶ If any treaty arrangement on a multilateral basis were achieved, it seems clear that it would have to involve no abruptly internationalized control of economic activity generally. Even within the bounds of relatively narrow subject-matters, proposals of far-reaching extra-national control have found little favor. In the course of the recent discussions, there was a reference to "certain interesting schemes" set on foot at Geneva but later shelved, and to such specific projects as that for an International Agricultural Mortgage Credit Company.²⁷ Perhaps action taken would look to restriction, not of all policies of states that might be objectionable to their neighbors, but of policies actually found to endanger seriously

²² Report cited, p. 16. The bad effects of a sudden influx of capital, or of mass immigration, are envisaged. A question may be raised as to the strictly legal significance of the Committee's observation that "It should be recognized that the Governments of countries which are important suppliers, actual or potential, of raw materials have a responsibility not unreasonably to hamper the development of their raw materials," and that such states should take into account "the interdependence of all countries." (*Idem.*, p. 16.)

²³ The Russian expert, in a separate declaration, expressed regret that the Committee had not shown sufficiently how the problem of raw materials was affected by present-day conditions, such as those connected with armaments, aggressive and warlike purposes. (Report, p. 3C.)

²⁴ Hjalmar Schacht, "Germany's Colonial Demands", *For. Affairs*, XV, No. 2 (Jan., 1937), p. 231. A more detailed statement of Germany's case is in *Völkerbund*, Nr. 192-206 (May/July, 1937). The League Committee found that, if dominions and other self-governing territories be excluded, only about three per cent. of all commercially important raw materials are produced in all colonial territories. (Report, p. 10.)

²⁵ Remarks of M. Yepes (Colombia), *League of Nations Official Journal*, Spl. Supp. No. 157, p. 70.

²⁶ *New York Times*, June 25, 1937, p. 33.

²⁷ Remarks of M. Rose (Poland), *League of Nations Official Journal*, Spl. Supp. No. 157, p. 4E. The specific project referred to is in *League Doc. C. 375. M. 155. 1931. II. A.*

the interests of other countries. Employment of negotiation, investigation and conciliation, and provision of some international jurisdiction with a function which would be interpretive and declaratory, would seem to be necessary features of a control arrangement.

The use of treaties on a narrower scale seems more likely to come, at a time when the general peace is itself threatened. Even bilateral arrangements might prove of considerable psychological value, unless used as weapons against other states. The contents of any agreements concerning commodity control would need to be devised in the light of trends in producing enterprises,²⁸ and of experience already available through the activity of such a body as the International Tin Committee.²⁹ Presumably, the principle of access to necessary materials without discrimination because of nationality would have special consideration.³⁰ From the purely legal point of view, the effects of changing conditions, and the matter of periodic or other kinds of revision, would have importance. The principle of the sanctity of treaty engagements cannot safely be discarded, but a reasonable amount of adjustability should permit the reconciliation of this with the basic right of states to exist and to have some opportunity for development.

Two concluding observations seem pertinent. Some economists have come to believe that the people of the world have no choice but to grapple with the problem of world-wide economic planning.³¹ With the soundness of this view, or with the tremendously complicated task of world planning as between states with differing ideologies and with varying degrees of control over their respective internal economies, this brief comment on certain legal aspects has not presumed to deal. It is conceivable that the process of "economic appeasement" which is associated with raw materials might well involve considerable use of the treaty device.³² But the futility of placing too great faith in the instruments alone, without adequate attention to the will for peace and for essentially just dealing in an ordered world, must be apparent. It is suggested in the words of Sir Thomas More, who wrote more than four

²⁸ Eugene Staley, *op. cit.*, p. 253: "International trade in raw materials appears to be entering an epoch that will be characterized relatively less by competition between individual producing enterprises within each industry and relatively more by competition between great cartels or combinations or control boards, each striving to promote sales and maintain prices for its commodity."

²⁹ *Ibid.*, p. 308. See also W. L. Holland, ed., *Commodity Control in the Pacific Area* (1935), Chs. XII, XIII.

³⁰ Cf. John C. de Wilde, "Raw Materials in World Politics", *For. Policy Reports*, XII, 162-176 (Sept. 15, 1936), and a pamphlet on "Colonies, Trade and Prosperity", prepared by Maxwell S. Stewart for the Public Affairs Committee (1937). Consideration of the interests of consumers, and the need of publicity, are stressed in the League Committee's Report (p. 18).

³¹ See, for example, E. W. Zimmermann, *World Resources and Industries* (1933), p. 807.

³² Cf. Report of the Economic Committee to the Council of the League of Nations, on the Present Phase of International Economic Relations, League Doc. C. 358. M. 242. 1937. II. B., p. 13 and annex.

hundred years ago of his Utopians that "though treaties were more religiously observed, they would still dislike the custom of making them; since the world has taken up a false maxim upon it, as if there were no tie of nature uniting one nation to another . . . and that all were born in a state of hostility, and so might lawfully do all that mischief to their neighbors against which there is no provision made by treaties. . . ."

ROBERT R. WILSON

THREE HAGUE CONVENTIONS ON NATIONALITY

The coming into force in 1937 of three of the conventions on nationality signed at The Hague Codification Conference of 1930, is an event of unusual significance in the development of international law.¹ This manifestation of effective coöperation is the more interesting because it occurred in the politically sensitive field of nationality laws and because the past few years have not been notable for evidences of renunciation of sovereign claims.

The conventions have come into force because they have now been ratified or acceded to by ten or more Powers. The principal convention, that relating to certain questions of conflicts of nationality laws, was not signed by the United States Government because its delegates considered it inconsistent with American policy to sign a treaty which recognized that dual nationality might arise out of a grant of naturalization not assented to by the state of origin, that such assent might be deemed necessary to make such naturalization effective, or that "expatriation permits" might be required.² But inasmuch as the convention provided for complete liberty of reservations, of which several signatories have taken advantage, it is regrettable that the United States could not find adequate comfort in recourse to that safeguard. The convention, now ratified or acceded to by Norway, Monaco, Brazil, Sweden, Great Britain, Canada, Poland, China, India and The Netherlands, provides for the resolution of some of the principal conflicts of municipal nationality laws.

While admitting the authority of each state to determine who are its nationals, it yet facilitates the freedom of renunciation or waiver in certain cases of dual nationality. For example, Article 5 establishes that in cases of dual nationality, a third state shall recognize exclusively the single nationality of the country in which the person is habitually resident or most closely connected, a principle adopted in the protocol concerning military service presently to be mentioned and likely to become more common. The chapter on the nationality of married women provides for a limitation in the number of cases of dual nationality or statelessness arising through marriage, for example, the loss of the wife's nationality shall be conditional upon her acquiring her husband's nationality; yet naturalization of the husband shall not be

¹ League of Nations: A 6 (a).1937. Annex 1, pp. 71-73.

² Cf. Convention, this JOURNAL, Supp., Vol. 24 (1930), p. 192; Report of Committee, *ibid.*, p. 215; and Flournoy, this JOURNAL, *ibid.*, p. 467 at 473.

deemed to change the wife's nationality without her consent. Obviously, this did not go so far in feminine emancipation as American law now provides, but it was as far as most of the countries were in 1930 willing to go. The conference, on the initiative of the American delegation, adopted a recommendation (*voeu*) urging the states to study further the possibility of introducing into their laws the principle of the equality of the sexes in matters of nationality.

The chapter on the nationality of children provides that the children born abroad of diplomats shall not acquire the nationality of their place of birth and that the children of other public officials, like consuls, shall be given the opportunity easily to renounce it. It also provides that the minor children shall be naturalized through the naturalization of their parents, under such conditions as the naturalizing state establishes. Apparently, this may even apply to children remaining resident in their country of origin, which seems rather questionable. Other articles provide that children of unknown parents shall have the nationality of the place of birth, which is also to be assigned, unless the state otherwise provides, to children of parents of no nationality or unknown nationality. The nationality of illegitimate children is also provided for. Adoption by an alien shall not forfeit the child's nationality unless he acquires the alien's nationality.

The convention of most interest to the United States and the only one ratified by the United States, is the protocol relating to military obligations in cases of dual nationality.³ Adopting a principle long urged by the United States and embodied in resolutions passed occasionally by Congress, it provides that a person having dual or multiple nationality shall be bound to perform military service only in that country in which he habitually resides or with which he is most closely connected, and shall be exempted from military service in the other country or countries—and this without regard to the question whether he thereby loses the latter's nationality. Also, if the prospective soldier, a dual national, has the privilege of renouncing the nationality of one or more of his states on reaching majority, he may not be drafted in that state during minority. Furthermore, under Article 3, a person who has lost the nationality of one state and has acquired the nationality of another is exempt from military obligations in the former.

This protocol, which was due largely to the initiative of Mr. Richard W. Flournoy, Jr., delegate of the United States,⁴ has been adopted by the United States, Great Britain, Brazil, India, Sweden, Australia, El Salvador, South Africa, Cuba, Colombia and The Netherlands. While the United States has naturalization treaties with most of these states and they are not the states, such as France, Italy and Switzerland, with which the United States has had

³ This JOURNAL, Supp., Vol. 24 (1930), p. 201.

⁴ See Mr. Flournoy's article in this JOURNAL, Vol. 24 (1930), p. 467, on "Nationality Convention, Protocols and Recommendations adopted by the First Conference on the Codification of International Law."

the main difficulties in the matter of military service of persons possessing two nationalities, it is nevertheless a source of gratification that the principle of single military service has now received the imprimatur of an international convention. Probably other ratifications and accessions will follow. And in the meantime, the municipal law of such countries as France and Italy has relaxed some of its claims to the military service of those who, even without consent, have acquired another nationality. In spite of the current era of military inflation, the climate of opinion in the matter of military claims on technically dual nationals is changing.

The third convention now in force is a protocol relating to a certain case of statelessness,⁵ to the effect that in countries not conferring nationality *jure soli*, a person born of a mother who is a citizen and of a father without nationality or of unknown nationality shall have the nationality of the country of birth. This protocol, adopted by Brazil, Great Britain, India, Poland, China, Chile, Australia, Salvador, South Africa, and The Netherlands, represents the present law of the United States. A fourth proposed protocol, requiring signatories to receive their former nationals who are or have become stateless and have become permanently indigent or criminally convicted abroad,⁶ has been accepted only by Brazil, Great Britain, Australia, South Africa, India, China and El Salvador, and is therefore not yet in force.

These first tangible results of the Codification Conference of 1930, achieved in the face of much discouragement, give promise of the eventual expansion of the movement for the cooperative reconciliation of conflicts of municipal law in fields which impinge on international relations. EDWIN BORCHARD

IMMUNITIES OF THE BANK FOR INTERNATIONAL SETTLEMENTS

The measures recently taken for extending the immunities of the Bank for International Settlements afford a striking example of the innovations which have been introduced in the process of international legislation during the past years.

The basic provisions for the establishment of the Bank for International Settlements were embodied in Articles 6 and 10 of the agreement concerning the complete and final settlement of the question of German reparations, signed at The Hague on January 20, 1930.¹ A convention signed at The Hague on the same date² incorporated the constituent charter of the Bank, and its Statutes³ were annexed to the convention. The Statutes came into force on February 26, 1930, and the Bank began its operations on May 17,

⁵This JOURNAL, Supp., Vol. 24 (1930), p. 206.

⁶*Ibid.*, p. 211.

¹5 Hudson, *International Legislation*, p. 135; this JOURNAL, Supp., Vol. 24 (1930), p. 262. See the writer's comment in this JOURNAL, Vol. 24 (1930), p. 561.

²Hudson, *op. cit.*, p. 307; this JOURNAL, *ibid.*, Supp., p. 323. Switzerland was a party to the convention.

³Hudson, *op. cit.*, p. 314; this JOURNAL, *ibid.*, p. 326. For an analysis of the Statutes, see the writer's comment in this JOURNAL, Vol. 24 (1930), p. 561.

1930. Ratifications of the Hague Agreement were duly deposited by Australia, Belgium, Canada, France, Germany, Great Britain, Greece, India, Italy, Japan, New Zealand, Poland, Portugal, Rumania, South Africa, and Yugoslavia.

Article 10 of the Hague Agreement of January 20, 1930, provides for the privileges and immunities of the Bank, as follows:

The Contracting Parties will take in their respective territories the measures necessary for securing that the funds and investments of the Bank, resulting from the payments by Germany, shall be freed from all national or local fiscal charges.

The Bank, its property and assets, and also the deposits of other funds entrusted to it, on the territory of, or dependent on the administration of, the Parties shall be immune from any disabilities and from any restrictive measures such as censorship, requisition, seizure or confiscation, in time of peace or war, reprisals, prohibition or restriction of export of gold or currency and other similar interferences, restrictions or prohibitions.

Fuller provisions were contained in the Constituent Charter granted to the Bank by Switzerland,⁴ in accordance with the provisions of the Convention of January 20, 1930. Paragraphs 6, 7, 8, and 9 of the Charter deal with immunity from Swiss taxation, in detail; paragraph 10 adds the following provision:

The Bank, its property and assets and all deposits and other funds entrusted to it shall be immune in time of peace and in time of war from any measure such as expropriation, requisition, seizure, confiscation, prohibition or restriction of gold or currency export or import, and any other similar measures.

On July 19, 1933, at a meeting of the technical subcommittee of the Second Monetary Subcommission of the Monetary and Economic Conference at London, the Chairman (M. Kienbock) called attention to the second paragraph of Article 10 of the Hague Agreement, and to the "fact that a number of Governments had not acceded" to the agreement. The fact was in no way surprising, for no invitations to accede had been issued. The Chairman then suggested that

in view of the fact that the Second Sub-Commission, on the Sub-Committee's proposal, had adopted a resolution on the function of the Bank for International Settlements, it would be well to remind Governments which had not yet acceded to that agreement of the desirability of as many countries as possible acceding to it. A letter on the subject would be addressed by the appropriate body to the Governments concerned.

This suggestion was adopted as a recommendation by the technical subcommittee.

⁴ 46 *Recueil officiel des lois et ordonnances* (1930), pp. 67, 305.

To ensure "uniform decision on the part of the various Governments which may be prepared to give effect to the Sub-Committee's recommendations," the Bank for International Settlements drew up the following draft relating to the privileges in question: ⁵

Whereas the Bank for International Settlements has been constituted and is functioning for certain purposes of general interest and utility and in particular for the purpose of promoting the co-operation of Central Banks and providing additional facilities for international financial operations;

Whereas in order to allow such purposes to be achieved by and during the functioning of the Bank for International Settlements certain immunities were granted to it by the signatory Governments of the principal Hague Agreement dated 20th January, 1930 and also by the Swiss Confederation;

Whereas the Sub-Committee for Permanent Measures of the Monetary and Financial Commission of the Monetary and Economic Conference sitting in London in June and July, 1933 unanimously approved the suggestion made by the Chairman of the Sub-Committee that as many countries as possible should join the signatory Governments of the said Convention and Switzerland in the action taken by them in regard to such necessary immunities;

Whereas the Government of desires for its part to comply with this suggestion;

Now therefore

The Government of hereby confirms that

(1) The Bank for International Settlements, its property and assets and also the deposits or other funds entrusted to it on the territory of, or dependent on the administration of, shall be immune from any disabilities and from any restrictive measures such as censorship, requisition seizure or confiscation, in time of peace or war, reprisals, prohibition or restriction of export of gold or currency and other similar interferences, restrictions, or prohibitions.

(2) Any dispute between the Government of and the Bank for International Settlements as to the interpretation or application of this present shall be referred to the Arbitral Tribunal provided for by the said Agreement of January 20th, 1930.

The Government shall appoint a member to sit on the occasion of such dispute, the President having a casting vote.

In having recourse to the said Tribunal the Parties may nevertheless agree to submit their dispute to the President or to a member of the Tribunal chosen to act as sole Arbitrator.

On August 29, 1933, the Secretary General of the League of Nations, acting as Secretary General of the Monetary and Economic Conference, transmitted to governments the text of the suggestion made at London on July 19, enclosing the above draft at the request of the Bank, and asked to be informed of any action that might be taken.⁶ In a further communication of June 29, 1934,⁷ the Secretary General stated that "as regards the procedure to be followed in connection with the grant of the privileges referred to, it is clearly a matter for each individual Government to determine the requisite internal measures in conformity with the constitutional law of the country." He added, also, at the suggestion of the Bank, that the latter had defined

⁵ League of Nations Document, C.L.173.1933.II.A.

⁶ *Ibid.*

⁷ C.L.124.1934.II.A.

the scope of the privileges accorded under Article 10 of the Hague Agreement, in the following terms:

The question was raised whether these privileges have the effect of exempting the Bank for International Settlements from ordinary civil and commercial proceedings on the part of its creditors or from the accompanying penalties of execution. It is the opinion of the Bank for International Settlements that this cannot be either the object or the effect of the proposed privileges. Attachment and other forms of compulsory execution are in no sense prohibited by Article 10 of the Hague Agreement. The Statutes of the Bank for International Settlements, moreover, explicitly provide in Article 57 that, apart from the exceptional cases to which Article 56 relates or cases for which special provisions have been laid down with regard to arbitration, the Bank may be "proceeded against in any court of competent jurisdiction."

The action taken by governments in response to the suggestion was embodied in various forms.

In Austria, a federal law of July 12, 1934,⁸ followed the text of paragraph (1) of the Bank's draft, and as to arbitration it provided as follows:

The Federal Government is empowered to submit any dispute between it and the Bank for International Settlements as to the interpretation or application of Article 1 to an Arbitral Tribunal to which each Party shall appoint a member. In the event of the two members of the Arbitral Tribunal being unable to agree in the election of a President, the Austrian Federal Government shall recognise as President whoever is nominated for the purpose by the President of the Permanent Court of International Justice at The Hague.

In Bulgaria, a legislative decree of June 4, 1934⁹ followed verbatim the substantive parts of the Bank's draft. In China, a decision of the Government¹⁰ was published on May 6, 1935, which contained the substance of paragraph (1) of the Bank's draft and a provision on arbitration similar to that in the Austrian law. On behalf of the Free City of Danzig, the Polish Government on October 9, 1934, made a formal declaration,¹¹ following the Bank's draft verbatim.

Denmark, by a royal resolution of May 3, 1935,¹² subject to approval by the Rigsdag, accepted the provisions in paragraph 2 of Article 10 of the Hague Agreement, but reserved the right to denounce this clause on twelve months' notice. Egypt, by a decree-law No. 14, 1936,¹³ provided for the Bank's immunity in terms substantially similar to those in paragraphs (1) and (2) of the Bank's draft. In Finland, the House of Representatives adopted a law¹⁴ on December 5, 1935, reading in part as follows:

⁸ *Bundesgesetzblatt*, 1934, II, p. 328; League of Nations Document, C.L.206(a).1934.II.A. Annex.

⁹ C.L.31(a).1935.II.A. Annex.

¹⁰ C.L.122(a).1935.II.A. Annex I.

¹¹ C.L.206(a).1934.II.A. Annex.

¹² C.L.93(a).1935.II.A. Annex.

¹³ C.L.86(a).1936.II.A. Annex.

¹⁴ C.L.2(a).1936.II.A.

Paragraph 1. The Bank for International Settlements, its property and assets, and also the deposits or other funds entrusted to it, shall be immune from any measures such as expropriation, seizure or confiscation, in time of peace or war, prohibition or restriction of exports or imports of gold or currency, and other similar administrative measures.

Paragraph 2. The competent authorities shall refrain from taking any measures of such a nature as to encroach upon the privileges granted to the Bank for International Settlements in paragraph 1.

Paragraph 3. Any dispute between the Government of Finland and the Bank for International Settlements as to the interpretation or application of paragraph 1 shall be referred to an arbitral tribunal. Such tribunal may be, as the Government chooses, either the arbitral tribunal provided for by Article 15 of the Hague Agreement of January 20th, 1930, or another arbitral tribunal constituted for the purpose, to which each of the parties shall appoint one member, the two members electing their chairman. Should the two arbitrators be unable to agree upon the choice of a chairman, the latter shall be appointed by the President of the Permanent Court of International Justice.

Iceland's action, in a royal resolution of June 19, 1935,¹⁵ was in terms similar to that of Denmark. By a letter addressed to the Secretary General on January 30, 1934, the Government of the Grand Duchy of Luxemburg stated that it "accepts by the present communication the Hague Agreement" with respect to the Bank's immunities;¹⁶ this letter does not seem to have been followed by any further communication. On November 27, 1933, the Netherlands Government replied to the Secretary General that it "accepts the draft" drawn up by the Bank.¹⁷ On July 16, 1935, the National Congress of Nicaragua adopted a decree¹⁸ which followed the Bank's draft verbatim. On July 13, 1935, the Norwegian Government made a declaration¹⁹ following substantially paragraph (1) of the Bank's draft, and containing the following provision on arbitration:

Any dispute between the Norwegian Government and the Bank for International Settlements as to the interpretation or application of the present declaration shall be referred to an Arbitral Tribunal composed of three members. Each of the Parties shall appoint a member to sit on the Tribunal and the umpire shall be chosen by agreement between the two Parties. Should the two Parties not agree on the choice of the umpire, the President of the Permanent Court of International Justice shall be requested to make this appointment.

The Norwegian Government retained the right to denounce the declaration on twelve months' notice.

The affirmative action taken by the various governments raises interesting legal questions, particularly as to the juridical character of such declarations as those made by Norway, and as to the extent of the obligation to submit to arbitration in consequence of a provision in such a national law as that of Finland.

¹⁵ C.L.146(a).1935.II.A. Annex.

¹⁶ C.L.124.1934.II.A. Annex.

¹⁷ *Ibid.*

¹⁸ C.L.186(a).1935.II.A. Annex.

¹⁹ C.L.122(a).1935.II.A. Annex II.

Several other governments replied to the Secretary General's communications. By a letter of March 6, 1934,²⁰ the Estonian Government expressed a willingness to accord to the Bank "the privileges contained in Article 10 of the Hague Agreement," but no further action seems to have been taken. On the other hand, two governments expressed an inability to give effect to the recommendation adopted at London. On November 10, 1933, the Government of the United States of America stated²¹ that as Article 10 of the Hague Agreement "provides, among other things, that gold or currency belonging to the Bank . . . should be immune from prohibition or restriction," executive orders in effect in the United States would not permit the grant of such immunity; under the executive order of August 28, 1933,²² it was stated, gold earmarked before April 20, 1933, "would be exempt from restrictions and would be exportable," but "no earmarking of gold after that date or export of gold earmarked after that date is permissible." However, the United States expressed a willingness to reconsider its position "when and as circumstances may change." On November 22, 1933, the Government of Siam stated²³ that, as Siam had no central Bank, the question did not arise for Siam.

Meanwhile, a more formal step has been taken by certain of the parties to the Hague Agreement and Switzerland. On July 30, 1936, a protocol was opened for signature at Brussels,²⁴ with respect to the immunities of the Bank. The preamble to this protocol states that the second paragraph of Article 10 of the Hague Agreement and paragraph (called article) 10 of the Constituent Charter "only imperfectly express the intention of the Contracting Parties and are liable to give rise to differences of interpretation"; it declares the purpose "to define the scope of the said articles and to substitute for the terms employed expressions which are clearer and more capable of assuring to the operations of the Bank for International Settlements the immunities which are indispensable to the accomplishment of its task." To this end, Article 1 of the protocol provides:

The Bank for International Settlements, its property and assets, as well as all the property and assets which are or will be entrusted to it, whether coin or other fungible goods, gold bullion, silver or any other metal, precious objects, securities or any other objects the deposit of which is admissible in accordance with banking practice, are exempt from the provisions or measures referred to in paragraph 2 of Article X of the Agreement with Germany and in Article X of the Constituent Charter consecutive to the Convention with Switzerland of the 20th January, 1930.

The property and assets of third parties, held by any other institution or person, on the instructions, in the name or for the account of the Bank for International Settlements, shall be considered as entrusted to the Bank for International Settlements and as enjoying the immunities laid down by the articles above mentioned by the same right as

²⁰ C.L.124.1934.II.A. Annex.

²¹ *Ibid.*

²² U. S. Code (1934 ed.), p. 363.

²³ C.L.124.1934.II.A. Annex.

²⁴ British Treaty Series, No. 25 (1937), Cmd. 5489.

the property and assets which the Bank for International Settlements holds for the account of others, in the premises set apart for this purpose by the Bank, its branches or agencies.

The Brussels Protocol, to which there were some thirteen signatories, came into force for Belgium on July 30, 1936, for Yugoslavia on September 18, 1936, for New Zealand on December 5, 1936, and for the Union of South Africa on December 21, 1936; and ratifications of the Protocol have been deposited at Brussels by France (April 3, 1937), and by Great Britain (April 6, 1937).

MANLEY O. HUDSON

CURRENT NOTES

THE UNITED STATES AND INTERNATIONAL LABOR CONVENTIONS

Acceptance by the United States, on August 20, 1934, of membership in the International Labor Organization was the occasion for some speculation as to the procedure to be followed in this country with respect to draft conventions and recommendations adopted by the International Labor Conference, and more particularly as to what was, under the United States Constitution, the "competent authority" to which member states are bound to submit such conventions and recommendations "for the enactment of legislation or other action."¹ The opinion was ventured at the time, that the United States was not "a federal State, the power of which to enter into conventions on labor matters is limited," and that therefore it could not avail itself of the right given to such states by paragraph 9 of Article 405 of the Constitution of the International Labor Organization to treat draft conventions as recommendations only. Further, with respect to the question of the "competent authority" in the United States for the consideration of both draft conventions and recommendations, it was suggested that it was not the treaty-making authority; that in the case of draft conventions that authority might be Congress, and in the case of recommendations it might be Congress, or Congress and the State legislatures, depending upon the subject-matter dealt with in the recommendation. In any event, it was pointed out that, "with our peculiar allocation of legislative power as between Congress and the State legislatures, time may be needed for a practice to be worked out as to the manner of fulfilment of our obligation as a member of the Organization."² In view of these comments it may be of some interest to note the procedure which has in fact been followed by the United States in the case of the draft conventions and recommendations adopted at the nineteenth and twentieth sessions of the International Labor Conference.

By a circular letter dated September 21, 1935, the Secretary-General of the League of Nations transmitted to the Secretary of State certified copies of the five draft conventions and one recommendation adopted by the Con-

¹ By Art. 405, par. 5, of the Constitution of the International Labor Organization "Each of the Members undertakes that it will . . . bring the recommendation or draft convention before the authority or authorities within whose competence the matter lies, for the enactment of legislation or other action." Par. 7 of the same article provides: "In the case of a draft convention, the Member will, if it obtains the consent of the authority or authorities within whose competence the matter lies, communicate the formal ratification of the convention to the Secretary-General and will take such action as may be necessary to make effective the provisions of such convention."

² M. O. Hudson, "The Membership of the United States in the International Labor Organization," this JOURNAL, Vol. 28 (1934), p. 669 ff., esp.: pp. 677-681. See also W. L. Tayler, *Federal States and Labor Treaties* (New York, 1935), Ch. V.

ference at its nineteenth session held in June, 1935.³ On June 18, 1936, some nine months later and only two days before the end of the second session of the seventy-fourth Congress, the President sent to both houses of the Congress a message accompanied by copies of the above-mentioned draft conventions and recommendation, "to which the attention of the Congress was invited."⁴ The message, which was addressed "To the Congress of the United States of America," after reciting the circumstances of the acceptance by the President of membership in the International Labor Organization on behalf of the Government of the United States, stated that representatives of the Government and of American employers and American labor had attended the nineteenth session of the International Labor Conference, and listed the conventions and the recommendation adopted by that conference. It then continued:

In becoming a member of the organization and subscribing to its constitution this Government accepted the following undertaking in regard to such draft conventions and recommendations:

"Each of the Members undertakes that it will, within the period of 1 year at most from the closing of the session of the conference, or if it is impossible owing to exceptional circumstances to do so within the period of 1 year, then at the earliest practicable moment and in no case later than 18 months from the closing of the session of the conference, bring the recommendation or draft convention before the authority or authorities within whose competence the matter lies, for the enactment of legislation or other action. (Art. 19 (405), par. 5, Constitution of the International Labor Organization.)

"In the case of a federal state, the power of which to enter into conventions on labor matters is subject to limitations, it shall be in the discretion of that government to treat a draft convention to which such limitations apply as a recommendation only, and the provisions of this article with respect to recommendations shall apply in such case. (Art. 19 (405), par. 9, Constitution of the International Labor Organization.)"

In accordance with the foregoing undertaking the above-named five draft conventions and one recommendation are herewith submitted to the Congress with the accompanying report of the Secretary of State, to which the attention of the Congress is invited.

The Senate, without discussion, referred the message with its accompanying papers to its Committee on Foreign Relations, and the House in like manner referred them to its Committee on Foreign Affairs. Nothing more was

³ U. S. Treaty Information, Bulletin No. 73 (Oct., 1935), p. 15. The conventions and the recommendation were: Draft convention concerning the employment of women on underground work in mines of all kinds; Draft convention limiting hours of work in coal mines (revised 1935); Draft convention concerning the reduction of hours of work to 40 a week; Draft convention concerning the establishment of an international scheme for the maintenance of rights under invalidity, old-age, and widows and orphans' insurance; Draft convention concerning the reduction of hours of work in glass-bottle works; Recommendation concerning unemployment among young persons.

⁴ U. S. Congressional Record, 74th Cong., 2d Sess., Vol. 80, pt. 9, pp. 9925, 9999.

heard of them between that time and the adjournment of the seventy-fourth Congress on June 20, 1935.

Under date of August 21, 1936, the Secretary-General of the League notified the Secretary of State of the three draft conventions and two recommendations which had been adopted at the twentieth session of the Labor Conference in June of that year.⁵ On June 28, 1937, the President, by a message identical in form with that described above,⁶ called the attention of the Congress to those instruments and added:

I wish particularly to call to the attention of the Congress the draft convention (No. 51), concerning the reduction of hours of work on public works, and recommend that action be taken by the Congress on this draft convention at its earliest convenience.

Again the two houses, without discussion, referred the papers to their respective committees on foreign affairs, and again no more was heard of the matter between that time and the end of the session on August 21, 1937.⁷

It cannot be said, on the basis of the above facts, that all possible questions concerning the correct procedure in the United States with respect to draft conventions and recommendations of the I.L.O. have been entirely cleared up. It does, however, appear that, so far at least, the Congress has been regarded as the "competent authority" in the United States to which both draft conventions and recommendations shall be submitted. There appears to have been no instance of a reference of any such instruments to State legislatures, although some of the recommendations might well be regarded as dealing with matters which fall within the scope of State rather than national authority. On the other hand, the inclusion in the President's messages to Congress of the provisions of Article 405, paragraph 9, of the constitution of the I.L.O. certainly suggests the possibility that, despite what appear to be strong arguments to the contrary, the Government still regards that article as applicable to the United States. There is, however, no specific statement to that effect and no express suggestion that the Congress should regard draft conventions as recommendations only. Neither is there anything in the procedure followed so far to indicate precisely the nature of the action which Congress is expected to take, either with respect

⁵ U. S. Treaty Information, Bulletin No. 84 (Sept., 1936), p. 17. The conventions and recommendations were: Draft convention concerning the regulation of certain special systems of recruiting workers; Draft convention concerning the reduction of hours of work on public works; Draft convention concerning annual holidays with pay; Recommendation concerning the progressive elimination of recruiting; Recommendation concerning annual holidays with pay.

⁶ U. S. Congressional Record (daily edition), 75th Cong., 1st Sess., Vol. 81, No. 121, pp. 8333, 8395.

⁷ On July 28 Senator Pittman, Chairman of the Senate Committee on Foreign Relations, asked that the President's "communication, together with the English text of the accompanying papers, be printed as a Senate document." No objection was made, and it was so ordered. *Ibid.*, Vol. 81, No. 143, p. 10017.

to draft conventions or recommendations. Indeed, submission of such instruments to Congress at or near the end of a session when already crowded calendars have clearly precluded any discussion has resulted in there being no action whatsoever taken by Congress. Whether or not this latter feature of the Government's procedure has been intentional is not evident; it may be doubted, however, whether submission of the work of the Labor Conference to the "competent authority" under such circumstances constitutes compliance with the spirit, even though it may with the letter, of the constitution of the I.L.O.⁸ There may also be reason to question whether, as within Congress, reference of draft conventions and recommendations from the International Labor Conference to the committees on foreign affairs of the respective houses is altogether proper or desirable. If it is legislative action by Congress that is contemplated, it would seem that, despite the fact that certain of the instruments adopted by the Labor Conference happen to be couched in the form of international treaties, these instruments might nevertheless better be referred to the committees more particularly concerned with labor matters.

Perhaps at this point it is safe only to conclude that American practice regarding international labor conventions need not necessarily be regarded as having already become settled, and that perhaps still more "time may be needed for a practice to be worked out as to the manner of fulfilment of our obligation as a member of the Organization."⁹

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AMERICAN FILIBUSTERING AND THE BRITISH NAVY: A CARIBBEAN ANALOGUE OF
MEDITERRANEAN "PIRACY"

The experiences of the British Navy with American filibusters and their recruits in the Caribbean Sea during the middle decade of the last century afford a striking precedent for the scene today in the western Mediterranean, where foreign "volunteers" have for some months been filtering into Spain. In the former case, as in the latter, Great Britain was concerned, and accordingly she took stock of her rights under international law.

Briefly the facts regarding filibustering are as follows: From May, 1855, to the midsummer of 1860 there was a succession of lawless expeditions from the Atlantic and Gulf ports of the United States against the Republics of Nicaragua and Honduras. The largest of these was captained by William Walker, the "grey-eyed man of destiny," who, in the summer of 1855, joined

⁸ As distinguished from municipal action taken on the product of the Labor Conferences, the international participation and coöperation of the United States in the various activities of the I.L.O. seem to have been all that could be desired. See, *e.g.*, "The United States and World Organization During 1936," International Conciliation No. 331 (June, 1937), pp. 597-609; also *ibid.*, No. 321 (June, 1936), pp. 318-323.

⁹ See note 2, *supra*.

in a civil war in Nicaragua and made himself the uncrowned king of that country. During the ensuing year Walker received recruits who were transported free of charge by the Accessory Transit Company of New York under the guise of peaceful travelers. Most of these reinforcements came from New York and New Orleans, and entered Nicaragua by way of the port of Greytown at the mouth of the San Juan River. Walker was overthrown in May, 1857, but, after returning to the United States, escaped from New Orleans in November of the same year and landed at Punta Arenas, a point at the mouth of the San Juan opposite Greytown, only to be arrested by Commodore Paulding, U.S.N., who landed four hundred men for the purpose. Walker was allowed to return to the United States on a private vessel with the understanding that he would submit to the authorities upon arrival. The Buchanan administration refused to arrest him, however, but instead censored his captor publicly.

The filibustering saga was brought to a close on August 19, 1860, when H.M.S. *Icarus* captured Walker off the coast of Honduras and delivered him over to the Honduran authorities. But in addition to those expeditions which actually had arrived, there were rumors of others which played an equally important part in influencing the British Foreign Office and Admiralty.¹

The administrations of Franklin Pierce and James Buchanan assumed little real responsibility for the stoppage and suppression of the filibusters. Filibustering was publicly branded as illegal, but few expeditions were stopped at American ports, and until the episode of Commodore Paulding in December, 1857, American warships in the Caribbean made no move whatever to interfere with them either on the high seas or in Greytown harbor. Finally in November, 1858, apparently spurred by British determination to put an end to filibustering, American warships were sent to Greytown in force and their commanders permitted discretion to interfere.² Filibustering was so popular with the country, particularly in the South and seaport towns, that not until after repeated failures by Walker did the Government dare to take vigorous measures against him.³

The principal naval patrol in the Caribbean was the British West Indian squadron, and the interests of Great Britain with respect to the filibusters were several. In the first place, both Walker himself on several occasions, and large bands of reinforcements, as well as supplies, passed through Mosquito territory, which had been formally converted into a British protectorate

¹ W. O. Scroggs, *Filibusters and Financiers* (New York, 1916), is the standard account.

² Navy Department, Confidential Letters, 1857-1861: Toucey to McIntosh, Nov. 17, 1858. I am indebted to the late Professor E. D. Adams for this note.

³ There is some evidence, which I have been unable to confirm, that the Pierce Administration for awhile connived at filibustering. No proclamation was made against it until December, 1855, although the expeditions had actually left the United States the preceding spring. Furthermore, there appears to have been a mysterious connection between the Accessory Transit Company and certain members of Pierce's cabinet, if not the President himself.

in 1845.⁴ The fact that so many of the recruits were disguised as peaceful travelers en route to California made detection especially difficult. In the second place, the turmoil into which the filibusters threw the Central American States and the interference which they wrought with the Nicaraguan transit route rendered the implementing of the Clayton-Bulwer Treaty of 1850 with the United States impossible.⁵ This task all British governments since the treaty was signed had assumed in vain. Thirdly, the filibusters menaced Mosquito territory itself. There was a rumor in 1855 that one Henry L. Kinney, a filibuster from Philadelphia, was plotting to capture and colonize Mosquito. And when Walker came into command in Nicaragua, it was reported that he was planning to attack Mosquito from the land side. Finally, there were property rights of British subjects in Greytown and throughout Central America to consider.

Acting upon rumor, the British Government asked for and obtained from its Law Officers on February 15, 1854, answers to the following questions: (1) how far would interference with filibustering be justifiable on the part of nations not immediately concerned; (2) what course should be pursued toward piratical vessels sailing under British or other flags?

The answers may be paraphrased as follows: (1) It is the duty of all friendly nations to give notice to any nation which is about to become the object of unlawful attack, and to use every effort to induce the United States Government to enforce its own neutrality laws, and obtain from it a formal disavowal of any connivance therein and of all protection or favor to those engaged in it. (2) In all cases of revolt or civil war or of unauthorized enterprises by foreigners, a friendly state will be justified in ordering its officers to render all the good offices and aid within their power to the constituted authorities, such as conveying troops and stores, communicating intelligence, and lending arms and munitions of war. But, as a general rule, the military or naval forces of friendly states not immediately concerned should not actually and directly attack, or engage any but pirates and banditti. (3) With respect to piratical vessels, when reasonable causes for suspicion exist, British warships may compel such ships to stop on the high seas and exercise the right of visit on board such ships, but they can only detain and take possession of them at their peril. (4) Where there is any cause of suspicion of the intentions or designs of any ship, whether on the high seas or within foreign jurisdiction, sailing under a recognized flag and with regular papers, she should be closely watched and

⁴ R. W. Van Alstyne, "The Central American Policy of Lord Palmerston, 1846-1848," *Hispanic American Historical Review*, XVI (Aug., 1936), 339-359. The Clayton-Bulwer Treaty of April 19, 1850, with the United States did not alter the legal status of the protectorate. Law Officers' Reports: America, 1846-1853. F.O. 83/2208 (British Public Record Office).

⁵ R. W. Van Alstyne, "Anglo-American Relations, 1853-1857. British Statesmen on the Clayton-Bulwer Treaty and American Expansion," *American Historical Review*, XLII (April, 1937), 491-500.

followed by British warships, which may give information to the authorities of the place against which her passengers may be suspected of hostile designs.⁶

It will be noted that the Law Officers side-stepped the question whether filibusters were pirates, and found no right to interfere with them on the high seas. The Admiralty assumed none. But the British naval commander at Greytown was told to watch all ships with emigrants arriving from the United States, and, unless actual violence occurred at Greytown, not to interfere with the landing of any person or company beyond making a written protest and referring the matter to the Admiralty for further consideration.⁷ In the *Orizaba* case these orders were applied. The *Orizaba*, an American ship, arrived in Greytown harbor on April 16, 1856, with 500 passengers booked for California. Captain Tarleton, commander of a British warship in the harbor, received information that the passengers were filibusters. He thereupon sent an armed boat temporarily to prevent the passengers from going up the river or from landing in the town, and went himself on board the *Orizaba* at the invitation of the captain to inspect the passenger list. He concluded that he had been misinformed, and allowed the passengers to proceed.⁸

In December, 1857, Lord Napier, the British Minister at Washington, learning of Walker's escape from New Orleans, sent a communication to the British commander at Greytown urging him to interfere with the expedition either with or without the coöperation of the American commander, and prevent it by force from going up the river.⁹ When Napier's report of his action reached the Foreign Office, however, an order was promptly sent out to countermand it, largely at the instance of Lord Palmerston, the Prime Minister. In a private letter to the Foreign Secretary, Palmerston succinctly summed up the difficulties as follows:

But suppose we were to interfere and to forbid Walker to go up, and suppose he persisted in trying to do so, and we were obliged to use Force, and half a Dozen Yankee Free Booters were to be killed, what would be the consequence? Buchanan as President has stigmatized some of his own Citizens as Criminals but Criminals by American Law, and not as Criminals *Hostes humani generis* out of the Pale of Law—and he would probably turn upon us and say that we had no Right to shoot American citizens, merely because he had declared that they had violated American laws or even international law. They were American Citizens still, and answerable only to the government to which they owed allegiance, or to the government whose country they had invaded, but that we had no jurisdiction over them, and no Right to put them to Death.¹⁰

From this policy of extreme circumspection the Derby Ministry departed in October, 1858. A special envoy, Sir William Ouseley, had meanwhile been sent to Nicaragua to arrange with that republic for the termination of the

⁶ Law Officers' Reports: America, 1854-1855. F.O. 83/2209.

⁷ British Legation Archives, America (F.O. 115/153). Public Record Office.

⁸ *Ibid.*, F.O. 115/165.

⁹ Napier to Clarendon, No. 284, Dec. 22, 1857. F.O. 5/675.

¹⁰ Palmerston to Clarendon, Jan. 6, 1858. Clarendon Papers.

Mosquito protectorate, and it resolved to use his presence as the pretext for taking forcible measures against any filibusters who might land at Greytown.¹¹ The real ground for this proposed interference was the need to preserve the general peace of Central America. The British Government asked and secured coöperation from French warships, and it resolved to ignore the United States, merely informing the Administration of its determination. Orders were dispatched to the commander of the squadron at Greytown to arrange for a garrison of Nicaraguan and Costa Rican soldiers at Punta Arenas, and to promise it armed assistance with the first overt act of hostility or unmistakable appearance of danger.¹² Thus intervention was to be "arranged" with Costa Rica and Nicaragua. That it never had to be carried out, since no more filibusters arrived at Greytown, does not alter the importance of the British Government's decision.

Filibustering was a symptom of American popular restlessness and aggressiveness in the fifties. It was carried on on a large scale from American ports against such widely separated places as the Hawaiian Islands, northern Mexico and Lower California, and Cuba. In all these areas it strained Anglo-American relations, but in none so much as Nicaragua. There British interests were most directly affected. But the anomaly of Walker's status, and the uncertain effect which interference with him would have on relations with the United States, combined with British difficulties in the Crimean War to dictate an extreme policy of caution.

Filibustering also helped to block a settlement of the differences over the Clayton-Bulwer Treaty, which was the British Government's program for peace with this country in Central America and indirectly in the Caribbean. In more senses than one the Caribbean Sea was at that time the Mediterranean of the Western Hemisphere.

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THE HANNEVIG CASE

In 1917, after our entry into the World War, the United States Government requisitioned certain ship construction contracts and shipyards belonging to companies incorporated in the United States. After the war these companies went into receivership and were liquidated in 1921. Six years later, in 1927, and upon several occasions since, the Norwegian Government has presented an international claim to the Department of State, on behalf of one Christoffer Hannevig, contending that Hannevig, who allegedly held a substantial interest in these corporations, suffered enormous damages by this war-time

¹¹ Malmesbury to Napier, No. 182, Nov. 26, 1858. F.O. 5/689.

¹² *Ibid.*, No. 133, Confidential, Oct. 13, 1858; No. 160, Nov. 3, 1858; No. 171, Nov. 13, 1858, Legation Archives, America, F.O. 115/191, 192; Napier to Malmesbury, No. 272, Nov. 20, 1858, F.O. 5/694.

action of the United States Government. The United States, in its turn, has "steadfastly maintained that the claim was absolutely without merit" as "complete settlements of all claims on that account were made with the receiver of the corporations in question in 1921."¹ Until 1937 the United States took the position that Hannevig should have exhausted his local remedies by taking his case to the United States Court of Claims before the Norwegian Government initiated international action.

During the early spring of 1937 the Norwegian Government renewed its efforts on behalf of Hannevig, sending a formal note to the Department on March 22 and making "several earnest personal appeals", in view of which the United States has agreed to waive, upon certain conditions, the general requirement of international law that the local remedies be exhausted before an international settlement takes place. It did this "in the interest of amicable relations between the two Governments," as an "evidence that it is not now and has not been the purpose of this Government to refuse to adopt any reasonable method of resolving our differences of view," and in order to be perfectly fair to Hannevig.

The earlier diplomatic correspondence and discussions had been unsatisfactory to the Department. The case had been "pressed on the basis of varying generalizations." The Department felt a need for "crystallizing the factual and legal issues of the case." Nevertheless, when the Norwegian Government asked to have the case submitted forthwith to an impartial "adjudication", the Department was eager to make another attempt to settle the matter by "instruments of diplomacy" before incurring the expense of a special court proceeding. But the instruments of diplomacy the Department had in mind were not those of more correspondence and discussion in the usual form. Instead it proposed, in a note of June 18, 1937:

First. Within six months from the date of the acceptance of this proposal by the Government of Norway, it shall present to the Government of the United States a Memorial, or statement of the claim, in which shall be set forth, in a clear, categorical and full manner:

- (a) the precise items of alleged loss or damage composing the claim, as they are finally conceived by the Norwegian Government to be, indicating definitely the amount of each separate item;
- (b) the facts alleged in support of each such item of the claim;
- (c) the principles of international law upon which each item of the claim is alleged to rest.

Such Memorial shall be accompanied by all the evidence upon which the claim is considered to be based, it being clearly understood that no further evidence may be injected into the case, in support of the claim, either during the stage of its diplomatic consideration or during its possible adjudication.

Second. Within six months from the date of receipt by the Department of State of such Memorial, it will present to the Norwegian Gov-

¹ Dept. of State Press Releases, June 30, 1937, Vol. XVII, No. 405, pp. 4-6. Quoted matter herein not otherwise cited is taken from this press release.

ernment an Answer to the Memorial, in which shall be set out, in a similarly clear, categorical and full manner, the defenses of the United States to each item of the claim, the facts upon which such defenses rest and the principles of international law relied upon in each instance. To such Answer there shall be attached all the evidence upon which the defense of the case shall rest and no further evidence shall be filed in defense, either during the stage of diplomatic consideration or during possible adjudication.

Third. With all issues of fact and law thus defined, the Norwegian Government shall, within four months from the date of the delivery of the Answer, file with the Government of the United States a written Brief containing all such factual and legal contentions as it may desire to make in support of the claim.

Fourth. Within four months from the date of the receipt of such Brief, the Government of the United States shall file a Reply Brief containing all such factual and legal contentions as it may desire to make in defense of the claim.

Fifth. In the event that the two Governments shall be unable to agree upon a disposition of the case within the six months next succeeding the delivery of the Reply Brief of the United States, the pleadings thus exchanged may be referred to adjudication, it being clearly understood, however, that in no event shall the issues of the case, either factual or legal, or the contentions of either party, as thus submitted to diplomatic adjustment, be changed in character or the written record above described augmented, in the event the matter is referred to adjudication.

This new "diplomatic" method should be of particular interest to the readers of this JOURNAL who have followed the recent trends in the procedure, not of diplomacy, but of international arbitration, especially those reflected in the recommendations in the Hunt report of the Panamanian arbitration of 1932-1933² and the methods since applied in the 1934-1937 stage of the General Claims Arbitration between the Governments of the United States and the United Mexican States, under the Protocol of April 24, 1934, relative to claims presented to the General Claims Commission between the United States and the United Mexican States, under the Convention of September 8, 1923.³ A number of forward steps have been proposed in the Hannevig case which may have far-reaching implications for the future of both diplomacy and international arbitration.

In general there is a similarity in the diplomatic communication of June 18, 1934, to the modern international arbitral procedure contained in the Protocol of April 24, 1934, but the procedure proposed in the Hannevig note goes beyond it. In the first place it is apparent from the foregoing excerpt from the note that if the Norwegian Government accepts the proposal as made, the case will have been fully prepared for court consideration while still in

² Report of the Agent for the United States, American and Panamanian General Claims Arbitration (1934), pp. 3-29.

³ U. S. Executive Agreement Series, No. 57, this JOURNAL, Supp., p. 57; Convention of Sept. 8, 1923, U. S. Treaty Series, No. 678, this JOURNAL, Supp., Vol. 18 (1924), p. 147.

the diplomatic stage.⁴ This, as the Department recognized, is in "the interest of economy of both time and funds." Secondly, no provision is made for the filing of rebuttal evidence to the evidence of the United States submitted with the Answer. This provision has made a second step forward from the earlier general practice, which permitted evidence to be introduced upon the initiative of an Agent at almost any stage of the proceedings, even during oral argument.⁵ The first step was made in the procedure adopted in Article Sixth (d) of the 1934 Protocol of the General Mexican Arbitration which provided that evidence in reply to evidence contained in the Answer could be filed with the Brief, but only then, and provided that it was "strictly limited to evidence in rebuttal." Even in this event "the alleged justification for the filing thereof" was to be "explained at the beginning of the Brief."⁶

While it is clear that international tribunals should not strait-jacket themselves with the Anglo-Saxon common law rules of evidence, it is equally apparent that Agents in international arbitrations should not withhold material evidence until a time when the opposing party has no opportunity to impeach it. Such action has been one of the unfortunate abuses in international litigation. If the international court, as distinguished from the Agent, requests, upon its own initiative, that further evidence in support of allegations be adduced, it is not so objectionable, so long as an opportunity to rebut it is afforded to the other party.⁷ Yet, while such a practice brings about no unwarranted element of surprise, it still puts a premium upon an inadequate preparation of the case at the start.

⁴ On Nov. 22, 1937, the Dept. of State advised the writer that "while the Norwegian Government has now accepted, in principle, the proposed procedure outlined in the Secretary's note of June 18, it has suggested several modifications thereof which will doubtless become the subject of further diplomatic negotiations before an agreement is definitely concluded."

⁵ Judge Huber stated the general rule in the Palmas Island Arbitration as follows: "However desirable it may be that evidence should be produced as complete and at as early a stage as possible, it would seem to be contrary to the broad principles applied in international arbitrations to exclude *a limine*, except under the explicit terms of a conventional rule, every allegation made by a Party as irrelevant, if it is not supported by evidence, and to exclude evidence relating to such allegations from being produced at a later stage of the procedure." (Award, p. 19; this JOURNAL, Vol. 22 (1928), pp. 867, 878.)

⁶ Article Sixth (d). It reads in full: "With the Memorial the claimant Government shall file all the evidence on which it intends to rely. With the Answer the respondent Government shall file all the evidence upon which it intends to rely. No further evidence shall be filed by either side except such evidence, with the Brief, as rebuts evidence filed with the Answer. Such evidence shall be strictly limited to evidence in rebuttal and there shall be explained at the beginning of the Brief the alleged justification for the filing thereof. If the other side desires to object to such filing, its views may be set forth in the beginning of the Reply Brief, and the Commissioners, or the Umpire, as the case may require, shall decide the point, and if it is decided that the evidence is not in rebuttal to evidence filed with the Answer, the additional evidence shall be entirely disregarded in considering the merits of the claim."

"The Commissioners may at any time order the production of further evidence."

⁷ Under the 1934 General Mexican Protocol the Commissioners could order the production of further evidence at any time. Article Sixth (d).

The desirability of requiring all evidence to be produced at the beginning of the case, as is proposed in the Hannevig note, has been brought out by Philip Jessup. He has made the point that where an arbitrator requests further evidence, after the pleadings and briefs have been filed, the judge is in effect asking the government to make good the deficiencies of its own case.⁸ Bert L. Hunt has made the following observations on this matter:

Issues of law arise from properly proven facts. The essential facts should therefore be established before an effort is made definitely to apply the law thereto, and, if the basic facts are to be changed or modified after the development of the law, not only is much time wasted in such development but the real issues are thereby confused and the work of the tribunal made more difficult. Moreover, it is not inconceivable that, on occasion, vital evidence may be withheld until the time for the collection of counter evidence shall have passed. . . . It is much more important that all evidence be introduced with the earliest pleadings in arbitral cases because, unlike in domestic proceedings, the matter of obtaining counter evidence is often a very difficult and dilatory one, and consequently the development of new issues of fact and law at late stages of the arbitral pleadings unduly prolongs the proceedings. It is believed that future conventions should contain stipulations which would allow the introduction of new evidence, after the issues of fact have first been shaped, only after a showing that its introduction is necessary to a proper adjudication of the case and also after a showing of real inability to have produced it before. Under no circumstances should it be admitted without adequate allowance of time to permit the opposite party to produce counter evidence.⁹

Notwithstanding the Continental viewpoint, there is much in favor of Jessup's and Hunt's positions. The function of the court is to pass judgment. It should not be burdened with the development or making out of the case. Counsel should aid the tribunal in doing justice, not the reverse; and the advantages of the modern private practice of "marked" pleadings is not to be gainsaid. The function of Agents in international adjudications in this matter is as apparent as that of lawyers in private practice. Governments should select Agents who can be relied upon to exhaust the sources of available evidence at the start. Certainly they should gather all the available evidence which tends to support their own case. In the Hannevig proposal the parties are put upon notice of such a procedure. No objection to it would thus seem valid. Anglo-Saxon lawyers will see in this innovation an important forward step.

A third interesting feature of the Hannevig note lies in the fact that it is not assumed that a single principle of international law will be controlling of the whole case. It is made an express condition that both the facts and the relevant principles of international law upon which "each item" of the claim is alleged to rest, shall be set forth in a clear, categorical, and full manner and the United States will set up its defenses upon the same precise bases.

⁸ "The Palmas Island Arbitration," this JOURNAL, *loc. cit.*, pp. 735, 751.

⁹ Hunt, *op cit.*, pp. 22-23.

Many claims involve a complicated set of losses or damages not all of which can be traced proximately to a single internationally illegal act. A lack of analysis in the pleadings or briefs of the causal relationship between such an illegal act and the damages resulting directly therefrom tends to create confusion on the part of the tribunal. The Hannevig innovation on this point should be of distinct advantage in assessing the damages, if responsibility for some or all parts of the claim are admitted or decided. Past practice, which has not usually made such a specific requirement, may account, to some extent, for the unsatisfactory state of the rules of damages in international law.

A fourth point worthy of note in the Hannevig communication is that the Department apparently believes that "an appropriate disposition of the case by the instruments of diplomacy, if possible, or by adjudication, if necessary" can be made by pleading and arguing the cases solely upon principles of international law. The Department did not add the often-used phrase, "justice and equity". While it cannot be said that the phrase "justice and equity" has to any degree been interpreted as allowing arbitrators to decide *ex aequo et bono*, but has by and large been interpreted in the jurisprudential sense of "justice under law",¹⁰ its elimination would seem to be a sound innovation, as the idea of justice under law is as clear an implication in international jurisprudence as in that of private law.

The United States conditioned its proposal upon the Norwegian Government's agreement to settle a United States claim against Norway on behalf of the George R. Jones Company, Incorporated, by the same procedure as that proposed in the Hannevig case. The Jones claim dates back to 1920. It is for alleged heavy losses suffered as a result of difficulties in Norway connected with a large shipment of United States made shoes, sent there by the Jones Company. If it cannot be settled by the new diplomatic procedure, it will be referred "to a sole neutral Umpire to be agreed upon by the two Governments at the time of such reference."

The main significance of the new diplomatic method lies in the seemingly warranted inference that the Department has recognized that international claims can best be handled procedurally by application of legal methods, instead of applying the older diplomatic ones of correspondence and discussion. It represents a distinct advance in adjective international law which has lagged far behind the growth of the substantive law. It is a second important step since the Panamanian Arbitration of 1932-1933¹¹ toward a modern procedure in the settlement of international claims. If practiced generally it should aid those who must make such decisions to do so with a minimum of time and expense and, at the same time, avoid international irritation. In such a system determinations made by diplomats based

¹⁰ See Lauterpacht, *Private Law Sources and Analogies of International Law*, pp. 65-67, and cases there cited.

¹¹ The first step being the one referred to in the 1934 General Mexican Protocol of 1934.

upon pleadings and briefs would seem to form valid precedents of a judicial nature for propositions of international law. Even if no formal opinions were handed down, the holding would emerge by inference from a study of the facts and decision of the case. The legal bases submitted by the winning party would have some weight, though they would not necessarily be controlling.

If the Department is instituting a new practice, it would be of value to international lawyers and tribunals generally, and doubtless to the Department too, if such pleadings and briefs, together with the diplomatic decisions, were published, say, in a Department of State series similar to its present Arbitration Series. The Arbitration Series might be enlarged to include both the arbitral and such diplomatic cases.

WILLARD BUNCE COWLES

MEMBERSHIP AND INDEBTEDNESS IN THE LEAGUE OF NATIONS

Paraguay gave notice of withdrawal from the League of Nations by a telegram acknowledged by the Secretary-General on February 25, 1935.¹ As usual in such cases, the Secretary-General's acknowledgment quoted to the Paraguayan Government the substance of Article 1, par. 3, of the Covenant, which runs that any member may withdraw after two years' notice "provided that all its international obligations and all its obligations under this Covenant shall have been fulfilled at the time of its withdrawal." When the two years were up, Paraguay was in complete financial default. Is Paraguay a member of the League?

The financial obligation of a member of the League arises out of Article 6, par. 5, of the Covenant which, since August 13, 1924, has read as follows: "The expenses of the League shall be borne by the Members of the League in the proportion decided by the Assembly." Payment of the contributions duly determined from year to year is an obligation under the Covenant. The Secretary-General has stated that "where a principal purpose of the agreement is to maintain an organization out of funds contributed by the parties, persistent failure to contribute would be a breach of a material obligation."²

When Brazil, Costa Rica, Germany and Japan withdrew from the League, each had met the obligation of contributing its quota to the budget before the expiration of the period of notice.³ Paraguay's two years' notice expired on

¹ Official Journal, 1935, 451. It is the practice of the League of Nations to date the effect of communications from the time of their receipt.

² Official Journal, 1927, 506, note.

³ Brazil's membership ended June 12, 1928, and its payment that year was for 13.07377 units of a quota of 29; Costa Rica's withdrawal coincided with the end of a budget period. Both, after withdrawal, received distributions of budget surpluses accruing during their membership. Germany's quota for the period ended October 20, 1935, amounted to 64.41643 units instead of 79 for the budget year. Japan's quota until March 27, 1935, was 13.97260 units instead of 60 for the budget year. In 1938 three withdrawals of states

February 24, 1937, according to the customary reckoning, with its financial obligations in complete default. Like several Latin American states, it had been a bad debtor for years and at the expiry of the withdrawal notice it was in default on a consolidated debt agreement, on nine whole years in arrear, and on the budget year 1937;⁴ in addition it had repaid none of its share of the Chaco Commission expenses.⁵ Paraguay was remitted 283,500 gold francs on four budgets of 1920-22 and still owes 15,370.80 gold francs on them; it has paid up only five of 19 budget assessments; it has paid 164,308 gold francs and owes 445,000 gold francs on budget and commission accounts.

The Fourth (financial) Committee of the 18th Assembly was confronted in 1937 with three aspects of the question whether a state that had not completed its financial obligations could remain a member of the League. Paraguay had allowed the withdrawal term to expire without replying to the communications of the Special Committee on Contributions in Arrear.⁶ That committee had received a request from Honduras to complete payment of its consolidated arrears (1920-34) after its withdrawal. Nicaragua, which had proposed a settlement before its notice of withdrawal, asked that its obligations be made payable by instalments after the withdrawal and that the arrangement accepted by the committee be confirmed with a reduction of debt for 1920-37

paying on the basis of single units will become effective with the following charges: Guatemala to May 14, 0.397260 unit; Honduras, to July 9, 0.520547 unit; Nicaragua, to June 26, 0.484931 unit of 24,326.55 gold francs.

⁴ On August 31, 1937, Paraguay's unpaid contributions were as follows, in gold francs:

1920-22	15,370.80
1927	17,593.24
1929	21,203.37
1930	27,553.28
1931	30,641.60
1932	32,941.19
1933	33,016.43
1934	30,432.20
1935	30,294.65
1936	28,777.10
1937	23,060.45

290,884.31

(A.28.1937.X. The amount in current Swiss francs was 411,256.35.)

⁵ The expenses of the Chaco Commission were advanced from the Working Capital Fund of the League of Nations by authority of the Council to a total of 315,000 gold francs. Bolivia repaid its moiety of 153,947.27 gold francs in three instalments in November, 1935, and January and April, 1936. (League of Nations, Audited Accounts for the 18th Financial Period (1936), 8-9 (A.3.1937.X.1).) No payments were received from Paraguay up to October, 1937. (Comment of the *rapporteur* of the Supervisory Commission in the meeting of the Assembly's Fourth Committee, Oct. 2, 1937). The advances were made by decisions of the Council for which the disputants made no request (Records of the 16th Assembly, Minutes of the Fourth Committee (Official Journal, Spl. Supp. No. 141, p. 10).

⁶ Report of the Special Committee on Contributions in Arrear (A.16.1937.X).

from 356,572.55 to 41,432.67 gold francs.⁷ The Fourth Committee on September 22 referred the three cases to the First (legal) Committee.

The Assembly had little difficulty in deciding the cases of Honduras and Nicaragua. The First Committee did not favor seeking an interpretation of the Covenant either by an advisory opinion of the Permanent Court of International Justice or by resolution of the Assembly, and contented itself with replying to the concrete questions. With relation to Honduras, the Assembly by adopting the report of the Fourth Committee permitted payment of instalments on the consolidated arrangement seventeen years after Honduras should leave the League on July 9, 1938. The Assembly granted Nicaragua a reduction of debt and decided that its withdrawal could become effective on the two years' notice (that is, on June 26, 1938), although the debt was not then paid in full.⁸ These adjustments being by agreement, only the subsequent failure to live up to them would involve the question of an international obligation under the Covenant. The provision in the arrangements that default would revive the cancelled debt would be legally enforceable after withdrawal.

The expiration of Paraguay's notice of withdrawal, its arrears and its general default made that case quite different. "Was the withdrawal effective or did this state continue to be a Member of the League and to incur liability for additional contributions until it regularized its financial position?" Mr. Limburg (Netherlands) expressed a generally accepted view in the First Committee that absurd consequences would flow from a literal interpretation of Article 1, par. 3. To say that a state must remain a member if its financial obligations had not been met was against the League's interest; a bad debtor could continue to have the advantages of membership. The most important obligations were those where default could not be redeemed, but in the case of Japan, flagrant failure to live up to such obligations was not interpreted as preventing complete withdrawal. Withdrawal would not cancel or extinguish financial obligation.⁹

The theoretical question of whether a minor failure in obligation, such as the nonpayment of contributions, was to be differentiated from a grave failure in obligation, such as that of Japan, was not further discussed. The means for enforcing payment were not discussed, but reference was made to the

⁷ The arrangement (summarized in A.16.1937.X) provides that 26,101.80 gold francs should be paid in twenty annual instalments of 1,305.10 gold francs each in 1937-56, with any default reviving the cancelled debt of 315,139.88 gold francs.

⁸ A.76.1937.X; Official Journal, 1937, p. 700. The 1935 Assembly approved this recommendation of the Special Committee on Contributions in Arrear: "When a State has made an arrangement with the approval of the Assembly for the payment of its debt by annual instalments, and punctually meets its obligations, it should be regarded as in good standing with the League" (A.15.1934.X; Records of the 16th Assembly, Minutes of the 4th Committee (Official Journal, Spl. Supp. No. 141, p. 80).)

⁹ These were the views of the Netherlands, Swedish, United Kingdom, Belgian, Soviet, Norwegian, Egyptian, Swiss and Chinese representatives.

report on that point adopted by the Council on March 9, 1927.¹⁰ The conclusion of the Council then was that the obligation to pay contributions fell under the sanction in Article 16, paragraph 4, which provides for expulsion of a member "which has violated any covenant of the League." The *rapporteur* added that mere non-execution would not lead automatically to expulsion, but the failure in payment would have to be accompanied by facts showing "the intention not to carry out the obligations arising from the Covenant."

The Bolivian representative in the First Committee on September 30 recalled that the legal settlement of the Chaco dispute between his country and Paraguay was still pending before the Chaco Peace Conference at Buenos Aires, which was an emanation of the League of Nations.¹¹ He objected to the separation of the pecuniary obligations of Paraguay from its political and legal obligations. The subcommittee's suggestion¹² that Paraguay's contribution cease when the notice for withdrawal became effective was abandoned, and the Fourth Committee was given the single statement: "The First Committee thinks that it is not desirable to give a reply at the moment to the question as put."

The Assembly took action on October 5, 1937, by adopting the decisions in the report of its Fourth Committee, which were as follows: ¹³

48. As regards the question whether Paraguay has ceased to be a Member of the League, since the expiry of the period of notice (two years from February 25, 1935), the Fourth Committee, after having received the answer of the First Committee, does not press for an interpretation of Article 1 of the Covenant.

49. It is perfectly clear, however, that Paraguay will, in all circumstances, owe the League the full amount of her arrears of contributions down to the date of her withdrawal from the League in conformity with Article 1 of the Covenant. The Supervisory Commission and the Special Committee on Contributions will no doubt take the necessary measures to deal with this part of the question.

50. On the other hand, the Fourth Committee can see no advantage, in present circumstances, in continuing to treat Paraguay as a state which is contributing to the expenses of the League. To do so would not merely introduce an element of unreality into the League budget but would also complicate the financial situation of the League.

51. The Assembly has frequently exercised its power to take special decisions with regard to the contributions of particular Members of the League, where it has thought it equitable to do so in the interests of those

¹⁰ Official Journal, 1927, 381, 505.

¹¹ Dispute between Bolivia and Paraguay. Records of the Special Session of the Assembly, 49 ("Report . . . adopted by the Assembly on November 24th 1934", Secs. 12, 13); protocol of June 12, 1935. Official Journal, 1935, 901.

¹² AI/8.1937.

¹³ Financial Questions. General Report of the Fourth Committee to the 1937 Assembly (A.76.1936.X), Official Journal, 1937, p. 700.

Members, and, on one occasion, it exercised this power in order to deal with an anomalous situation which had arisen with regard to a particular Member.¹⁴ There can be no doubt that it is entitled to exercise such a power in the interests of the League itself and of sound budgeting.

Though these decisions do not interpret the meaning of the international obligations and obligations under the Covenant which must be fulfilled before withdrawal from the League, they are not without significance. Paraguay, having exercised the prescribed method for dissociating itself from the League, is not treated "as a state which is contributing to the expenses" for the 1938 financial period, though it remains charged with the contribution (23,060.45 gold francs) for the whole of 1937. The normal expiration of its notice of withdrawal would have made it liable, if in good standing for the 1937 period, for only 15% of its single budget unit; on the date of the Assembly's decision that there was no advantage in treating Paraguay as a contributing state, 87% of the obligation had been incurred. Paraguay "in all circumstances" owes "the full amount of arrears" to the date of withdrawal "in conformity with Article 1 of the Covenant." It would seem that the "necessary measures" to secure payment of the indebtedness can be taken under the Covenant.

The notification of Paraguay on February 19, 1937,¹⁵ that its withdrawal "is now to be regarded as complete and definite" is clearly denied by the whole course of the 1937 Assembly. The fulfillment of obligations is always to be appraised more or less subjectively, and it is unlikely that the Assembly will deal with that phase of the Paraguay case unless a concrete question arises. The Chaco settlement is still pending in its territorial aspects, and in consequence the effect of the Assembly report of November 24, 1934, is not exhausted. Any member of the League would seem to possess the right to adduce the provisions of the Covenant against Paraguay until its financial obligations are discharged.

DENYS P. MYERS

¹⁴ The reference is to China, Records of the 11th Ordinary Session of the Assembly, Minutes of the 4th Committee (Official Journal, Spl. Supp. No. 88, p. 411); Records of the 12th Ordinary Session of the Assembly, Minutes of the 4th Committee (Official Journal, Spl. Supp. No. 97, p. 70); Official Journal, 1931, 1140. The anomalous situation was the use of arrear payments to meet expenses of the collaboration with China.

¹⁵ Official Journal, 1937, 260.

CHRONICLE OF INTERNATIONAL EVENTS

FOR THE PERIOD AUGUST 16–NOVEMBER 15, 1937

(Including earlier events not previously noted)

WITH REFERENCES

Abbreviations: *B. I. N.*, Bulletin of International News; *C. S. Monitor*, Christian Science Monitor; *Clunet*, Journal du droit international; *Cmd.*, Great Britain, Parliamentary papers; *Cong. Rec.*, Congressional Record; *Cur. Hist.*, Current History (New York Times); *Europe*, L'Europe Nouvelle; *Ex. Agr. Ser.*, U. S. Executive Agreement Series; *G. B. Treaty Series*, Great Britain Treaty Series; *I. L. O. B.*, International Labor Office Bulletin; *L. N. M. S.*, League of Nations Monthly Summary; *L. N. O. J.*, League of Nations Official Journal; *L. N. T. S.*, League of Nations Treaty Series; *P. A. U.*, Pan American Union Bulletin; *Press Releases*, U. S. State Department; *R. A. I.*, Revue aéronautique internationale; *T. I. B.*, Treaty Information Bulletin, U. S. State Department; *U. S. T. S.*, U. S. Treaty Series.

April, 1936

- 24 HUNGARY—POLAND. Signed at Budapest a convention regarding extradition and judicial assistance in criminal matters. *L. N. M. S.*, Sept., 1937, p. 208.

October, 1936

- 5 GREECE—POLAND. Signed at Athens an additional agreement to the convention of Apr. 22, 1931, relating to the operation of regular air lines. *L. N. M. S.*, Sept., 1937, p. 207.
- 30 PORTUGAL—SOUTH AFRICA. Exchanged notes regarding identity documents for aircraft personnel. Texts: *G. B. Treaty Series*, No. 37 (1937), *Cmd.* 5565.

November, 1936

- 5 CANADA—FRANCE. Exchanged ratifications of the commerce and navigation convention, signed at Ottawa, May 12, 1933. Text of convention: *G. B. Treaty Series* No. 43 (1937), *Cmd.* 5581.

December, 1936

- 5 GREAT BRITAIN—ROMANIA. Signed agreement at Belgrade, supplementary to the payments agreement of May 2, 1936. Text: *Rumania*, No. 1 (1937), *Cmd.* 5470. Texts of both agreements: *G. B. Treaty Series*, No. 45 (1937), *Cmd.* 5587.
- 28 to January 6, 1937 BELGIUM—IRISH FREE STATE. Exchanged notes regarding commercial relations. Texts: *G. B. Treaty Series*, No. 35 (1937), *Cmd.* 5562.

January, 1937

- 23 GREAT BRITAIN—LUXEMBURG. Signed at Luxemburg extradition treaty, supplementary to the treaty of Nov. 24, 1880. *Luxemburg*, No. 1 (1937), *Cmd.* 5416.

March, 1937

- 25 GREAT BRITAIN—JAPAN. Exchanged notes at Tokyo, regarding the termination of perpetual leases in Japan. Texts: *G. B. Treaty Series*, No. 29 (1937), *Cmd.* 5548.

April, 1937

- 17 CZECHOSLOVAKIA—FINLAND. Signed at Prague additional protocol to the convention of commerce and navigation. *L. N. M. S.*, Aug., 1937, p. 181.
- 24 BELGIUM—FRANCE—GREAT BRITAIN. Exchanged documents at Brussels concerning the international position of Belgium. *Belgium*, No. 1 (1937), *Cmd.* 5437.

- 24 IRAQ—SYRIA. Signed "good neighbor" agreement at Damascus. *Revue internationale française du droit des gens* (Paris), June–Sept., 1937, p. 73.

May, 1937

- 12/28 FINLAND—LATVIA. Signed convention regarding postal relations at Helsinki and Riga. *L. N. M. S.*, Aug., 1937, p. 181.
- 21 GREAT BRITAIN—THE NETHERLANDS. Signed at The Hague a convention supplementary to that of May 31, 1932, to facilitate the conduct of legal proceedings. *Netherlands*, No. 1 (1937), *Cmd.* 5490.
- 21 to June 8 RADIO CONSULTING COMMITTEE. The fourth meeting of the international committee (C. C. I. R.) was held in Bucharest. *T. I. B.*, Aug., 1937, pp. 27–28.
- 22 FRANCE—POLAND. Signed treaty of commerce and navigation, and payments accord. *Revue internationale française du droit des gens* (Paris), June–Sept., 1937, p. 68.
- 26 FINLAND—FRANCE. Signed at Paris an agreement for facilitating the admission of student employees into the two countries. *L. N. M. S.*, Aug., 1937, p. 181.
- 27 GREAT BRITAIN—RUMANIA. Signed agreement at London, supplementary to the payments agreement of May 2, 1936 [with technical agreement]. Text: *Rumania*, No. 2 (1937), *Cmd.* 5471. Texts of both agreements: *G. B. Treaty Series*, No. 46 (1937), *Cmd.* 5588.

June, 1937

- 7 GREAT BRITAIN—JAPAN. Signed convention at London, regarding trade and commerce between Burma and Japan. Text: *Japan*, No. 1 (1937), *Cmd.* 5504.
- 9 BELGIUM—THE NETHERLANDS. Signed agreement at Brussels regarding itinerant merchants. *L. N. M. S.*, Sept., 1937, p. 207.
- 9 FRANCE—SWITZERLAND. Signed an agreement at Paris regarding reciprocal assistance to the unemployed. *L. N. M. S.*, Sept., 1937, p. 208.
- 15 FRANCE—TURKEY. Signed a payments agreement. *Revue internationale française du droit des gens* (Paris), June–Sept., 1937, p. 69.
- 18 GREAT BRITAIN—YUGOSLAVIA. Exchanged ratifications at Belgrade of the convention regarding legal proceedings in civil and commercial matters, signed at London, Feb. 27, 1936. Text: *G. B. Treaty Series*, No. 28 (1937), *Cmd.* 5542.
- 18 GREAT BRITAIN—YUGOSLAVIA. Exchanged ratifications at Belgrade of the trade and payments agreement signed at London, Nov. 27, 1936. Text: *G. B. Treaty Series*, No. 27 (1937), *Cmd.* 5540.
- 30 FRANCE—LUXEMBURG. Signed at Paris a declaration regarding reciprocal issue, free of charge, of extracts from civil status records. *L. N. M. S.*, Sept., 1937, p. 208.

July, 1937

- 1 COLOMBIA—MEXICO. Exchanged ratifications of the arbitration treaty of July 11, 1928. *T. I. B.*, July, 1937, p. 1.
- 1 LITHUANIA—SWEDEN. Exchanged notes at Stockholm, constituting an arrangement regarding the reciprocal recognition of certificates of origin. *L. N. M. S.*, Aug., 1937, p. 181.
- 6 to August 23 CHILE—ECUADOR. Ratification by both countries of the plant sanitary agreement, signed Jan. 9, 1937, made public. *P. A. U.*, Dec., 1937, p. 943.
- 7 BELGIUM—FRANCE. Signed declaration at Paris regarding the reciprocal issue, free of charge, of extracts from civil status records. *L. N. M. S.*, Sept., 1937, p. 208.

- 13 GREAT BRITAIN—HUNGARY. Exchanged ratifications in London of the extradition treaty, signed at Budapest, Sept. 18, 1936, supplementary to that of Dec. 3, 1873. Text of treaty: *G. B. Treaty Series*, No. 32 (1937), *Cmd.* 5550.
- 16/23 FRANCE—GREAT BRITAIN. Exchanged notes at Paris, regarding importation of raffia of French origin, and of British East African coffee and New Zealand kauri gum. *G. B. Treaty Series*, No. 34 (1937), *Cmd.* 5558.
- 21 DENMARK—GREAT BRITAIN. Exchanged notes at Copenhagen regarding documents of identity for aircraft personnel. Texts: *G. B. Treaty Series*, No. 44 (1937), *Cmd.* 5586.
- 31 to September 30 GREAT BRITAIN—POLAND. Exchanged notes regarding amendments to the commercial agreement of Feb. 27, 1935. *G. B. Treaty Series*, No. 49 (1937), *Cmd.* 5599.

August, 1937

- 17 PANAMA—UNITED STATES. Effected, by exchange of notes, an agreement concerning mutual recognition of ship measurement certificates. *Ex. Agr. Ser.*, No. 106.
- 18 CZECHOSLOVAKIA—PORTUGAL. Portugal broke off diplomatic relations because of alleged refusal by Czechoslovakia to deliver machine guns ordered by Portugal. *C. S. Monitor*, Aug. 19, 1937, p. 1; *N. Y. Times*, Aug. 19, 1937, p. 1; *Times* (London), Aug. 20, 1937, p. 10.
- 19 BRAZIL—UNITED STATES. Issued joint statement relative to the leasing of over-age American destroyers to Brazil for training purposes, to which Argentina had objected. Text: *N. Y. Times*, Aug. 20, 1937, p. 3.
- 20 RUMANIA—UNITED STATES. President Roosevelt ratified the parcel post agreement, signed March 12 and Aug. 10, 1937. *T. I. B.*, Aug., 1937, p. 27.
- 20 to November 9 CHINA—JAPAN. Japan refused to accept the British proposal for a neutral zone in Shanghai. *C. S. Monitor*, Aug. 20, 1937, p. 1; *Times* (London), Aug. 20, 1937, p. 10; *B. I. N.*, Sept. 4, 1937, p. 228; *N. Y. Times*, Aug. 20, 1937, p. 2. Secretary of State Hull gave formal notice on August 27 that the United States reserves all rights on its own behalf and its nationals for life and property damage. *N. Y. Times*, Aug. 28, 1937, p. 1.

British, French and American naval commanders proposed Sept. 4 that Chinese and Japanese forces withdraw from the vicinity of Shanghai. *N. Y. Times*, Sept. 5, 1937, p. 1. On Sept. 5 the Japanese Navy extended its blockade to the whole Chinese coast, except Tsingtao and leased foreign territory. The Japanese Diet approved aim of the war in China. *N. Y. Times*, Sept. 6, 1937, pp. 1, 3.

All Americans urged to leave China; those remaining do so at their own risk. *N. Y. Times*, Sept. 6, 1937, p. 1.

Great Britain, France, Germany, and the United States protested Sept. 22 the bombing of Nanking. *C. S. Monitor*, Sept. 22, 1937, p. 1; *N. Y. Times*, Sept. 23, 1937, p. 1; Text of second United States protest: p. 19; *Press Releases*, Sept. 25, 1937, p. 255. Japan's reply of Sept. 30 refused to accept responsibility for loss and urged evacuation. Text: *C. S. Monitor*, Sept. 30, 1937, p. 1; *N. Y. Times*, Sept. 30, 1937, p. 11. Japan issued on Oct. 1 a "hands off" notice to the world regarding the Chinese conflict. *C. S. Monitor*, Oct. 1, 1937, p. 1; *Times* (London), Oct. 2, 1937, p. 11. Following condemnation by the League of Nations Japan issued statement on Oct. 9. Text: *N. Y. Times*, Oct. 9, 1937, p. 1. Extracts: *B. I. N.*, Oct. 16, 1937, p. 375. Japan denied Chinese charge of Oct. 11 on use of poison gas. *B. I. N.*, Oct. 16, 1937, p. 376. Chinese memorandum to the League of Nations on Oct. 4 claimed use of poison gas, dum-dum bullets and flame throwers by Japan. *N. Y. Times*, Oct. 15, 1937, p. 3; *B. I. N.*, Oct. 30, 1937, p. 422.

In a formal statement on Nov. 8, Gen. Chiang Kai-shek opposed direct negotiations with Japan. *C. S. Monitor*, Nov. 8, 1937, p. 2; *N. Y. Times*, Nov. 8, 1937, p. 5.

Shanghai surrendered on Nov. 9. *Times* (London), Nov. 10, 1937, p. 14; *N. Y. Times*, Nov. 9, 1937, p. 1.

- 21 CHINA—RUSSIA. Signed non-aggression pact at Nanking. Text: *N. Y. Times*, Aug. 30, 1937, p. 2. Summary: *Times* (London), Aug. 30, 1937, p. 10.
- 21 LEAGUE OF NATIONS—SPAIN. Spanish Government appealed to the League because of "criminal and repeated aggressions suffered by Spanish merchant ships at the hands of the Italian navy." *Times* (London), Aug. 24, 1937, p. 9; *N. Y. Times*, Aug. 24, 1937, p. 6; *L. N. M. S.*, Aug., 1937, p. 168.
- 22 PAN AMERICAN CONFERENCE ON EDUCATION. Third conference opened at Mexico City with nearly 500 delegates from the United States and Latin American countries. *C. S. Monitor*, Aug. 23, 1937, p. 3; *T. I. B.*, Aug., 1937, p. 11.
- 23 HULL PEACE PLEA. In a formal statement Secretary of State Hull called on China and Japan "to refrain from resort to war" and to settle their differences on the basis of his fourteen principles of international policy as enumerated on July 16. *N. Y. Times*, Aug. 24, 1937, p. 1. Text: p. 3.
- 23 PALESTINE. The Permanent Mandates Commission issued a summary of its report of proposals for Palestine. *Times* (London), Aug. 24, 1937, p. 10; *B. I. N.*, Aug. 21, 1937, p. 185. Official summary of minutes: *Times* (London), Sept. 6, 1937, p. 11. Report: *Cmd.* 5479. Extracts: *N. Y. Times*, Sept. 5, 1937, p. 16.
- 25 CHINA—JAPAN. Partial blockade of Chinese shipping instituted by the Japanese Navy. Text of blockade notice: *N. Y. Times*, Aug. 26, 1937, p. 1; *Times* (London), Aug. 26, 1937, p. 12.
- 26/30 BRAZIL—CHILE. Ratification by both countries of the extradition treaty of Nov. 8, 1935, made public. *P. A. U.*, Dec., 1937, p. 943.
- 26 GREAT BRITAIN—JAPAN. British ambassador to China was shot by Japanese aviator. *N. Y. Times*, Aug. 27, 1937, p. 1. Japan sent expression of regret on August 27 and promised an inquiry. *B. I. N.*, Sept. 4, 1937, p. 230. British Foreign Office informed Tokyo on Sept. 22 it regarded the incident "closed." *Times* (London), Sept. 22, 1937, p. 11; *C. S. Monitor*, Sept. 22, 1937, p. 1. Texts of British and Japanese notes: *N. Y. Times*, Sept. 23, 1937, p. 18.
- 27 PARAGUAY—UNITED STATES. Paraguayan Government recognized by the United States. *Press Releases*, Aug. 28, 1937, p. 182.
- 30 to September 4 INSTITUTE OF INTERNATIONAL LAW. Held 41st session at Luxemburg. Texts of resolutions: *Revista de derecho internacional* (Habana), Sept. 1, 1937, p. 12; *Die Friedenswarte* (Zürich), 1937, pp. 249-253; *Revue de droit international* (Paris), July-Sept., 1937, pp. 219-263.
- 30 LEAGUE OF NATIONS—CHINA. Chinese complaint, declaring disregard of three treaties and claiming aggression by Japan, sent to the League of Nations. *N. Y. Times*, Aug. 31, 1937, p. 1. Extracts: pp. 1, 4.
- 30/31 LITTLE ENTENTE CONFERENCE. Discussed attitude toward Italian conquest of Ethiopia, Hungary's forthcoming rearmament program, etc. *Times* (London), Aug. 31, 1937, p. 9; *N. Y. Times*, Aug. 31, 1937, p. 4. Pledged cooperation with the United States and welcomed American leadership in preserving peace. *B. I. N.*, Sept. 4, 1937, p. 235. *Communiqué* listing nine-point policy: *C. S. Monitor*, Sept. 1, 1937, p. 4; *N. Y. Times*, Sept. 1, 1937, p. 3.

September, 1937

1/6 INTER-PARLIAMENTARY UNION. Held 33d conference in Paris with twenty-four nations represented. Summary of proceedings: *Inter-Parliamentary Bulletin*, Sept., 1937.

2 CHILE—NORWAY. Extended invitation to Secretary of State Hull to serve as non-national member and chairman of the Permanent Conciliation Committee, created by the treaty of Jan. 27, 1936. Mr. Hull accepted. *T. I. B.*, Sept., 1937, p. 1.

4 to November 4 SPAIN. In a note, Sept. 4, Secretary of State Hull declined to follow Uruguay's proposal granting belligerent rights to General Franco. *N. Y. Times*, Sept. 5, 1937, p. 19. On the 17th the British and French Governments informed the Non-Intervention Committee they had decided to discontinue the naval patrol. *B. I. N.*, Oct. 2, 1937, p. 339.

On Sept. 30 the League of Nations Peace Commission (6th Committee) adopted a sub-committee resolution instructing Great Britain and France to submit plan for withdrawal of foreign volunteers from Spain to a conference. *C. S. Monitor*, Sept. 30, 1937, p. 1. Text of resolution: *N. Y. Times*, Oct. 1, 1937, p. 1. At a plenary session, Oct. 1, of the League Assembly, 32 nations voted to end neutrality in Spain. Albania and Portugal voted negatively, preventing the resolution becoming binding. *N. Y. Times*, Oct. 2, 1937, p. 33; *C. S. Monitor*, Oct. 4, 1937, p. 13. Evacuation of Italian troops from Spain was demanded in a note sent to Italy on Oct. 2 by Great Britain and France. Simultaneously, Russia demanded permission to make arms shipments to Spain, and abolition of entire non-intervention scheme. *N. Y. Times*, Oct. 3, 1937, pp. 1, 37. Italy replied unfavorably on the 9th to Franco-British proposal for a conference. Texts of both notes: *N. Y. Times*, Oct. 10, 1937, pp. 1, 40; *Times* (London), Oct. 11, 1937, p. 11. Great Britain and France decided on Oct. 13 to turn the "volunteer" problem over to the Non-Intervention Committee. *N. Y. Times*, Oct. 14, 1937, p. 1.

On Oct. 16, at the opening meeting of the Non-Intervention Committee in London, Italy offered to withdraw volunteers, requiring an equal number from the Loyalist side. *N. Y. Times*, Oct. 17, 1937, p. 1. Text of offer: p. 35. Italy and Germany withdrew objections to Franco-British proposal whereby belligerent rights will be withheld until "token" withdrawals have been carried out. *C. S. Monitor*, Oct. 20, 1937, p. 1; *N. Y. Times*, Oct. 21, 1937, p. 1. Text of Count Grandi's statement: *Times* (London), Oct. 21, 1937, p. 13.

France, Great Britain, Germany and Italy agreed Oct. 26 to grant belligerent rights upon "substantial progress" in withdrawals. *N. Y. Times*, Oct. 27, 1937, p. 1; *Times* (London), Oct. 27, 1937, p. 14. Texts of recommendations of Non-Intervention subcommittee of nine nations asking both sides in Spain to approve the British plan for gradual withdrawal of volunteers: *N. Y. Times*, Nov. 3, 1937, p. 3; *Times* (London), Nov. 3, 1937, p. 13. On the 4th the full Committee received a resolution authorizing an approach to both sides in Spain. *C. S. Monitor*, Nov. 4, 1937, p. 1. Summary of provisions of resolution and supplementary resolution: *B. I. N.*, Nov. 13, 1937, p. 11.

5 to November 23 MEXICAN OIL. United States warned against forcing out of American oil companies and recalled the Morrow-Calles agreement of 1928, guaranteeing their rights. *N. Y. Times*, Sept. 6, 1937, p. 1. Mexican President signed a contract on Nov. 12, granting concessions to the Royal Dutch Shell-controlled Eagle Oil Co. *Times* (London), Nov. 13, 1937, p. 12; *N. Y. Times*, Nov. 13, 1937, p. 1. Seven United States companies filed suit on Nov. 23 as a result of the nationalization of the oil fields. *N. Y. Times*, Nov. 25, 1937, p. 12.

5 to November 11 **PIRACY.** Great Britain and France issued invitations Sept. 5 to Italy, Greece, Yugoslavia, Turkey, Egypt, Albania, Russia, Rumania, Bulgaria and Germany to attend a conference on "pirate" submarine and aircraft warfare in the Mediterranean, to be held near Geneva about Sept. 10. *N. Y. Times*, Sept. 6, 1937, p. 2; *Times* (London), Sept. 7, 1937, p. 12. In a note on Sept. 7, Russia accused Italy of being responsible for attacks on shipping, and opposed invitation to Germany. Text: *N. Y. Times*, Sept. 8, 1937, pp. 1, 8. In a note delivered Sept. 9, Italy refused invitation to attend conference and would not accept Russia as a Mediterranean Power. Germany also declined. *N. Y. Times*, Sept. 10, 1937, p. 1. Texts of Italian and German notes, p. 4; text of Italian and summary of German notes, *Times* (London), Sept. 10, 1937, p. 11.

Conference opened Sept. 10 at Nyon, Switzerland. Agreed on an international warship patrol. *N. Y. Times*, Sept. 11, p. 1; Sept. 12, 1937, pp. 1, 42. Issued *communiqué* on Sept. 11. Text: *N. Y. Times*, Sept. 12, 1937, p. 1. On Sept. 14, Great Britain, France, Russia, Rumania, Turkey, Egypt, Bulgaria, Yugoslavia and Greece signed the accord on pirate submarine warfare. It specifically declares no intention to grant belligerent rights to either side in Spain. *C. S. Monitor*, Sept. 14, 1937, p. 1. Extracts: p. 8. Text: *N. Y. Times*, Sept. 15, 1937, p. 16; *T. I. B.*, Sept., 1937, p. 17; *L. N. Doc.* C.409.M.273.1937.VII; *Cmd.* 5568; *L. N. M. S.*, Sept., 1937, p. 241. Italian note of Sept. 14 refused to adhere to conclusions of the conference unless given equal footing in the patrol scheme. *N. Y. Times*, Sept. 15, 1937, p. 1. Great Britain and France commenced the patrol Sept. 15. *N. Y. Times*, Sept. 16, 1937, p. 5. Conference closed Sept. 14. *B. I. N.*, Sept. 18, 1937, p. 256.

On Sept. 17 nine Powers signed at Geneva an elaborated accord on pirate aircraft warfare. *Times* (London), Sept. 18, 1937, p. 10; *C. S. Monitor*, Sept. 17, 1937, p. 1; *N. Y. Times*, Sept. 18, 1937, p. 8. Text: *Times* (London), Sept. 20, 1937, p. 11; *L. N. Doc.* C.409.M.273.1937.VII; *L. N. M. S.*, Sept., 1937, p. 242; *G. B. Treaty Series*, No. 38 (1937), *Cmd.* 5569.

A new patrol plan, submitted on Sept. 30 to the British, French and Italian governments, came into force Nov. 11. *B. I. N.*, Nov. 27, 1937, p. 531.

6 **ITALY—RUSSIA.** Russia sent note to Italy charging responsibility for torpedoing of two Russian freighters in the eastern Mediterranean, and demanded reparation and punishment of the guilty parties. Text: *N. Y. Times*, Sept. 8, 1937, p. 1; *B. I. N.*, Sept. 18, 1937, p. 286. Italian reply repudiated responsibility for attacks and rejected indemnification demands and punishment of guilty persons. *B. I. N.*, Sept. 18, 1937, p. 286. Text: *N. Y. Times*, Sept. 8, 1937, p. 8.

7 to December 10 **HONDURAS—NICARAGUA.** Offer of good offices made by Costa Rica in settling dispute over issuance of postage stamps showing map of certain areas claimed by both countries. *N. Y. Times*, Sept. 8, 1937, p. 5. Guatemala and Salvador also offered aid. *N. Y. Times*, Sept. 11, 1937, p. 7. Offer of the United States accepted on Oct. 22. *N. Y. Times*, Oct. 23, 1937, p. 7. Text of U. S. message: *C. S. Monitor*, Oct. 22, 1937, p. 4; *N. Y. Times*, Oct. 22, 1937, p. 17. Text of Nicaraguan acceptance: *Press Releases*, Oct. 23, 1937, p. 315. Honduran reply received on Nov. 27 by the Mediation Commission. *N. Y. Times*, Nov. 28, 1937, p. 36. Signed on Dec. 10 a "pact of reciprocal agreements" at San José. Summary of agreement: *N. Y. Times*, Dec. 11, 1937, p. 5. Text of agreement: *Press Releases*, Dec. 18, 1937, p. 453.

8/12 **ARAB CONGRESS.** Opened at Bludan near Damascus, with representatives from Lebanon, Palestine, Iraq, Trans-Jordan, Hedjaz, Syria and Egypt. *N. Y. Times*, Sept. 9, 1937, p. 4; *Times* (London), Sept. 10, 1937, p. 11.

- On Sept. 12, it adopted a resolution declaring Palestine "an integral part" of the Arab fatherland. It demanded annulment of the Balfour Declaration, abrogation of the Palestine mandate and conclusion of an Anglo-Palestine treaty recognizing its sovereignty and independence. *B. I. N.*, Sept. 18, 1937, p. 290.
- 10/15 CHACO DISPUTE. Two neutral observers (Chilean and Uruguayan) were arrested in a neutral zone of Bolivia by a Paraguayan patrol. *N. Y. Times*, Sept. 14, 1937, p. 1. Paraguayan delegation to the peace conference presented excuses on Sept. 15 for arresting neutral observers. *N. Y. Times*, Sept. 16, 1937, p. 12.
- 10 to 16 LEAGUE OF NATIONS COUNCIL. Held 98th session. Voted on Sept. 16 to revive the Advisory Committee on the Far East. *N. Y. Times*, Sept. 17, 1937, p. 1; *Times* (London), Sept. 17, 1937, p. 11.
- 10 LEAGUE OF NATIONS COVENANT. Committee studying reform of the Covenant reopened sessions. *N. Y. Times*, Sept. 11, 1937, p. 6. Recommended that in case of war or threat of war the League should make contact with non-members bound by the Kellogg and Rio de Janeiro treaties. Adopted by the Assembly. *B. I. N.*, Oct. 16, 1937, p. 376. The Cranborne report suggested an intermediate League, optionally coercive. *N. Y. Times*, Sept. 11, 1937, p. 6.
- 13 to October 6 LEAGUE OF NATIONS ASSEMBLY. 18th ordinary session met, with fifty-two states represented. Elected the Aga Khan president. China invoked Articles X, XI and XVII of the Covenant. *C. S. Monitor*, Sept. 13, 1937, p. 1; *Times* (London), Sept. 14, 1937, p. 11. Text of appeal: *N. Y. Times*, Sept. 14, 1937, p. 1. Elected Iran and Peru to Council seats on Sept. 20. *N. Y. Times*, Sept. 21, 1937, p. 13. Elected Belgium to the Council on Sept. 28. *B. I. N.*, Oct. 2, 1937, p. 333; *N. Y. Times*, Sept. 29, 1937, p. 8. Unanimously condemned Japanese unrestricted bombardment of Chinese cities. *N. Y. Times*, Sept. 29, 1937, p. 8; *C. S. Monitor*, Sept. 28, 1937, p. 1. Japan replied on Sept. 28, claiming military inconvenience in order not to bomb civilian areas. *N. Y. Times*, Sept. 29, 1937, p. 13.
- Adopted on Oct. 6 the resolution of the Advisory Committee on the Far East. Adjourned. *B. I. N.*, Oct. 16, 1937, p. 379; *C. S. Monitor*, Oct. 6, 1937, p. 1. Text of resolution: *N. Y. Times*, Oct. 6, 1937, p. 4; *L. N. M. S.*, Oct., 1937, p. 258. Text of Japanese reply of Oct. 9: *N. Y. Times*, Oct. 9, 1937, p. 1.
- 14/17 EMBARGO. United States imposed partial embargo on arms shipments to China and Japan. *C. S. Monitor*, Sept. 15, 1937, p. 1. Nanking Government formally protested through its United States Ambassador against the embargo. *C. S. Monitor*, Sept. 17, 1937, p. 1; *N. Y. Times*, Sept. 18, 1937, p. 1.
- 16 to 25 AVIATION CONFERENCE. Met at Lima, Peru. *N. Y. Times*, Sept. 18, 1937, p. 8. On Sept. 22 it approved in committee the creation of an international commission to draft an air code. *C. S. Monitor*, Sept. 23, 1937, p. 5. Closed Sept. 25, after forming a commission for codification of inter-American aviation law, and voting a series of resolutions concerning unification of air control, air traffic regulations, meteorological and radio coöperation. The Codification Commission will meet in Bogota and fix a date for the second conference to be held at Santiago de Chile. *N. Y. Times*, Sept. 28, 1937, p. 9; *C. S. Monitor*, Sept. 27, 1937, p. 1.
- 17 to October 4 EQUAL RIGHTS. Women from many countries, interested in the status of women, met in Geneva. Fifteen nations had requested that the subject be placed on the agenda of the League Assembly. *C. S. Monitor*, Sept. 17, 1937, p. 1. Representatives from nine countries, meeting under the auspices of the Women's Consultative Committee, drew up a letter recommending four amendments to the Covenant, seeking equality in all fields, especially political rights and nationality. *C. S. Monitor*, Sept. 20, 1937, p. 1. The Assembly Commission adopted on Sept.

- 23 a resolution establishing "rightness of equality in principle." *C. S. Monitor*, Sept. 23, 1937, p. 2. The Committee, considering revision of the Covenant, placed women's status on the agenda of its December meeting. *C. S. Monitor*, Oct. 4, 1937, p. 5. The Assembly adopted a resolution providing for a comprehensive scientific inquiry into the legal status of women in the various nations. *L. N. M. S.*, Sept., 1937, p. 204.
- 20 ARGENTINA—DENMARK. Signed an immigration and colonization convention at Buenos Aires. *Revue internationale française du droit des gens* (Paris), June–Sept., 1937, p. 72.
- 21 to October 5 LEAGUE OF NATIONS ADVISORY COMMITTEE ON THE FAR EAST. Held meetings at Geneva. Japan rejected on Sept. 25 an invitation to attend. Text of Japanese reply: *N. Y. Times*, Sept. 26, 1937, p. 36. On Oct. 1, China submitted a resolution condemning Japan as an aggressor. Text: *Times* (London), Oct. 2, 1937, p. 11; *N. Y. Times*, Oct. 2, 1937, p. 8. Recommended on Oct. 5 that League members give direct aid to China, condemned invasion of China and recommended convocation of the Nine-Power Treaty signatories. Adjourned. *C. S. Monitor*, Oct. 5, 1937, p. 1. Texts of first and second reports and resolution: *N. Y. Times*, Oct. 6, 1937, p. 4.
- 25 GERMANY—GREECE. Announced conclusion of a trade and clearance agreement in Berlin. *N. Y. Times*, Sept. 26, 1937, p. 28.
- 29 IRISH FREE STATE—UNITED STATES. Air navigation arrangement made by exchange of notes. *N. Y. Times*, Nov. 28, 1937, p. 25; *Press Releases*, Nov. 27, 1937, p. 403.
- 29 to October 5 LEAGUE OF NATIONS COUNCIL. Held 99th session. Considered routine business. *L. N. Information Sec.* Nos. 8298 and 8320; *L. N. M. S.*, Sept., 1937, p. 190.
- 30 HUNGARY—UNITED STATES. Extended indefinitely the agreement for temporary waiver of visitors' visa fees which would have expired on this date. It is subject to termination on three months' notice by either party. *T. I. B.*, Sept., 1937, p. 14.
- October, 1937
- 1 AUSTRALIA—CANADA. Announced conclusion of a new trade treaty, effective this date. *B. I. N.*, Oct. 16, 1937, p. 359.
- 1 JAPAN—UNITED STATES. Under the provisions of Art. 13 of the Parcel Post Convention of 1904, parcel post exchange was discontinued, since no new convention had been concluded by this date. *T. I. B.*, Sept., 1937, pp. 13–14.
- 2 BRAZIL. Declaration of a state of war in Brazil came into force for ninety days. *N. Y. Times*, Oct. 3, 1937, p. 1.
- 5 GERMANY—NEW ZEALAND. Announced the signature of a trade and ancillary payments agreement to operate for two years. *B. I. N.*, Oct. 16, 1937, p. 379; *Times* (London), Oct. 6, 1937, p. 13.
- 6 JAPAN—UNITED STATES. An announcement from the United States State Department named Japan a treaty-breaker and an aggressor. Text: *N. Y. Times*, Oct. 7, 1937, pp. 1, 12.
- 8 PERMANENT COURT OF INTERNATIONAL JUSTICE. Gave judgment in the case concerning Lighthouses in Crete and Samos, under special agreement of Greek and French Governments. *L. N. M. S.*, Oct., 1937, p. 256.
- 12 FRANCE—YUGOSLAVIA. Renewed for five years their treaty of friendship, signed Nov. 11, 1927. *N. Y. Times*, Oct. 13, 1937, p. 15; *Times* (London), Oct. 13, 1937, p. 13; *B. I. N.*, Oct. 30, 1937, p. 411.

- 12 INDIA—JAPAN. Signed a protocol at London regarding commercial relations [with exchange of notes regarding prolongation of the convention of July 12, 1934]. *G. B. Treaty Series*, No. 50 (1937), *Cmd.* 5600.
- 13 BELGIUM—GERMANY. Germany sent pledge to Belgium to respect her inviolability and integrity and to support Belgium in case of attack or invasion. Text of note and reply of Belgium: *N. Y. Times*, Oct. 14, 1937, p. 18; *Times* (London), Oct. 14, 1937, p. 14.
- 13 FRANCE—SWITZERLAND. Signed loan agreement. *B. I. N.*, Oct. 30, 1937, p. 433.
- 15 CAPITULATIONS: EGYPT. Egyptian capitulations were formally abolished. The new régime of Mixed Courts, in place of Consular Courts for each nation, was inaugurated. *C. S. Monitor*, Oct. 15, 1937, p. 1; *N. Y. Times*, Oct. 16, 1937, p. 2; *Times* (London), Oct. 16, 1937, p. 11. Pending the ratification by the United States of the convention, signed May 8, 1937, President Roosevelt issued on Oct. 15 a proclamation suspending judicial functions performed by the minister and consuls of the United States in Egypt. Text: *T. I. B.*, Oct., 1937, p. 6.
- 16 to November 24 NINE-POWER CONFERENCE. Belgium issued invitations to Nine-Power Treaty signatories on Oct. 15 to meet on Oct. 30 to discuss the Far Eastern situation. United States accepted. *C. S. Monitor*, Oct. 16, 1937, p. 1; *N. Y. Times*, Oct. 17, 1937, p. 1. Japan rejected invitation on Oct. 27. *N. Y. Times*, Oct. 28, 1937, p. 1. Text and statement outlining stand on China: *Times* (London), Oct. 28, 1937, p. 15; *N. Y. Times*, Oct. 28, 1937, p. 2. Germany refused invitation on Oct. 29. *C. S. Monitor*, Oct. 29, 1937, p. 5; *N. Y. Times*, Oct. 30, 1937, p. 3.
 Opened at Brussels on Nov. 3, with 19 nations represented. *N. Y. Times*, Nov. 4, 1937, p. 1; *Times* (London), Nov. 4, 1937, p. 14. Decided on Nov. 4 to set up a small "contact committee" to approach China and Japan in mediation attempt. *C. S. Monitor*, Nov. 4, 1937, p. 1; *N. Y. Times*, Nov. 5, 1937, p. 1. A note on Nov. 6 to Japan invited exchange of views. Text: *N. Y. Times*, Nov. 7, 1937, pp. 1, 37; *Times* (London), Nov. 8, 1937, p. 11.
 Japan declined a second invitation on Nov. 12. *Times* (London), Nov. 13, 1937, p. 12. Text: *N. Y. Times*, Nov. 13, 1937, p. 7. Adopted a resolution on Nov. 15 branding Japan an outlaw. With Italy voting negatively, Denmark, Norway and Sweden abstained from voting. *C. S. Monitor*, Nov. 15, 1937, p. 1; *N. Y. Times*, Nov. 16, 1937, p. 1; *Times* (London), Nov. 16, 1937, p. 15. Text of resolution: *Press Releases*, Nov. 20, 1937, p. 381.
 Adjourned *sine die* on Nov. 24 after adopting draft report and declaration. Text of declaration: *Times* (London), Nov. 25, 1937, p. 13; *Press Releases*, Nov. 27, 1937, p. 396.
- 18 LITHUANIA—UNITED STATES. Signed nationality and military service treaty at Kaunas. *T. I. B.*, Oct., 1937, p. 12.
- 18 THE NETHERLANDS—UNITED STATES. President Roosevelt ratified the parcel post agreement, signed Sept. 5 and 20, 1937, which abrogates the agreement of Nov. 16 and Dec. 11, 1926. It may be terminated by notice of six months. *T. I. B.*, Oct., 1937, p. 19.
- 19 CHILE—ECUADOR. Signed commercial treaty at Santiago de Chile. *N. Y. Times*, Oct. 20, 1937, p. 13.
- 22 GREECE—UNITED STATES. Exchanged ratifications at Athens of the treaty of entry, establishment and residence, signed Nov. 21, 1936. *T. I. B.*, Oct., 1937, p. 11.
- 29 INNER MONGOLIAN NATION. Foundation of a new independent state in the northwestern Chinese provinces recently conquered by the Japanese Army, was proclaimed, with capital at Kwisui (Hoho). *C. S. Monitor*, Oct. 29, 1937, p. 5.

November, 1937

- 1 to December 13 RADIO CONFERENCE. Inter-American conference met in Havana, with representatives from fifteen countries. *N. Y. Times*, Nov. 2, 1937, p. 18. Signed agreements for uniformity of procedure, for elimination of interference in broadcasting, for increased safety at sea, and for granting further facilities to amateurs. Accepted Chile's invitation to entertain the next conference, probably in 1940. Agreed to establish an international radio office in Havana, to serve purely as a consultative technical body. *N. Y. Times*, Dec. 13, 1937, p. 15. Provision was made for the adhesion of non-signatory American nations. *N. Y. Times*, Dec. 15, 1937, p. 18.
- 1 to 16 TERRORISM CONFERENCE. Met in Geneva as a result of the League of Nations Council resolution following the assassination of King Alexander of Yugoslavia. *Times* (London), Nov. 2, 1937, p. 15. At the closing session signed a convention, providing for coöperation to repress terrorism, and a convention creating an international criminal court in which countries may try terrorist cases. The judges of the court will be appointed by the Permanent Court of International Justice. *N. Y. Times*, Nov. 17, 1937, p. 8. Texts: *L. N. Docs.* C.546.M.383.1937.V. and C.547.M.384.1937.V.
- 2 CUBA—UNITED STATES. Cuba's invitation of Oct. 21 to participate in a proposed all-American mediation of the Spanish civil war was declined by the United States. *C. S. Monitor*, Nov. 2, 1937, p. 2. Text of United States note: *N. Y. Times*, Nov. 3, 1937, p. 2.
- 2 JAPAN—SIAM. Signed a commercial treaty at Bangkok. *C. S. Monitor*, Nov. 4, 1937, p. 2; *N. Y. Times*, Nov. 4, 1937, p. 2; *Times* (London), Nov. 3, 1937, p. 13.
- 4 GERMANY—GREAT BRITAIN. Exchanged ratifications at London of the naval treaty, bringing Germany within the scope of the 1936 Naval Treaty. *N. Y. Times*, Nov. 5, 1937, p. 7; *Times* (London), Nov. 5, 1937, p. 14.
- 4 GREAT BRITAIN—RUSSIA. Exchanged ratifications at London of the naval treaty, bringing Russia within the scope of the 1936 Naval Treaty. *N. Y. Times*, Nov. 5, 1937, p. 7; *Times* (London), Nov. 5, 1937, p. 14.
- 5 GERMANY—POLAND. Agreed, after three months' negotiations, to a reciprocal policy concerning the treatment of Poles in Germany and Germans in Poland. Text of agreement: *N. Y. Times*, Nov. 6, 1937, p. 2. Summary: *C. S. Monitor*, Nov. 6, 1937, p. 4; *Times* (London), Nov. 6, 1937, p. 11; *B. I. N.*, Nov. 13, 1937, p. 465.
- 5 JAPAN—MANCHUKUO. Signed treaty at Hsinking, Manchukuo, abolishing extra-territorial rights of all foreign nationals and transferring to Manchukuo administration of the South Manchurian railway. *C. S. Monitor*, Nov. 5, 1937, p. 1; *N. Y. Times*, Nov. 6, 1937, p. 3; *Times* (London), Nov. 6, 1937, p. 11.
- 6 CZECHOSLOVAKIA—GERMANY. A number of agreements providing for increased trade and regulating commercial and tourist payments for 1938 were signed at Hamburg. *Times* (London), Nov. 8, 1937, p. 11; *B. I. N.*, Nov. 13, 1937, p. 466.
- 6 FRANCE—SIAM. Entered into a commercial and customs arrangement with Indo-China, abolishing the 16-mile barrier on each side of the frontier. *Times* (London), Nov. 6, 1937, p. 11.
- 6 GERMANY—ITALY—JAPAN. Italy signed the anti-communist pact, concluded by Germany and Japan on Nov. 25, 1936. *C. S. Monitor*, Nov. 6, 1937, p. 1; *N. Y. Times*, Nov. 7, 1937, p. 1; *Times* (London), Nov. 8, 1937, p. 12.

- 6 PERMANENT COURT OF INTERNATIONAL JUSTICE. Delivered judgment in regard to preliminary objections lodged by the Spanish Government in the Borchgrave case. *L. N. M. S.*, Nov., 1937, p. 282.
- 10 BRAZIL. New Constitution was promulgated, providing for dissolution of the Senate, Chamber and legislatures. *C. S. Monitor*, Nov. 10, 1937, p. 1; *N. Y. Times*, Nov. 11, 1937, p. 1. Excerpts from new Constitution: *N. Y. Times*, Nov. 20, 1937, p. 8.
- 12 GREAT BRITAIN—SPAIN. Announced conclusion of an agreement for the exchange of agents of Great Britain and the Franco government, who will not receive diplomatic status. This does not imply recognition of the Franco government. *Times* (London), Nov. 12, 1937, p. 16; *B. I. N.*, Nov. 13, 1937, p. 468.
- 13 CZECHOSLOVAKIA—GERMANY. Signed a treaty at Berlin delimiting the frontier between the two countries. *B. I. N.*, Nov. 27, 1937, pp. 517-518.
- 13 SIAM—UNITED STATES. Signed trade treaty at Bangkok, to run five years. It recognized full Siamese sovereignty through abandonment of extraterritorial rights, which the United States was the first country to surrender. *C. S. Monitor*, Nov. 13, 1937, p. 4; *N. Y. Times*, Nov. 14, 1937, p. 34; *Press Releases*, Nov. 13, 1937, p. 377.
- 15 DOMINICAN REPUBLIC—HAITI. The United States joined Mexico and Cuba in offering "friendly services" toward the pacific solution of a controversy growing out of border clashes resulting from heavy migration of Haitian laborers. *C. S. Monitor*, Nov. 15, 1937, p. 5. Text of President Roosevelt's offer of good offices: *Press Releases*, Nov. 20, 1937, pp. 379-380.

INTERNATIONAL CONVENTIONS

AIR MAIL. Panama, Dec. 22, 1936.

Ratifications:

Argentina. Sept. 15, 1937.

Venezuela. Sept. 16, 1937. *T. I. B.*, Oct., 1937, pp. 18-19.

Ratification deposited: Ecuador. Aug. 20, 1937. *T. I. B.*, Sept., 1937, p. 12.

AIR TRAFFIC. Warsaw, Oct. 12, 1929.

Adhesion deposited: Finland and Sweden. July 3, 1937. *T. I. B.*, Aug., 1937, p. 14.

Ratification: Greece. March 29, 1937. *T. I. B.*, Sept., 1937, p. 9.

Ratifications deposited: Denmark and Norway. July 3, 1937. *T. I. B.*, Aug., 1937, p. 14.

AIRCRAFT ATTACHMENT. Rome, May 29, 1933.

Ratification deposited: Poland. Aug. 31, 1937. *T. I. B.*, Oct., 1937, p. 14.

ANTI-COMMUNIST PROTOCOL. Rome, Nov. 6, 1937.

Signatures: Italy, Germany, Japan.

Text: *Völkerbund* (Geneva), Nov. 15, 1937.

ARTISTIC EXHIBITIONS. Buenos Aires, Dec. 23, 1936.

Promulgation: Dominican Republic. Sept. 29, 1937. *P. A. U.*, Dec., 1937, p. 942.

Ratification: El Salvador. Sept. 9, 1937. *P. A. U.*, Dec., 1937, p. 943.

Ratification deposited: United States. July 29, 1937. *T. I. B.*, Aug., 1937, p. 32.

BILLS OF LADING. Brussels, Aug. 25, 1924.

Ratifications deposited:

Rumania. Aug. 4, 1937.

United States. June 29, 1937. *T. I. B.*, Oct., 1937, pp. 17-18.

BROADCASTING. Convention and Final Act. Geneva, Sept. 23, 1936.

Application to: Burma. Oct. 13, 1937. *L. N. O. J.*, Nov., 1937.

Promulgation: Dominican Republic. July 10, 1937. *T. I. B.*, Aug., 1937, p. 6.

Ratification: Denmark. Oct. 11, 1937. *L. N. O. J.*, Nov., 1937.

Ratifications deposited:

Great Britain. Aug. 18, 1937.

India. Aug. 11, 1937. *T. I. B.*, Sept., 1937, pp. 1-2.

Signatures: Albania, Argentina, Austria, Belgium, Brazil, Chile, Colombia, Czechoslovakia, Denmark, Dominican Republic, Egypt, Estonia, France, Greece, Great Britain, India, Lithuania, Luxemburg, Mexico, The Netherlands, New Zealand, Norway, Rumania, Russia, Switzerland, Turkey, Uruguay. *T. I. B.*, Aug., 1937, p. 6.

CAPITULATIONS IN EGYPT. Montreux, May 8, 1937.

Text and signatures: *Egypt*, No. 1 (1937), *Cmd.* 5491.

CAPITULATIONS IN EGYPT. Montreux, May 8, 1937.

Ratifications deposited:

Belgium. Sept. 11, 1937. *T. I. B.*, Sept., 1937, p. 3.

Denmark. Oct. 13, 1937. *B. I. N.*, Oct. 30, 1937, p. 409.

Egypt. Sept. 4, 1937. *T. I. B.*, Sept., 1937, p. 3.

Great Britain. Oct. 12, 1937. *Times* (London), Oct. 13, 1937, p. 13.

Greece and Italy. Sept. 26, 1937. *T. I. B.*, Sept., 1937, p. 3.

Came into force following three deposits of ratifications: Oct. 15, 1937. *T. I. B.*, Sept., 1937, p. 3; *B. I. N.*, Oct. 30, 1937, p. 409.

CATTLE HERDBOOKS. Rome, Oct. 14, 1936.

Ratification: Italy. July 1, 1937. *T. I. B.*, Sept., 1937, p. 9.

CONTAGIOUS DISEASES OF ANIMALS. Geneva, Feb. 20, 1935.

Ratifications deposited:

Belgium. July 21, 1937. *T. I. B.*, Aug., 1937, p. 12.

Latvia. May 4, 1937. *T. I. B.*, Sept., 1937, p. 5.

Russia. Sept. 20, 1937. *T. I. B.*, Oct., 1937, p. 12; *L. N. O. J.*, Nov., 1937.

COUNTERFEITING CURRENCY AND PROTOCOL. Geneva, April 20, 1929.

Accession: Ecuador. Sept. 25, 1937. *T. I. B.*, Oct., 1937, p. 16; *L. N. O. J.*, Nov., 1937.

EDUCATIONAL FILMS. Geneva, Oct. 11, 1933.

Ratification deposited: Poland (with reservation). Sept. 25, 1937. *T. I. B.*, Oct., 1937, p. 11; *L. N. O. J.*, Nov., 1937.

EDUCATIONAL AND PUBLICITY FILMS. Buenos Aires, Dec. 23, 1936.

Promulgation: Dominican Republic. Sept. 29, 1937.

Ratification: El Salvador. Sept. 9, 1937. *P. A. U.*, Dec., 1937, pp. 942-943.

EMPLOYMENT OF CHILDREN IN INDUSTRY. Geneva, Nov. 28, 1929.

Ratification: Norway. *T. I. B.*, Aug., 1937, p. 24.

EXPORT AND IMPORT OF ANIMAL PRODUCTS. Geneva, Feb. 20, 1935.

Ratifications deposited:

Belgium. July 21, 1937. *T. I. B.*, Aug., 1937, p. 12.

Latvia. May 4, 1937. *T. I. B.*, Sept., 1937, p. 5.

Russia. Sept. 20, 1937. *T. I. B.*, Oct., 1937, p. 12; *L. N. O. J.*, Nov., 1937.

GOOD OFFICES AND MEDIATION. Buenos Aires, Dec. 23, 1936.

Ratifications:

Brazil. Nov. 5, 1937. *N. Y. Times*, Nov. 6, 1937, p. 3.

El Salvador. Sept. 9, 1937. *P. A. U.*, Dec., 1937, p. 943.

Ratifications deposited:

Ecuador. Oct. 19, 1937. *T. I. B.*, Oct., 1937, p. 2.

United States. July 29, 1937. *T. I. B.*, Aug., 1937, pp. 4-5.

HISTORY TEACHING. Geneva, Oct. 2, 1937.

Signatures: Belgium and Dominican Republic.

Text: L. N. Doc. C.485.M.326.1937.XII.

HISTORY TEACHING. Montevideo, Dec. 26, 1933.

Promulgation: Dominican Republic. Sept. 29, 1937. *P. A. U.*, Dec., 1937, p. 942.

HOURS OF WORK IN SHEET-GLASS WORKS. Geneva, June 21, 1934.

Ratification: Belgium (not applicable to Belgian Congo and Ruanda-Urundi). Aug. 4, 1937. *T. I. B.*, Sept., 1937, p. 11.

IMMUNITY OF GOVERNMENT VESSELS. Brussels, April 10, 1926. Protocol. May 24, 1934.

Ratification deposited: Rumania. Aug. 4, 1937. *T. I. B.*, Oct., 1937, p. 18.

INDUSTRIAL PROPERTY. Paris, March 20, 1883. Revision. The Hague, Nov. 6, 1925.

Adhesion: Denmark. June 24, 1937. *T. I. B.*, Aug., 1937, p. 24.

INTER-AMERICAN CULTURAL RELATIONS. Buenos Aires, Dec. 23, 1936.

Promulgation: Dominican Republic. Sept. 29, 1937. *P. A. U.*, Dec., 1937, p. 942.

Ratification deposited: United States. July 29, 1937. *T. I. B.*, Aug., 1937, p. 11.

INTERCHANGE OF PUBLICATIONS. Buenos Aires, Dec. 23, 1936.

Promulgation: Dominican Republic. Sept. 29, 1937.

Ratification: El Salvador. Sept. 9, 1937. *P. A. U.*, Dec., 1937, p. 943.

INTERNATIONAL CRIMINAL COURT. Geneva, Nov. 16, 1937.

Text: L. N. Doc. C.547.M.384.1937.V.

LETTERS, ETC., OF DECLARED VALUE. Cairo, March 20, 1934.

Application to: Aden and Burma. April 1, 1937. *T. I. B.*, Aug., 1937, pp. 26-27.

Ratifications deposited:

France, Algeria, Morocco, Tunisia, French Indo-China, Syria and Lebanon, and all other French colonies. Aug. 7, 1937. *T. I. B.*, Sept., 1937, p. 13.

Yugoslavia. June 26, 1937. *T. I. B.*, Aug., 1937, pp. 26-27.

LOAD LINE CONVENTION. London, July 5, 1930.

Ratification deposited: United States. July 12, 1937. *T. I. B.*, Aug., 1937, p. 25.

MAINTENANCE, ETC., OF PEACE. Buenos Aires, Dec. 23, 1936.

Ratifications:

Brazil. Nov. 5, 1937. *N. Y. Times*, Nov. 6, 1937, p. 3.

Ecuador. June 30, 1937. *T. I. B.*, Aug., 1937, p. 3.

El Salvador. Sept. 9, 1937. *P. A. U.*, Dec., 1937, p. 943.

Ratification deposited: United States. Aug. 25, 1937. *T. I. B.*, Aug., 1937, p. 3.

MARITIME MORTGAGES. Brussels, April 10, 1926.

Ratification deposited: Rumania. Aug. 4, 1937. *T. I. B.*, Oct., 1937, p. 18.

MINIMUM AGE (SEA) CONVENTION. Revised. Oct. 22, 1936.

Ratification: Norway. *T. I. B.*, Aug., 1937, p. 24.

MINIMUM WAGE-FIXING MACHINERY. Geneva, June 16, 1928.

Ratification: Belgium (not applicable to Belgian Congo and Ruanda-Urundi). Aug. 11, 1937. *T. I. B.*, Sept., 1937, p. 11.

MONEY ORDERS. Cairo, March 20, 1934.

Ratifications deposited:

France, Algeria, Morocco, Tunisia, French Indo-China, Syria, Lebanon and all other French colonies. Aug. 9, 1937. *T. I. B.*, Sept., 1937, p. 13.

Yugoslavia. June 26, 1937. *T. I. B.*, Aug., 1937, p. 27.

MONEY ORDERS. Panama, Dec. 22, 1936.*Ratifications:*

Argentina. Sept. 15, 1937.

Venezuela. Sept. 16, 1937. *T. I. B.*, Oct., 1937, pp. 18-19.*Ratifications deposited:*

Ecuador. Aug. 20, 1937.

United States. Sept. 17, 1937. *T. I. B.*, Sept., 1937, pp. 12-13.**NARCOTIC DRUG TRAFFIC.** Geneva, June 26, 1936.*Ratification:* China. Oct. 21, 1937. *L. N. O. J.*, Nov., 1937.*Ratification deposited:* India (by Great Britain). Aug. 4, 1937. *T. I. B.*, Sept., 1937, p. 6.*Signatures up to Dec. 31, 1936:* Austria, Belgium, Brazil, Bulgaria, Canada, China, Colombia, Cuba, Czechoslovakia, Denmark, Ecuador, Egypt, Estonia, France, Great Britain, Greece, Honduras, Hungary, India, Japan, Mexico, Monaco, The Netherlands, Panama, Poland, Portugal, Rumania, Russia, Spain, Switzerland, Uruguay, Venezuela. *T. I. B.*, Sept., 1937, p. 6.**NARCOTICS.** Geneva, July 13, 1931.*Adhesions:*Albania. Oct. 9, 1937. *L. N. O. J.*, Nov., 1937.Latvia. Aug. 3, 1937. *T. I. B.*, Sept., 1937, p. 5.*Application to:*Newfoundland. June 28, 1937. *T. I. B.*, Sept., 1937, p. 6.Southern Rhodesia (by Great Britain). July 14, 1937. *T. I. B.*, Aug., 1937, p. 12.**NATIONALITY OF WOMEN CONVENTION.** Montevideo, Dec. 26, 1933.*Ratification:* Brazil. Sept. 24, 1937. *Equal Rights*, Dec. 1, 1937, p. 174.**NAVAL TREATY.** London, March 25, 1936.*Promulgation:* France. Aug. 22, 1937. *Revue internationale française du droit des gens*, June-Sept., 1937, p. 71.*Text:* *G. B. Treaty Series*, No. 36 (1937), *Cmd.* 5561.**NIGHT WORK OF WOMEN.** Washington, Nov. 28, 1919.*Denunciation:* Belgium. *T. I. B.*, Sept., 1937, p. 11.**NIGHT WORK OF WOMEN.** Washington, Nov. 28, 1919. Revised. 1934.*Ratification:* Belgium. *T. I. B.*, Sept., 1937, p. 11.**NON-INTERVENTION.** Buenos Aires, Dec. 23, 1936.*Ratifications:*Brazil. Nov. 5, 1937. *N. Y. Times*, Nov. 6, 1937, p. 3.Ecuador. June 30, 1937. *T. I. B.*, Aug., 1937, p. 5.El Salvador. Sept. 9, 1937. *P. A. U.*, Dec., 1937, p. 943.United States. Aug. 25, 1937. *T. I. B.*, Aug., 1937, p. 5.**PAN AMERICAN HIGHWAY.** Buenos Aires, Dec. 23, 1936.*Ratification:* El Salvador. *P. A. U.*, Dec., 1937, p. 943.*Ratification deposited:* United States. July 29, 1937. *T. I. B.*, Aug., 1937, p. 30.**PARCEL POST.** Cairo, March 20, 1934.*Adhesion:* Afghanistan. Aug. 28, 1937. *T. I. B.*, Oct., 1937, p. 18.*Ratifications deposited:*France, Algeria, Morocco, Tunisia, French Indo-China, Syria, Lebanon and all other French colonies. Aug. 9, 1937. *T. I. B.*, Sept., 1937, p. 13.Yugoslavia. June 26, 1937. *T. I. B.*, Aug., 1937, p. 27.

PARCEL POST. Panama, Dec. 22, 1936.

Ratifications:

Argentina. Sept. 15, 1937.

Venezuela. Sept. 16, 1937. *T. I. B.*, Oct., 1937, pp. 18-19.

Ratification deposited: United States. Sept. 15, 1937. *T. I. B.*, Sept., 1937, p. 13.

PEACE CONVENTION. Buenos Aires, Dec. 23, 1936.

Ratifications:

Brazil. Nov. 5, 1937. *N. Y. Times*, Nov. 6, 1937, p. 3.

Ecuador. June 30, 1937. *T. I. B.*, Aug., 1937, p. 3.

El Salvador. Sept. 9, 1937. *P. A. U.*, Dec., 1937, p. 943.

Ratification deposited: United States. Aug. 25, 1937. *T. I. B.*, Aug., 1937, p. 3.

PIRACY: SHIPS AND AIRCRAFT. Geneva, Sept. 17, 1937.

Text: *G. B. Treaty Series*, No. 39 (1937), *Cmd.* 5569; *L. N. Doc.* C.409.M.273.1937.VII;

L. N. M. S., Sept., 1937, p. 242.

PIRACY: SUBMARINES. Nyon, Sept. 14, 1937.

Text: *G. B. Treaty Series*, No. 38 (1937), *Cmd.* 5568; *L. N. Doc.* 409.M.273.1937.VII;

L. N. M. S., Sept., 1937, pp. 241-242; *N. Y. Times*, Sept. 15, 1937, p. 16.

POSTAL COLLECTION ACCOUNTS. Cairo, March 20, 1934.

Ratifications deposited:

France, Algeria, Morocco, Tunisia. Aug. 9, 1937. *T. I. B.*, Sept., 1937, p. 13.

Yugoslavia. June 26, 1937. *T. I. B.*, Aug., 1937, p. 27.

POSTAL CONVENTION. Cairo, March 20, 1934.

Ratifications deposited: France, Algeria, Morocco, Tunisia, French Indo-China, Syria and

Lebanon and all other French colonies. Aug. 9, 1937. *T. I. B.*, Sept., 1937, p. 13.

POSTAL SUBSCRIPTIONS TO NEWSPAPERS. Cairo, March 20, 1934.

Ratifications deposited:

France, Algeria, Morocco, Tunisia. Aug. 9, 1937. *T. I. B.*, Sept., 1937, p. 13.

Yugoslavia. June 26, 1937. *T. I. B.*, Aug., 1937, p. 27.

POSTAL TRANSFERS. Cairo, March 20, 1934.

Ratifications deposited: France, Algeria, Morocco, Tunisia. Aug. 9, 1937. *T. I. B.*,

Sept., 1937, p. 13.

POSTAL UNION OF THE AMERICAS AND SPAIN. Panama, Dec. 22, 1936.

Ratifications:

Argentina. Sept. 15, 1937.

Venezuela. Sept. 16, 1937. *T. I. B.*, Oct., 1937, p. 18.

Ratifications deposited:

Ecuador. Aug. 20, 1937.

United States. Sept. 17, 1937. *T. I. B.*, Sept., 1937, p. 12.

PREVENTION OF CONTROVERSIES. Buenos Aires, Dec. 23, 1936.

Ratification: El Salvador. Sept. 9, 1937. *P. A. U.*, Dec., 1937, p. 943.

Ratifications deposited:

Ecuador. Oct. 19, 1937. *T. I. B.*, Oct., 1937, p. 1.

United States. July 29, 1937. *T. I. B.*, Aug., 1937, p. 4.

PRISONERS OF WAR. Geneva, July 27, 1929.

Adhesion: Bulgaria. July 30, 1937. *T. I. B.*, Aug., 1937, p. 7.

PUBLIC INSTRUCTION. Buenos Aires, Dec. 23, 1936.

Promulgation: Dominican Republic. Sept. 29, 1937.

Ratification: El Salvador. Sept. 9, 1937. *P. A. U.*, Dec., 1937, pp. 942-943.

RED CROSS. Geneva, July 27, 1929.

Adhesion: Bulgaria. July 30, 1937. *T. I. B.*, Aug., 1937, p. 7.

REFUGEES (INTERNATIONAL STATUS). Geneva, Oct. 28, 1933.

Ratification (with reservation) deposited: Belgium. Aug. 4, 1937. *T. I. B.*, Sept., 1937, p. 7.

RIGHTS AND DUTIES OF STATES. Montevideo, Dec. 26, 1933.

Ratification deposited: Costa Rica. Sept. 28, 1937. *T. I. B.*, Oct., 1937, p. 1.

SAFETY AT SEA. London, May 31, 1929.

Ratification deposited: United States. July 27, 1937. *T. I. B.*, Aug., 1937, p. 13.

SANITARY CONVENTION FOR AIR NAVIGATION. The Hague, April 12, 1933.

Ratification: Greece. Mar. 29, 1937. *T. I. B.*, Sept., 1937, p. 4.

SUBMARINES IN WAR. Procès verbal. London, Nov. 6, 1936.

Adhesions:

Costa Rica. July 7, 1937. *T. I. B.*, Sept., 1937, p. 2.

Czechoslovakia. Sept. 14, 1937.

Egypt. June 23, 1937. *T. I. B.*, Oct., 1937, p. 2.

Estonia. June 26, 1937. *T. I. B.*, Sept., 1937, p. 2.

Norway. May 21, 1937. *T. I. B.*, Oct., 1937, p. 3.

Poland. July 21, 1937.

Switzerland. May 22, 1937.

Turkey. July 7, 1937. *T. I. B.*, Sept., 1937, p. 2.

SUGAR PRODUCTION AND MARKETING. London, May 6, 1937.

Ratifications deposited:

Australia. July 21, 1937.

Czechoslovakia. Sept. 1, 1937.

Dominican Republic. Aug. 9, 1937.

Germany. Sept. 1, 1937.

Great Britain. Aug. 27, 1937.

Peru. July 30, 1937.

Portugal. Sept. 2, 1937.

South Africa. Sept. 9, 1937.

Declarations under Article 4 of the Protocol:

Belgium. Sept. 7, 1937.

Cuba. Aug. 31, 1937.

Haiti. July 19, 1937.

Hungary. June 29, 1937.

The Netherlands. Sept. 4, 1937.

Poland. Aug. 31, 1937. *T. I. B.*, Oct., 1937, p. 13.

TELECOMMUNICATIONS. Madrid, Dec. 9, 1932.

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DOROTHY R. DART

SUPREME COURT OF THE UNITED STATES

BORAX CONSOLIDATED, LTD., AND PACIFIC COAST BORAX CO. *v.*
CITY OF LOS ANGELES *

November 11, 1935

The City of Los Angeles brought suit to quiet title to land in the harbor claimed to be tideland granted to it by the legislature of the State. Petitioners claim under a patent issued by the United States after the admission of California as a State of the Union.

Held:

Soils under tidewaters within the original States were reserved to them respectively, and the States since admitted to the Union have the same sovereignty and jurisdiction in relation to such lands within their borders as the original States possessed.

Upon the acquisition of the territory from Mexico, the United States acquired the title to tidelands equally with the title to upland, but held the former only in trust for the future States that might be erected out of that territory. This limitation is not applicable to lands subject to previous grants by Mexico, since it was a duty resting upon the United States under the Treaty of Guadalupe Hidalgo, and also under principles of international law, to protect all rights of property which had emanated from the Mexican Government prior to the treaty; but no such limitation is involved in the present case, as was involved in the case of *Knight v. United States Land Association*, 142 U. S. 160, relied upon by petitioners.

A survey made by the Federal General Land Office which erroneously embraced tideland which the United States had no power to convey, was not binding upon the State, and its grantee is entitled to appeal to the court to show that the land in question was tideland.

The tideland extends to the high-water mark, and the line of ordinary high-water mark is always intended where the common law prevails. It is neither the mean of the spring high tides nor of the neap high tides, but the mean of all the high tides over a considerable period of time, which may be fixed at 18.6 years as found by the United States Coast and Geodetic Survey to be the average periodic variation in the rise of water above sea level.

Mr. Chief Justice HUGHES delivered the opinion of the court.

The City of Los Angeles brought this suit to quiet title to land claimed to be tideland of Mormon Island situated in the inner bay of San Pedro now known as Los Angeles Harbor. The city asserted title under a legislative grant by the State. Stats. Cal. 1911, p. 1256; 1917, p. 159.¹ Petitioners claimed under a preemption patent issued by the United States on December 30, 1881, to one William Banning. The District Court entered a decree, upon findings, dismissing the complaint upon the merits and adjudging that petitioner, Borax Consolidated, Limited, was the owner in fee simple and entitled to the possession of the property. 5 Fed. Supp. 281. The Circuit Court of

* 296 U. S. 10.

¹ The Act of 1911 (Stats. 1911, p. 1256) provided: "There is hereby granted to the city of Los Angeles, a municipal corporation of the State of California, and to its successors, all the right, title and interest of the State of California, held by said state by virtue of its sovereignty, in and to all tidelands and submerged lands, whether filled or unfilled, within the present boundaries of said city, and situated below the line of mean high tide of the Pacific ocean, or of any harbor, estuary, bay or inlet within said boundaries, to be forever held by said city, and by its successors, in trust for the uses and purposes, and upon the express conditions, following, to wit": The conditions which followed are not material here.

The granting clause above quoted is the same in the Act of 1917 (Stats. 1917, p. 159).

Appeals reversed the decree. 74 F. (2d) 901. Because of the importance of the questions presented, and of an asserted conflict with decisions of this court, we granted certiorari, June 3, 1935.

In May, 1880, one W. H. Norway, a Deputy Surveyor, acting under a contract with the Surveyor General of the United States for California, made a survey of Mormon Island. The surveyor's field notes and the corresponding plat of the island were approved by the Surveyor General and were returned to the Commissioner of the General Land Office. The latter, having found the survey to be correct, authorized the filing of the plat. The land which the patent to Banning purported to convey was described by reference to that plat as follows: "Lot numbered one, of section eight, in township five south, of range thirteen west of San Bernardino Meridian, in California, containing eighteen acres, and eighty-eight hundredths of an acre, according to the Official Plat of the Survey of the said Lands, returned to the General Land Office by the Surveyor General."

The District Court found that the boundaries of "lot one," as thus conveyed, were those shown by the plat and field notes of the survey; that all the lands described in the complaint were embraced within that lot; and that no portion of the lot was or had been tideland or situated below the line of mean high tide of the Pacific Ocean or of Los Angeles Harbor. The District Court held that the complaint was a collateral, and hence unwarranted, attack upon the survey, the plat and the patent; that the action of the General Land Office involved determinations of questions of fact which were within its jurisdiction and were specially committed to it by law for decision; and that its determinations, including that of the correctness of the survey, were final and were binding upon the State of California and the City of Los Angeles, as well as upon the United States.

The Circuit Court of Appeals disagreed with this view as to the conclusiveness of the survey and the patent. The court held that the Federal Government had neither the power nor the intention to convey tideland to Banning, and that his rights were limited to the upland. The court also regarded the lines shown on the plat as being meander lines and the boundary line of the land conveyed as the shore line of Mormon Island. The court declined to pass upon petitioners' claim of estoppel *in pais* and by judgment upon the ground that the question was not presented to or considered by the trial court, and was also of the opinion that the various questions raised as to the failure of the city to allege and prove the boundary line of the island were important only from the standpoint of the new trial which the court directed. 74 F. (2d) p. 904. For the guidance of the trial court the Court of Appeals laid down the following rule: The "mean high tide line" was to be taken as the boundary between the land conveyed and the tideland belonging to the State of California, and in the interest of certainty the court directed that "an average for 18.6 years should be determined as near as possible by observation or calculation." *Id.*, pp. 906, 907.

Petitioners contest these rulings of the Court of Appeals. With respect to the ascertainment of the shore line, they insist that the court erred in taking the "mean high tide line" and in rejecting "neap tides" as the criterion for ordinary high water mark.

1. The controversy is limited by settled principles governing the title to tidelands. The soils under tidewaters within the original States were reserved to them respectively, and the States since admitted to the Union have the same sovereignty and jurisdiction in relation to such lands within their borders as the original States possessed. *Martin v. Waddell*, 16 Pet. 367, 410; *Pollard v. Hagan*, 3 How. 212, 229, 230; *Goodtitle v. Kibbe*, 9 How. 471, 478; *Weber v. Harbor Commissioners*, 18 Wall. 57, 65, 66; *Shively v. Bowlby*, 152 U. S. 1, 15, 26. This doctrine applies to tidelands in California. *Weber v. Harbor Commissioners*, *supra*; *Shively v. Bowlby*, *supra*, pp. 29, 30; *United States v. Mission Rock Co.*, 189 U. S. 391, 404, 405. Upon the acquisition of the territory from Mexico, the United States acquired the title to tidelands equally with the title to upland, but held the former only in trust for the future States that might be erected out of that territory. *Knight v. United States Land Association*, 142 U. S. 160, 183. There is the established qualification that this principle is not applicable to lands which had previously been granted by Mexico to other parties or subjected to trusts which required a different disposition,—a limitation resulting from the duty resting upon the United States under the Treaty of Guadalupe Hidalgo (9 Stat. 922), and also under principles of international law, to protect all rights of property which had emanated from the Mexican Government prior to the treaty. *San Francisco v. LeRoy*, 138 U. S. 656, 671; *Knight v. United States Land Association*, *supra*; *Shively v. Bowlby*, *supra*. That limitation is not applicable here, as it is not contended that Mormon Island was included in any earlier grant. See *DeGuyer v. Banning*, 167 U. S. 723.

It follows that if the land in question was tideland, the title passed to California at the time of her admission to the Union in 1850. That the Federal Government had no power to convey tidelands, which had thus vested in a State, was early determined. *Pollard v. Hagan*, *supra*; *Goodtitle v. Kibbe*, *supra*. In those cases, involving tidelands in Alabama, the plaintiffs claimed title under an inchoate Spanish grant of 1809, an Act of Congress confirming that title, passed July 2, 1836, and a patent from the United States, dated March 15, 1837. The court held that the lands, found to be tidelands, had passed to Alabama at the time of her admission to the Union in 1819, that the Spanish grant had been ineffective, and that the confirming Act of Congress and the patent conveyed no title. The court said that "The right of the United States to the public lands, and the power of Congress to make all needful rules for the sale and disposition thereof, conferred no power to grant to the plaintiffs the land in controversy." *Pollard v. Hagan*, *supra*. See also *Shively v. Bowlby*, *supra*, at pp. 27, 28; *Mobile Transportation Company v. Mobile*, 187 U. S. 479, 490; *Donnelly v. United States*, 228 U. S. 243, 260-261.

2. As to the land in suit, petitioners contend that the General Land Office had authority to determine the location of the boundary between upland and tideland and did determine it through the survey in 1880 and the consequent patent to Banning, and that this determination is conclusive against collateral attack; in short, that the land in controversy has been determined by competent authority not to be tideland and that the question is not open to re-examination. Petitioners thus invoke the rule that "the power to make and correct surveys belongs to the political department of the government and that, whilst the lands are subject to the supervision of the General Land Office, the decisions of that bureau in all such cases, like that of other special tribunals upon matters within their exclusive jurisdiction, are unassailable by the courts, except by a direct proceeding." R. S., Secs. 453, 2395-2398, 2478; 43 U. S. C. 2, 751-753, 1201. *Cragin v. Powell*, 128 U. S. 691, 698, 699; *Heath v. Wallace*, 138 U. S. 573, 585; *Knight v. United States Land Association*, *supra*; *Stoneroad v. Stoneroad*, 158 U. S. 240, 250, 252; *Russell v. Maxwell Land Grant Company*, 158 U. S. 253, 256; *United States v. Coronado Beach Co.*, 255 U. S. 472, 487, 488.

But this rule proceeds upon the assumption that the matter determined is within the jurisdiction of the Land Department. *Cragin v. Powell*, *supra*. So far as pertinent here, the jurisdiction of the Land Department extended only to "the public lands of the United States." The patent to Banning was issued under the preëemption laws which expressly related to lands "belonging to the United States." R. S. 2257, 2259. Obviously these laws had no application to lands which belonged to the States. Specifically the term "public lands" did not include tidelands. *Mann v. Tacoma Land Company*, 153 U. S. 273, 284. "The words 'public lands' are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws." *Newhall v. Sanger*, 92 U. S. 761, 763; *Barker v. Harvey*, 181 U. S. 481, 490; *Union Pacific Railroad Company v. Harris*, 215 U. S. 386, 388.

The question before us is not as to the general authority of the Land Department to make surveys, but as to its authority to make a survey, as a basis for a patent, which would preclude the State or its grantee from showing in an appropriate judicial proceeding that the survey was inaccurate and hence that the patent embraced land which the United States had no power to convey. Petitioners' argument in substance is that while the United States was powerless as against the State to pass title to tidelands in the absence of a survey (*Pollard v. Hagan*, *supra*), the question whether or not the land was tideland would be foreclosed by a departmental survey although erroneous. This contention encounters the principle that the question of jurisdiction, that is, of the competency of the Department to act upon the subject matter, is always one for judicial determination. "Of course," said the court in *Smelting Company v. Kemp*, 104 U. S. 636, 641, "when we speak of the conclusive presumptions attending to a patent for lands, we assume that it was issued in a case where the department had jurisdiction to act and execute it; that is

to say, in a case where the lands belonged to the United States, and provision had been made by law for their sale. If they never were public property, or had previously been disposed of, or if Congress had made no provision for their sale, or had reserved them, the department would have no jurisdiction to transfer them, and its attempted conveyance of them would be inoperative and void, no matter with what seeming regularity the forms of law may have been observed." The court added that questions of that sort "may be considered by a court of law" for in such cases "the objection to the patent reaches beyond the action of the special tribunal, and goes to the existence of a subject upon which it was competent to act." *Id.* See, also, *Polk v. Wendal*, 9 Cranch, 87, 99; *Moore v. Robbins*, 96 U. S. 530, 533; *Wright v. Roseberry*, 121 U. S. 488, 519; *Doolan v. Carr*, 125 U. S. 618, 625; *Hardin v. Jordan*, 140 U. S. 371, 401; *Crowell v. Benson*, 285 U. S. 1, 58, 59. Here, the question goes to the existence of the subject upon which the Land Department was competent to act. Was it upland, which the United States could patent, or tideland, which it could not? Such a controversy as to title is appropriately one for judicial decision upon evidence, and we find no ground for the conclusion that it has been committed to the determination of administrative officers.

Petitioners urge a distinction in that at the time of the survey no private right in the property had yet attached and the question lay between the Federal Government and the State of California. But the distinction is immaterial. If tideland, the title of the State was complete on admission to the Union. No transfer to private parties was necessary to perfect or assure that title and no power of disposition remained with the United States.

To support their contention as to the conclusiveness of the survey and patent, petitioners largely rely upon our decision in *Knight v. United States Land Association*, *supra*. But that decision is not in point as it related to land which, albeit tideland, had been the subject of a Mexican grant made prior to statehood. What had there been done by the Federal Government was found to be in pursuance of the duty of the United States, imposed by the Treaty of Guadalupe Hidalgo and the principles of international law, to protect the rights of property which had previously been created by the Mexican Government. The contest related to land in Mission Creek, an estuary of the bay of San Francisco. The plaintiffs claimed under a tideland grant from the State. The defendant's claim rested upon the title of the City of San Francisco as successor to the Mexican pueblo of that name. Following the procedure prescribed by statute with respect to the confirmation of such titles (Acts of March 3, 1851, 9 Stat. 631; July 1, 1864, 13 Stat. 332), the city had obtained a confirmatory decree from the United States Circuit Court in May, 1865. The statutes required that such a decree should be followed by a survey under the supervision of the General Land Office and patent was to issue to the successful claimant when such survey had been finally approved. *Id.* Accordingly, after the decree in favor of the city, a survey was made which

was approved by the Surveyor General and the Commissioner of the General Land Office. The line of that survey ran along the line of ordinary high water mark of the bay of San Francisco, but in the case of the estuary followed the tideline up the creek and, crossing over, ran down on the other side. The city objected to that method, insisting that the line should have crossed the mouth of the estuary, and, on appeal, that contention was sustained by the Secretary of the Interior. A second survey was made pursuant to that decision and a patent was issued. 142 U. S. pp. 162-172. The plaintiffs contended that the first survey was correct and the second unauthorized. Reviewing that branch of the case, the court decided that the Secretary of the Interior had power to set aside the first survey and direct another, and that the departmental action in that particular was unassailable. But that conclusion was not sufficient to meet the plaintiffs' claim under the state grant, unless it could be held that title to the land had not passed to the State. Upon that question the court found that the case of *San Francisco v. LeRoy*, 138 U. S. 656, 670, 672, was "directly in point," as the court had there decided that "if there were any tidelands within the pueblo, the power and duty of the United States under the treaty to protect the claims of the City of San Francisco as successor to the pueblo were superior to any subsequently acquired rights of California." 142 U. S. pp. 183-185. In discharge of that duty provision had been made by Congress for the investigation and confirmation of the property rights of pueblos equally with those of individuals. The rights of the pueblo "were dependent upon Mexican laws and when Mexico established those laws she was the owner of tidelands as well as uplands, and could have placed the boundaries of her pueblos wherever she thought proper." It was for the United States to ascertain those boundaries when fixing the limits of the claim of the city as successor to the pueblo. *Id.*, pp. 186, 187. The obligation of protection was "political in its character, to be performed in such manner and on such terms as the United States might direct." Accordingly, Congress had established a special tribunal to consider claims derived from Mexico, had authorized determinations by the court upon appeal, and "had designated the officers who should in all cases survey and measure off the land when the validity of the claim presented was finally determined." *Id.*, pp. 202, 203. The survey upon which the patent rested in the Knight case was thus made pursuant to the authority reserved to the United States to enable it to discharge its international duty with respect to land which, although tideland, had not passed to the State. See *Shively v. Bowlby*, *supra*, pp. 30, 31; *United States v. Coronado Beach Company*, *supra*.

The distinguishing features of the instant case are apparent. No prior Mexican grant is here involved. We conclude that the State was not bound by the survey and patent, and that its grantee was entitled to show, if it could, that the land in question was tideland.

In this view it is not necessary to consider whether the lines designated in the plat of the Norway survey as "meander" lines were intended as boundaries.

3. As the District Court fell into a fundamental error in treating the survey and patent as conclusive, it was not incumbent upon the Court of Appeals to review the evidence and decide whether it showed, or failed to show, that the land in question was tideland. The court remanded the cause for a new trial in which the issues as to the boundary between upland and tideland, and as to the defenses urged by petitioners, are to be determined. In that disposition of the case we find no error.

4. There remains for our consideration, however, the ruling of the Court of Appeals in instructing the District Court to ascertain as the boundary "the mean high tide line" and in thus rejecting the line of "neap tides."

Petitioners claim under a federal patent which, according to the plat, purported to convey land bordering on the Pacific Ocean. There is no question that the United States was free to convey the upland, and the patent affords no ground for holding that it did not convey all the title that the United States had in the premises. The question as to the extent of this federal grant, that is, as to the limit of the land conveyed, or the boundary between the upland and the tideland, is necessarily a federal question. It is a question which concerns the validity and effect of an act done by the United States; it involves the ascertainment of the essential basis of a right asserted under federal law. *Packard v. Bird*, 137 U. S. 661, 669, 670; *Brewer-Elliott Oil Company v. United States*, 260 U. S. 77, 87; *United States v. Holt Bank*, 270 U. S. 49, 55, 56; *United States v. Utah*, 283 U. S. 64, 75. Rights and interests in the tideland, which is subject to the sovereignty of the State, are matters of local law. *Barney v. Keokuk*, 94 U. S. 324, 338; *Shively v. Bowlby*, *supra*, p. 40; *Hardin v. Jordan*, 140 U. S. 381, 382; *Port of Seattle v. Oregon & Washington R. R. Co.*, 255 U. S. 56, 63.

The tideland extends to the high water mark. *Hardin v. Jordan*, *supra*; *Shively v. Bowlby*, *supra*; *McGilvra v. Ross*, 215 U. S. 70, 79. This does not mean, as petitioners contend, a physical mark made upon the ground by the waters; it means the line of high water as determined by the course of the tides. By the civil law, the shore extends as far as the highest waves reach in winter. *Inst. lib. 2, tit. 1, § 3*; *Dig. lib. 50, tit. 16, § 112*. But by the common law, the shore "is confined to the flux and reflux of the sea at ordinary tides." *Blundell v. Catterall*, 5 B. & A. 268, 292. It is the land "between ordinary high and low-water mark, the land over which the daily tides ebb and flow. When, therefore, the sea, or a bay, is named as a boundary, the line of ordinary high-water mark is always intended where the common law prevails." *United States v. Pacheco*, 2 Wall. 587, 590.

The range of the tide at any given place varies from day to day, and the question is, how is the line of "ordinary" high water to be determined? The range of the tide at times of new moon and full moon "is greater than the average," as "high water then rises higher and low water falls lower than usual." The tides at such times are called "spring tides." When the moon is in its first and third quarters, "the tide does not rise as high nor fall as low

as on the average." At such times the tides are known as "neap tides." *Tidal Datum Plane*, U. S. Coast and Geodetic Survey, Special Publication No. 135, p. 3.² The view that "neap tides" should be taken as the ordinary tides had its origin in the statement of Lord Hale. *De Jure Maris*, cap. VI; Hall on the Sea Shore, p. 10, App. XXIII, XXIV. In his classification, there are "three sorts of shores, or *littora marina*, according to the various tides," (1) "The high spring tides, which are the fluxes of the sea at those tides that happen at the two equinoxials"; (2) "The spring tides, which happen twice every month at full and change of the moon"; and (3) "Ordinary tides, or nepe tides, which happen between the full and change of the moon." The last kind of shore, said Lord Hale, "is that which is properly *littus maris*." He thus excluded the "spring tides" of the month, assigning as the reason that "for the most part the lands covered with these fluxes are dry and maniorable," that is, not reached by the tides.

The subject was thoroughly considered in the case of *Attorney General v. Chambers*, 4 De G. M. & G. 206. In that case Lord Chancellor Cranworth invited Mr. Baron Alderson and Mr. Justice Maule to assist in the determination of the question as to "the extent of the right of the Crown to the sea-shore." Those judges gave as their opinion that the average of the "medium tides in each quarter of a lunar revolution during the year" fixed the limit of the shore. Adverting to the statement of Lord Hale, they thought that the reason he gave would be a guide to the proper determination. "What," they asked, are "the lands which for the most part of the year are reached and covered by the tides?" They found that the same reason that excluded the highest tides of the month, the spring tides, also excluded the lowest high tides, the neaps, for "the highest or spring-tides and the lowest high tides (those at the neaps) happen as often as each other." Accordingly, the judges thought that "the medium tides of each quarter of the tidal period" afforded the best criterion. They said: "It is true of the limit of the shore reached by these tides that it is more frequently reached and covered by the tide than left uncovered by it. For about three days it is exceeded, and for about three days it is left short, and on one day it is reached. This point of the shore therefore is about four days in every week, *i. e.* for the most part of the year, reached and covered by the tides." *Id.*, p. 214.

Having received this opinion, the Lord Chancellor stated his own. He

² See *The Tide*, H. A. Marmer, Assistant Chief, Division of Tides and Currents, U. S. Coast and Geodetic Survey, pp. 9, 10. "There is generally an interval of one or two days between full moon or new moon and the greatest range of the tide. And a like interval is found between the first and third quarters of the moon and the smallest tides." *Id.*, p. 11.

The origin of the terms spring and neap tides "is probably due to the fact that as the moon leaves the meridian of the sun in her orbital transit round the earth and approaches the quarters the tides begin to 'fall off' or are 'nipped', and neap tides ensue. As she leaves the quarters for the meridian they begin to 'lift', or 'come on,' or 'spring up,' and when the meridian is reached spring tides ensue." *A Practical Manual of Tides and Waves*, W. H. Wheeler, p. 49.

thought that the authorities had left the question "very much at large." Looking at "the principle of the rule which gives the shore to the Crown," and finding that principle to be that "it is land not capable of ordinary cultivation or occupation, and so is in the nature of unappropriated soil," the Lord Chancellor thus stated his conclusion:

Lord Hale gives as his reason for thinking that lands only covered by the high spring-tides do not belong to the Crown, that such lands are for the most part dry and maniorable; and taking this passage as the only authority at all capable of guiding us, the reasonable conclusion is that the Crown's right is limited to land which is for the most part not dry or maniorable. The learned Judges whose assistance I had in this very obscure question point out that the limit indicating such land is the line of the medium high tide between the springs and the neaps. All land below that line is more often than not covered at high water, and so may justly be said, in the language of Lord Hale, to be covered by the ordinary flux of the sea. This cannot be said of any land above that line.

The Lord Chancellor therefore concurred with the opinion of the judges "in thinking that the medium line must be treated as bounding the right of the Crown." *Id.*, p. 217.³

This conclusion appears to have been approved in *Massachusetts v. Roxbury*, 9 Gray. 451, 483; *East Boston Company v. Commonwealth*, 203 Mass. 68, 72. See also, *New Jersey Zinc Co. v. Morris Canal Co.*, 44 N. J. Eq. 398, 401; *Gould on Waters*, p. 62.

In California, the Acts of 1911 and 1917, upon which the City of Los Angeles bases its claim, grant the "tidelands and submerged lands" situated "below the line of mean high tide of the Pacific Ocean."⁴ Petitioners urge that "ordinary high water mark" has been defined by the state court as referring to the line of the neap tides.⁵ We find it unnecessary to review the cases cited or to attempt to determine whether they record a final judgment as to the construction of the state statute, which, of course, is a question for the state courts.

In determining the limit of the federal grant, we perceive no justification for taking neap high tides, or the mean of those tides, as the boundary between upland and tideland, and for thus excluding from the shore the land which is

³ See, also, *Tracey Elliott v. Earl of Morley*, Ch. Div. 51 Sol. Journal (1907), 625.

⁴ See Note 1.

⁵ See *Teschemacher v. Thompson*, 18 Cal. 11, 21; *Ward v. Mulford*, 32 Cal. 365, 373; *Eichelberger v. Mills Land, etc. Co.*, 9 Cal. App. 628, 639; *Forgeus v. County of Santa Clara*, 24 Cal. App. 193, 195; *F. A. Hihn Co. v. City of Santa Cruz*, 170 Cal. 436, 442; *Oakland v. Wood Lumber Co.*, 211 Cal. 16, 23; *Otey v. Carmel Sanitary District*, 219 Cal. 310, 313. In a number of cases the state court has referred to the limit of the shore as the "ordinary" high water mark. See *Wright v. Seymour*, 69 Cal. 122, 126; *Long Beach Company v. Richardson*, 70 Cal. 206; *Oakland v. Oakland Water Front Co.*, 118 Cal. 160, 183; *Pacific etc. Co. v. Packers' Association*, 138 Cal. 632, 635, 636; *People v. California Fish Co.*, 166 Cal. 576, 584. See, also, *Strand Improvement Co. v. Long Beach*, 173 Cal. 765, 770; *Miller & Lux v. Secara*, 193 Cal. 755, 761, 762.

actually covered by the tides most of the time. In order to include the land that is thus covered, it is necessary to take the mean high tide line which, as the Court of Appeals said, is neither the spring tide nor the neap tide, but a mean of all the high tides.

In view of the definition of the mean high tide, as given by the United States Coast and Geodetic Survey,⁶ that "Mean high water at any place is the average height of all the high waters at that place over a considerable period of time," and the further observation that "from theoretical considerations of an astronomical character" there should be "a periodic variation in the rise of water above sea level having a period of 18.6 years,"⁷ the Court of Appeals directed that in order to ascertain the mean high tide line with requisite certainty in fixing the boundary of valuable tidelands, such as those here in question appear to be, "an average of 18.6 years should be determined as near as possible." We find no error in that instruction.

The decree of the Court of Appeals is affirmed.

Decree affirmed.

Mr. Justice McREYNOLDS is of opinion that *Knight v. United States Land Association*, 142 U. S. 161, is controlling and that the decree of the District Court should be affirmed.

SUPREME COURT OF THE UNITED STATES

PETER VAN DER WEYDE *v.* OCEAN TRANSPORT COMPANY, LTD., CLAIMANT OF
THE *S.S. Taigen Maru*.*

February 3, 1936

The Seamen's Act of March 4, 1915, having directed the President to give notice of the termination of treaty provisions in conflict with the Act, it was incumbent upon the President, charged with the conduct of negotiations with foreign governments and also with the duty to take care that the laws of the United States are faithfully executed, to reach a conclusion as to the inconsistency between the provisions of the treaty and the provisions of the new law. It is not possible to say that his conclusion as to Articles XIII and XIV of the Treaty of Commerce and Navigation of 1827 between the United States and Sweden and Norway was arbitrary or inadmissible. Having determined that their termination was necessary, and Norway having agreed to the termination, her consul cannot be heard to question it.

Mr. Chief Justice HUGHES delivered the opinion of the court.

Petitioner brought this libel in 1931, in the District Court for the Western District of Washington, against the vessel *Taigen Maru*, for personal injuries which he sustained as a seaman in 1922. The vessel was then known as the *Luisse Nielsen* and was of Norwegian registry. The respondent, Ocean Transport Company, Ltd., a Japanese corporation, made claim as owner, and filed exceptions alleging that a final decree had been entered in the District

⁶ *Tidal Datum Plane*, Special Publication No. 135, p. 76.

⁷ *Id.*, p. 81.

* 297 U. S. 114.

Court for the District of Oregon in 1924, dismissing a libel, for the same cause, on the intervention of the Norwegian consul.

In the present case, there was again an intervention by the Norwegian consul who claimed that, while the vessel was now Japanese, he was nevertheless officially concerned, as the former Norwegian owner had agreed to deliver the vessel "free from all debts and encumbrances." The consul filed exceptive allegations to the effect that the libelant, a Dutch subject, had signed Norwegian articles and, so far as his rights as a seaman were concerned, was bound by the laws of Norway, which provided for appropriate remedies. The consul asked that, if the cause was not dismissed because of the former decree, the dispute should be left for his adjustment and disposition. The libelant made response and, on hearing, the District Court dismissed the cause "in the exercise of its discretion."

The Circuit Court of Appeals affirmed the decree, but upon the ground that the dismissal should have been for want of jurisdiction rather than as an exercise of discretion. 73 F. (2d) 922. The court based its decision upon the second paragraph of Article XIII of the Treaty of Commerce and Navigation, of 1827, between the United States and the Kingdom of Sweden and Norway, the text of which is given in the margin.¹ The court assumed that this provision was still in effect, apparently not being advised of the fact that Articles XIII and XIV of that treaty had been terminated in 1919. See *Foreign Relations of the United States, 1919*, pp. 47-54.

Section 16 of the Seamen's Act of March 4, 1915,² expressed "the judgment of Congress" that treaty provisions in conflict with the provisions of the Act "ought to be terminated," and the President was "requested and directed" to give notice to that effect to the several governments concerned within ninety days after the passage of the Act. It appears that, in consequence, notice was given and that a large number of treaties were terminated in whole or in part.³ The treaty with Sweden and Norway of 1827 provided that it might be terminated, after an initial period of ten years, upon one year's notice.⁴ On February 2, 1918, the Government gave notice to the Norwegian

¹ 8 Stat. 346, 352. "Article XIII. . . . The consuls, vice consuls, or commercial agents, or the persons duly authorized to supply their places, shall have the right, as such, to sit as judges and arbitrators in such differences as may arise between the captains and crews of the vessels belonging to the nation whose interests are committed to their charge, without the interference of the local authorities, unless the conduct of the crews, or of the captain, should disturb the order or tranquillity of the country; or the said consuls, vice consuls, or commercial agents should require their assistance to cause their decisions to be carried into effect or supported. It is, however, understood, that this species of judgment, or arbitration shall not deprive the contending parties of the right they have to resort, on their return, to the judicial authority of their country."

² 38 Stat. 1164, 1184.

³ *Foreign Relations of the United States, 1915*, p. 3 *et seq.*; 1916, p. 33 *et seq.*; 1917, p. 9 *et seq.*; 1918, p. 3 *et seq.*; 1919, p. 47 *et seq.*

⁴ Article XIX, 8 Stat. 356.

Government of the denunciation of the treaty in its entirety, to take effect on February 2, 1919, but later by an exchange of diplomatic notes, this Government formally withdrew its denunciation, except as to Articles XIII and XIV. *Foreign Relations of the United States, 1919*, pp. 50-52. It was expressly stated that Articles XIII and XIV of the treaty, being in conflict with provisions of the Seamen's Act, were deemed to be terminated on July 1, 1916, so far as the laws of the United States were concerned. *Id.*, pp. 53, 54.

On June 5, 1928, the two governments signed a Treaty of Friendship, Commerce, and Consular Rights, and on February 25, 1929, an additional article, which supplanted the treaty of 1827 (so far as the latter had remained effective), save that Article I of the former treaty concerning the entry and residence of the nationals of the one country in the territories of the other for the purposes of trade, was continued in force.⁵

Respondent contends (1) that the Seamen's Act did not specifically direct the abrogation of Article XIII, (2) that the Act was not so unavoidably inconsistent with all the provisions of Article XIII as to require its entire abrogation, and (3) that the diplomatic negotiations attempting to effect abrogation of the whole of Article XIII "were in excess of congressional direction and in violation of constitutional authority."

The first and second points are unavailing, if Article XIII was actually abrogated in its entirety, and that this was the purport of the diplomatic exchanges between the two governments is beyond dispute. As to the third point, we think that the question as to the authority of the Executive in the absence of congressional action, or of action by the treaty-making power, to denounce a treaty of the United States, is not here involved. In this instance, the Congress requested and directed the President to give notice of the termination of the treaty provisions in conflict with the Act. From every point of view, it was incumbent upon the President, charged with the conduct of negotiations with foreign governments and also with the duty to take care that the laws of the United States are faithfully executed, to reach a conclusion as to the inconsistency between the provisions of the treaty and the provisions of the new law. It is not possible to say that his conclusion as to Articles XIII and XIV was arbitrary or inadmissible. Having determined that their termination was necessary, the President through the Secretary of State took appropriate steps to effect it. Norway agreed to the termination of Articles XIII and XIV and her consul cannot be heard to question it.

The injuries, of which libelant complains, took place after that termination. The effect of the new treaty we need not, and do not, consider, as in any event it could not be regarded as retroactively affecting the jurisdiction of the District Court.

The Circuit Court of Appeals fell into error in sustaining the dismissal of

⁵ 47 Stat. Pt. 2, pp. 2135, 2158, 2159.

the cause upon the ground of want of jurisdiction by reason of the treaty provision invoked. We express no opinion upon any other questions which the cause may present, as these have not been considered by the courts below. They should be considered and determined.

The decree is reversed and the cause is remanded for further proceedings in conformity with this opinion.

It is so ordered.

BOOK REVIEWS AND NOTES*

Académie de Droit International. Recueil des Cours, 1936. Paris: Librairie du Recueil Sirey, 1936, 1937. T. I, pp. iv, 719; T. II, pp. iv, 701; T. III, pp. iv, 747; T. IV, pp. iv, 715 (Vols. 55, 56, 57, and 58 of the whole series). Indexes.

These four somewhat ponderous volumes contain the lectures delivered at the Hague Academy of International Law at its session in 1936, which, it may be remarked, was the 14th since the opening of the Academy in 1923. Altogether 22 persons (professors, magistrates, diplomats, economists and jurists) gave courses at this session of the Academy. They represented 14 countries and were distributed among them as follows: France, 4 (Ancel, Basdevant, Maury and Scelle); Italy, 3 (Ago, Canina and Vitta); Germany, 2 (Freytagh-Loringhoven and Lewald); Russia, 2 (Mirkine-Guetzévitch and Nolde); Switzerland, 2 (Bühler and Musy); and the others, one each: Belgium (de Leener), Denmark (Brüel), England (Brierly), Hungary (Balogh), The Netherlands (Moresco), Poland (Witenberg), Rumania (Négulesco), Sweden (Hammar skjöld), and the United States (Hindmarsh). It may be added that 354 students attended the 1936 session of the Academy, as compared with 263 in 1935. Of these, 58 per cent. had already completed their university studies and were engaged in such professions as law, diplomacy, teaching, etc. The students in attendance represented 33 different nationalities, The Netherlands leading, as usual, with 161, Germany with 48, France 27, the United States 14, Belgium 13, and the others from one to six.

The lectures, as in former years, covered a wide range of subjects: public and private international law, comparative law, international organization and relations, economics and finance, questions of geography and boundaries, colonial relations, immunities of international functionaries, the procedure of international tribunals, and foreign policies. As in former recent years, two general courses of 16 lectures each were devoted to the rules of international law governing the peaceful relations of states (the original ban on the so-called laws of war is still in force). These two courses were given in 1936 by Professor Brierly, of Oxford University, and Professor Basdevant, of the University of Paris, who is also jurisconsult of the French Ministry of Foreign Affairs. A third somewhat general course (of 10 lectures) was given by a very young professor, Ago, of Italy, on the general rules governing the conflict of laws. The lectures of these three professors fill the entire 4th volume of about 700 pages. The other 19 courses were limited to five hours each or fewer.

*The JOURNAL assumes no responsibility for the views expressed in book reviews and notes.—Ed.

Dealing at the outset with the three general courses and, of these, that of Professor Brierly first, it may be remarked that his lectures (they fill 235 pages of Volume IV) constitute a veritable treatise on the international law of peace, since they deal with most of the subjects ordinarily covered in a general treatise on public international law. Referring to some of his opinions, he maintains that the competence of states is derived from international law, rejects the theory of absolute national sovereignty, and declares that there is nothing in the relations among states which renders impossible the conception of a super or supra-national law. He criticizes the "voluntarist," auto-limitation, and *Vereinbarung* theories as furnishing no correct explanation of the obligatory force of international law, as he does also the doctrine of consent. As between the monist and dualist theories, he is a partisan of the former and with it the primacy of international law, which he says is more nearly in accord with the practice of states than is the dualist conception. As to the increasing sentiment in favor of giving the individual a place in international law, for certain purposes at least, he appears to be sympathetic and expresses the opinion that the old dogma that only states are subjects of international law is gone. On the subject of recognition, he emphasizes the untenability of the doctrine sometimes acted upon that recognition has a creative effect, and he rejects as a confusion of international and constitutional law the distinction between *de facto* and *de jure* recognition when applied to *governments*, although he thinks it is defensible when applied to *states*. On the subject of the sources of international law, upon which there has been so much ambiguous and confusing writing, he distinguishes between "formal" sources such as custom and treaties, and "material" sources such as the decisions of international tribunals. Concerning the maintenance of peace, he apparently has a good deal of sympathy for the old distinction between "just" and "unjust" wars, and adds that if it is the view of international law that it is lawful to make war for any cause, international law has renounced its principal rôle and can no longer maintain its juridical character. As to the future of international law, he thinks there is no justifiable cause for the present pessimism and discouragement due to its shortcomings and the disregard with which certain governments have recently treated it, for to despair of its future would be to despair of civilization itself, since international law is one of its essential conditions. Professor Brierly's lectures are characterized by the learning and sound judgment for which he is well known, and they constitute an important contribution to the vast literature of international law found in the fifty-eight volumes of the *Academy Recueil*.

Professor Basdevant's lectures, which were given during the second period of the session (they fill 215 pages of Volume IV) deal with a good many subjects which Professor Brierly had treated in his course during the first period, although his method of approach and his conclusions are not always the same as Brierly's. At the outset he states that his lectures will deal only with positive international law; he does not therefore concern himself with the

law of nature, reason, etc. He discusses the diverse conceptions of international law and the different kinds: universal, general and particular—a distinction which he thinks is well recognized in practice. Under the head of sources of international law he examines in some detail the meaning of the phrase in the Statute of the Permanent Court of International Justice which requires it to apply “the general principles of law recognized by civilized nations” and discusses the two conceptions regarding the nature of custom as a source. He emphasizes strongly the importance of good faith in international relations, something which needs to be stressed in these times. Other matters which he treats in turn are the subjects of international law (he admits that the present conception which eliminates the individual is not altogether satisfactory), international organizations, the equality of states, their jurisdiction and juridical character, international responsibility, and the procedure for the settlement of international disputes. By way of conclusion, he emphasizes that, while the rules of international law recognize the sovereignty of states, they recognize at the same time that the sovereign state is juridically subject to international law. There is, he thinks, no inconsistency between these two propositions.

Included in the same volume with the lectures of Professors Brierly and Basdevant are the ten lectures (212 pages) of Professor Ago which deal with the general rules concerning the conflict of laws. He treats in detail and with much learning the nature of private international law and the problems of interpretation which arise in the application of its rules. Two other courses in this field were those of Baron Nolde on the codification of private international law, and of Professor Maury on the general rules of the conflict of laws. Baron Nolde describes the present state of private international law as a “veritable tower of Babel” in which each state speaks its own language. He dwells upon the advantages of codification, emphasizes the complexity of the problem and discusses the progress that has been made in the direction of codification as shown by the Hague and Geneva Conventions and the Bustamante Code, all of which he analyzes and evaluates. Professor Maury, after an analysis of the situation resulting from the conflict of different legislations, undertakes to explain the general rules applied by the courts when they are called on to decide controversies in which conflicting laws are invoked.

The space here available does not permit of much more than a statement of the subjects of the other five-lecture courses given at the Academy. In the order in which the lectures are arranged in the *Recueil* come first those of M. de Leener on the general rules of law concerning international communications, in which the lecturer traces the origin and development of conventional international law for the regulation of railway traffic and river and air navigation—a subject which M. Hostie had previously treated in two courses of lectures before the Academy. The lecturer emphasizes that the general purpose of this regulation has been to insure the freedom of international

traffic and communication and to generalize the rules which originally applied only to a few of the great rivers of Europe.

Professor Scelle's lectures deal with the theory and practice of the executive function in international law, which he defines as one whose object is essentially that of stabilization, that is, the guarantee of situations legally established. He is of course obliged to admit that in the field of international relations there is as yet no adequate executive power to enforce the decisions of the League of Nations, and this is one reason why the achievements of the League in the maintenance of peace have been disappointing.

M. Ancel in his course discusses the subject of geography of frontiers, and examines the various kinds of boundaries: literary, cultural, ethnic, linguistic, economic, geographical, etc. The notion of the superiority of so-called "natural" boundaries he thinks is not well founded. In fact, he concludes they are often less well defined and less stable than those traced by the hand of man.

In a not entirely unrelated field were the lectures of M. Brühl on the Danish Straits from the point of view of international law. Following a discussion of the geographical features of the Straits, he passes in review the history of their political and international status from early times to the present, giving special attention to the abolition of the Sound dues in 1857, the treaty of 1907 between Germany and Russia for the maintenance of the *status quo* in the Baltic Sea, and the policy of Denmark regarding the Straits during the World War.

M. Balogh, Secretary-General of the Academy of Comparative Law, explains the nature of comparative law, which, he says, must not be confused with private international law, and discusses its rôle in international law. After analyzing in turn the "renvoi" and the "ordre public" he discusses the question whether the parties in litigation are free to choose the law that shall be applied in the determination of their contractual obligations. He points out that although the jurisprudence is universally in favor of such a right, it is denied by the preponderance of the doctrine.

In the field of economics and finance, attention may be called to the lectures of M. Bühler on international agreements concerning double taxation and fiscal evasion. He shows how, with sixty different states and colonies having their own systems of income taxation, double taxation is inevitable. He discusses the efforts that have been made and the results achieved in the direction of international agreements whose purpose is to prevent or diminish double taxation. He offers certain suggestions which in his opinion would promote agreement. On the whole, he thinks bilateral agreements are preferable to multilateral agreements as a means of achieving this object.

Falling also within the field of public finance were the lectures of M. Canina on the gold standard and its future in international relations. While the gold standard has rendered notable service in the past and may do so again in the future, he thinks it would be dangerous to retain it in the present economic situation of the world. Stabilization is the present great need and it can, he

thinks, be brought about only through international agreement among the great body of states and with the aid of the Bank for International Settlements or some other international organ of this kind.

In the related field of economics were the lectures of M. Musy on the basis of an economic organization of Europe. He discusses the nature and causes of the present economic crisis, reviews the somewhat futile efforts of the various international economic conferences that have been called to deal with the matter, and makes certain proposals which he thinks would, if adopted, contribute to the amelioration of the present situation. In his opinion deflation is a better remedy in the long run than inflation, although he admits that it would involve some hardship for the people and possible danger to the government. He urges greater economy of expenditures, the balancing of budgets, the adoption of the English parliamentary system of budgetary procedure, a better system of distribution of economic goods, and, last but not least, a more effective policy of international coöperation.

Two very interesting courses of lectures deal with the subject of the procedure of international judicial tribunals. The first of these were the lectures of M. Witenberg on the theory of proof in the procedure of international courts, in which he discusses in the light of his great familiarity with the jurisprudence, such matters as what is proof, its different kinds, what must be and what need not be proven, upon whom the burden of proof rests, admissible and irrelevant evidence, the means of proof, the duty of litigants to collaborate in the disclosure of facts, etc. He points out that treaties of arbitration, unlike the Statute of the Permanent Court of International Justice, seldom lay down rules of procedure except those of a very general character. In that case the judge has full power over the admission of evidence and in determining the weight to be given it. He remarks that long and abundant experience in the practice of arbitration has resulted in the development of a fairly well-settled and coherent body of procedural rules which he thinks deserves very high praise.

The second course in this field was that of M. Négulesco on the evolution of the procedure of the Permanent Court of International Justice in giving advisory opinions. When Judge Manley O. Hudson lectured on this subject at the Academy in 1925 the statute of the court contained few or no rules regarding the procedure of the court in giving advisory opinions. Since the coming into force in 1936, however, of the amendments to the statute the discretion of the court has been limited and its procedure in giving advisory opinions has more and more become assimilated to its procedure in contentious cases. M. Négulesco examines the cases which show this *rapprochement* and indicates the tendencies in the evolution of the court's procedure. He concludes that advisory opinions now have virtually the same character as judgments and that they are treated as hardly less obligatory than the judgments of the court.

Professor Mirkine-Guetzévitch in his lectures discusses the parliamentary

technique of international relations, emphasizing the rôle played by parliaments, especially in democratic countries, in the control of foreign policy. He considers in turn the forms and organs of parliamentary control in different types of states, the rôle of the ministry, the ratification of treaties, the influence of public opinion, etc. He thinks the greatest "disasters" in the foreign policies of states have occurred in those in which the legislature has no control over foreign policy.

M. Lewald lectured on the control of national supreme courts over the application of foreign laws—a study in comparative jurisprudence. He analyzes and compares the powers of the supreme courts of various countries—those which are tribunals of cassation only and those which are also tribunals of revision. Starting with the premise that when a national supreme court is called on to decide a question which depends upon a foreign law, the court must take that law into account, he examines such questions as how is the court to determine the existence of the foreign law? Must the party invoking it prove its existence? If so, what are the means of proof? If it is a case on appeal, has the judge of the lower court properly determined the law applicable? If it is a foreign law, has he properly applied it? He points out that the rules of practice regarding these matters are not the same in all countries, yet he finds that there are certain conceptions which are generally recognized and applied.

The subject of Herr von Freytagh-Loringhoven's course was "regional ententes"—a topic on which M. Orue y Arregui had lectured at the previous session of the Academy. After adverting to Articles 20 and 21 of the Covenant of the League of Nations relative to treaties and regional ententes which are incompatible with the Covenant, he examines "from the political point of view" various pacts of non-aggression, conciliation, consultation, mutual assistance, alliances, etc., that have been entered into by groups of states since the World War, and comes to the conclusion that they are all in contravention of the spirit of the Covenant, that some of them were entered into for the purpose of maintaining the impossible *status quo* created by the treaties of peace and that they retard rather than promote the cause of international peace. He admits that few jurists share his opinion on these points, but the conclusions stated above nevertheless represent his own convictions.

For lack of space only a reference can be made here to the lectures of the late Judge Hammarskjöld on the immunities of persons vested with international functions, in which he discusses the persons who come within this category and analyzes the legislation and international agreements that have been made to insure them the enjoyment of certain immunities; to those of M. Moresco which deal with the relations between Powers which possess colonies or other dependencies and such colonies or other dependencies; to those of M. Vitta on international coöperation for the promotion of agriculture, in which he traces the development of the international movement for the promotion of agriculture, calls attention to the succession of conferences, the

commissions and other organs such as the International Institute of Agriculture which have been created for this purpose, and reviews the activities of the League of Nations and of the International Labor Organization in this field; and, finally, to those of Professor Hindmarsh on Japan and peace in Asia, which are mainly a study of Japanese foreign policy in the Far East. By no means unsympathetic with Japan in the "critical situation" in which she finds herself, Professor Hindmarsh calls attention to the fact that she has deliberately refused to adopt the two policies which might have enabled her to solve her problem of over-population, namely, birth control and the improvement of the industry of agriculture which would have drawn away from the over-crowded cities a large part of the population. Instead, she has preferred a policy of industrialization which has intensified the population problem, and the policy of expansion which has brought her into conflict with other countries, and especially China, over whom she seeks to establish a régime of tutelage. Professor Hindmarsh correctly points out that it does not follow that because a state believes it is obliged by its internal situation to adopt a certain line of foreign policy, such a policy is justifiable in the light of international law.

JAMES W. GARNER

Comparative Commentaries on Private International Law or Conflict of Laws. By Arthur K. Kuhn. New York: Macmillan Co., 1937. pp. xiv, 381. Index. \$4.50.

This book is the first of its kind in modern Anglo-American legal literature to deal with the conflict of laws from a comparative point of view. On the continent and in Latin America the comparative method in the field of the Conflict of Laws has been in vogue for many years. Rarely is a major treatise on the subject published there without an intimate knowledge of the law of foreign countries. (See, for example, treatises by Nussbaum and Frankenstein.) A number of important foreign legal periodicals, beginning with Clunet's *Journal du Droit Internationale Privé*, have been founded in foreign countries in the exclusive interest of Private International Law (Conflict of Laws) or in the interest of both Public and Private International Law. The first great work on the Conflict of Laws in English—Story's *Commentaries*—gives likewise in great detail the views of the great foreign writers on the subject. Among the continental scholars using the comparative method in the Conflict of Laws, Meili takes a prominent place, whose principal work was translated into English by the present author in 1905, supplemented with notes on English and American law. The interest thus evinced in the foreign systems of the Conflict of Laws has found its culminating expression in the present *Comparative Commentaries on Private International Law*.

Unlike the earlier work mentioned, the author has restricted his commentaries to the ordinary topics falling within the field of civil law as contrasted with commercial law. Thus he does not deal with the subject of foreign cor-

porations, carriers, bills and notes, maritime law and the like. The scope of the work is indicated by the following chapter headings: (1) Historical Development; (2) General Nature and Scope; (3) Nationality and Domicil; (4) Jurisdiction and Procedure; (5) Status and Capacity of Persons; (6) The Contract and the Status of Marriage; (7) Dissolution of the Marriage Status; (8) Parent and Child; (9) Property; (10) Contracts; (11) Foreign Torts; (12) Succession Upon Death. Under each of these topics the author gives a brief account of the law of Anglo-American countries, of France, Germany, Italy, Switzerland and Latin America, consisting not of a bare recital of legislative texts and court decisions, but of a vivid presentation of the subject matter in the light of its international background and the practical needs of today. The author's long experience at the bar in international affairs, combined with a deep scholarly interest in the subject, have enabled him to produce a most excellent and useful book from the study of which all students of the Conflict of Laws can derive a great deal of benefit.

ERNEST G. LORENZEN

Grey of Fallodon. The Life and Letters of Sir Edward Grey, afterwards Viscount Grey of Fallodon. By George Macaulay Trevelyan. Boston: Houghton Mifflin Co., 1937. pp. xvi, 447. Illustrations. Index. \$3.75.

There is little of international law and much of diplomacy and philosophy in this biography. This emphasis is most significant in throwing considerable light upon British foreign policy. Englishmen are controlled as a race more by the rule of common sense than of logic. They are strict realists and know how to avoid legalistic, as well as other kinds of pitfalls. They are wise opportunists who know how to take advantage of circumstances. In that respect the hunting instinct seems very strong and they are alert to profit by the mistakes of their adversaries.

The portrait which Trevelyan gives us of Viscount Grey is much more than a personal delineation. It is an initiation into the game of British diplomacy as played by a worthy representative of the "governing class." Neither by experience nor by temperament was Grey prepared for his heavy responsibilities in the Foreign Office. His ruling passion was love of nature, and rural life attracted him more than public life. The amazing fact, however, is that this English country gentleman should have shown so much wisdom and wielded so great an influence in international affairs. Nor is this fact to be attributed solely to his intellectual ability, which was great, but rather to the sheer force of his remarkable personality. He imposed instant respect by his disinterestedness, his sincerity, and the nobility of his character.

To attempt to appraise in detail Grey's achievements as Minister for Foreign Affairs seems quite beyond the capacity of his able biographer, or, for that matter, of anyone else. The chief criticism so often made of Grey, namely, that he might have prevented the World War had he been more definite and downright in his foreign policy, is not satisfactorily met by

Trevelyan. In fact his allusions to the subject betray an obvious sense of uneasiness and doubt. Nevertheless he leads one to believe that Grey's policy was determined by a fateful combination of circumstances which no one man could control. The laborious fiction which Grey sought to maintain that the military and naval "conversations" with France in no wise constituted a political "commitment" was resorted to in the main because of the existence of conflicting views within the British Cabinet. The ambiguous policy which eventually brought England into the war on the side of France and Belgium seemed wiser to Grey than to venture a definite commitment which might have had a contrary, and a disastrous, result. Trevelyan shows that others in the Cabinet at various times, notably Prime Minister Campbell Bannerman, were most uneasy concerning the nature of England's commitments to France. In the light of this biography the best defense that can be offered for Grey's policy would seem to be one of "confession and avoidance."

It is impossible to express, adequately, admiration for the diplomatic skill displayed by Grey over a long period abounding in such dangerous international situations and complications as Agadir, Tangiers, Bosnia-Herzegovina, and Serajevo. It is incredible that any one man could have mastered so many details and have been so sensitive and wise in many delicate situations which might easily have involved England in a whole series of catastrophes. And this is all the more remarkable when one considers the state of Grey's health over many years following the shock of the death of his wife in 1906, and the gradual loss of his eyesight in the last years of public life. It was a remarkable example of the triumph of brains and character, as well as of selfless patriotic devotion.

One quality that stands out conspicuously in Grey, and one which unfortunately is increasingly rare in statesmen, is the prophetic quality. He read accurately the "signs of the times." He understood, as only a genuine prophet can understand, the trend of contemporary events and the underlying factors affecting the destinies of mankind. PHILIP MARSHALL BROWN

Damages in International Law. By Marjorie M. Whiteman, Assistant to the Legal Adviser of the Department of State. Washington: Government Printing Office, 1937. Vol. I, pp. viii, 826; Vol. II, pp. iv, 827-1549. \$1.50 each.

The task assigned to this reviewer calls for a threefold achievement: first, to edify the exacting reader; secondly, to cheer the astute and agreeable author; and thirdly, to satisfy the conscience of the reviewer. Such a task defies accomplishment. If the reviewer yields to his impulse to acknowledge his own great indebtedness to the author and to say it with flowers, the reader will challenge his eligibility to appraise justly her accomplishment; nor will he fare better if he endeavors too obviously to please the reader; and if he proceeds fastidiously to enlarge upon or accentuate the grounds of certain strictures, he may sadden the author and earn the epithet of "brute." In

such a situation it is obvious that all of the paragraphs which follow cannot possibly satisfy these three classes of individuals. Each of them may, however, find a paragraph or so to his or her liking. It is suggested, therefore, that they be perused accordingly, and those be left unread that from their opening words appear to provoke disapproval. But the reviewer must read them all.

At the outset of her work, the author announces that "There has been little attempt to criticize the rulings in any of the cases considered." The attempt she declares "has been, rather, to present, if possible, a fair picture of the extent to which the gravity or degree of the wrong committed by the individual or the state, or both, has been looked to in fixing the indemnities in these cases" (p. 51). In so far as the author has kept within these limits, her accomplishment has been admirable. Her portrayal of the factors that have influenced the minds of those empowered to mete out damages is illuminating and realistic. The value of this endeavor prosecuted in a field where abundant and authoritative materials were within her reach is inestimable. The fruits of it which are consolidated in series of tabular analyses and factual conclusions will be a boon to arbitrators as well as foreign offices and individual claimants in every land. They will doubtless observe that the tables indicate "that the average amount recovered on behalf of a widow without children for the death of her husband, when the case is settled through diplomatic channels, is \$17,824 (table 23) whereas the average amount allowed to a widow who is left with children upon the death of her husband is only \$12,244.45, when the case is settled through diplomatic channels (table 24)" (p. 794); and they may therefore conclude that according to the diplomatic mind under certain circumstances it is preferable for a prospective widow not simultaneously to be an expectant mother.

If the author has modestly withheld her own conclusions concerning what should be regarded as the correct theory of awarding damages against a state on account of its failure to respond to its international obligation to seek out and duly prosecute individuals whose lawlessness has produced injury to alien life or property, she has at least offered the relevant documents that enable the reader to make his own deductions. The author is at times, however, in this as in other fields, seemingly critical of particular awards or decisions, as, for example, (with good reason), the decision of the General Claims Commission, United States and Mexico, in the *Janes* case (p. 45). With respect to the *Zeelandia* case, the author observes that "by failing to exhaust whatever remedies might have been available, the settlement of the claim was delayed for a period of nearly thirteen years, and the United States, under the decision of the Court of Claims, was burdened with the payment of interest during that period. On this ground the claim might appropriately have been appealed to the Supreme Court of the United States" (p. 201). The author does not, however, indicate what precise remedies were available to the claimant during that interval, or by what process they might have been

exhausted. Nor does she make like comment in relation to the conduct of the claimant in the Union Bridge Company case, before the British-American Pecuniary Claims Commission, under Convention of August 18, 1910 (pp. 865-866). She adverts, moreover, to certain awards of the Mixed Claims Commission, United States and Germany, under Convention of August 10, 1922, as having been "extremely arbitrary," referring particularly to the award in the case of Mary Anne Baker (p. 737).

The author declares that the recommendation of the Commissioners in the *I'm Alone* case, under agreement between the United States and Canada, that the sum of \$25,000 be paid to the Canadian Government "represents punitive damages—a type of damage the allowance of which is generally condemned in international arbitrations," adding that "the allowance of damages for any public injury suffered was seemingly not contemplated by the terms of article 4 of the convention of January 23, 1924, under the terms of which the claim was considered." The reviewer disagrees with these views; but inasmuch as the author has been generous enough to print in a footnote what he has published elsewhere in this connection, she has accentuated sufficient criticism of her position. It need not here be repeated. Penal damages against a respondent state in satisfaction of a public claim were, however, seemingly decreed in the indemnity amounting to the sum of 50,000,000 lire imposed upon the Greek Government by the Conference of Ambassadors in 1923, in consequence of the atrocities committed against General Tellini and his associates, and, as the price of the evacuation of Corfu. While the author in discussing this case (p. 714) adverts to "the insult to the Italian state" as an element of damages demanded and paid, she does not discuss the question whether a substantial portion of the indemnity was not in fact a penalty designed to accrue primarily to the enrichment of the public claimant as such.

The term "damages" in international law, according to the author, "presupposes the existence of an international claim based upon the wrongful act or omission of one State toward another State" (p. 6). The author has not, however, confined her discussion to the matter of appraisals where the requisite basis for such a presupposition existed. She has gone further, and as a subsidiary means of explaining the character of awards or diplomatic conclusions, has undertaken to lay down certain bases of damages, purporting to be indicative of the responsibility of states as a consequence of particular delinquencies. She has not infrequently sought to indicate under what circumstances in her judgment the conduct of particular actors associated with a respondent state is to be regarded as producing responsibility in favor of a claimant state whose nationals have suffered loss from such conduct. In so doing the author appears at less advantage, despite the fact that there will be some who may be disposed to agree with certain of her conclusions.¹ Her views of the law are not always deductions from the materials which

¹See, for example, Art. 7, Harvard Draft Convention on the Responsibility of States, this JOURNAL, Spl. Supp., Vol. 23 (1929), 133-144.

she has published, and are at times seemingly unsupported by, and perhaps even at variance with what she prints,² and thus appear to be attributable to extrinsic data. The reader happens to be one of those who feel obliged to challenge the sufficiency and accuracy of the statement that "a state is not responsible, however, for acts of its subordinate officials, unless the wrongful act was directed or approved, unless a denial of justice is suffered in the exhaustion of local remedies, or unless there was a failure to punish the criminal" (pp. 7-8; also p. 639).³ In touching upon these and kindred matters, the author does not appear to have given close heed to the distinction between acts that breed state responsibility and those which justify diplomatic interposition or other methods of reclamation.

Such are, however, relatively minor blemishes. The author has diligently examined and analyzed a vast amount of material, and has made available to the reader much that has heretofore remained undisclosed. Moreover, as Mr. Hackworth has observed in his foreword, "The work is more than a compilation. . . . The author has held the mirror up to the legal processes by which damages are measured and international claims are decided" (p. iii). By so holding up the mirror, which is itself praiseworthy and distinctive conduct, she has succeeded in gaining and passing on to the reader an accurate reflection of the precise factors which, howsoever arising, have in fact caused an enhancement or diminution of damages in situations where they were due; and she has also pointed to factors that in other instances served as a complete bar to recovery. Declaring that "Public international law," as distinct from "Private international law," treats of relations between states, the author significantly observes that in the field of public international law "the state's right to damages comes into existence when the wrong is committed" (p. 854, citing case of William E. Bowerman and Messrs. Burberry's Limited, British-Mexican Claims Commission under Convention of November 19, 1926). This is refreshing.

In dealing at length with the Norwegian Claims case, the author adverts to the precise grounds on which the tribunal held that "just compensation was to be allowed where property was requisitioned" (p. 919). She makes careful appraisal of the several elements of damages in cases pertaining in special degree to vessel property, as well to other forms of personal property, and also to real property. Her special conclusions (pp. 1547-1549) express authoritative deductions; as well as her analysis and conclusions in relation to cases on Arrest, Detention, Imprisonment or Expulsion (pp. 383-385). Although the reader may complain of the lack of an index, and the absence of a list of cases, he may find that future supplementary volumes concerning, for example, damages in contractual claims which are thus far but partially

² Note 23, for example, affords inadequate support for the statement to which it is appended.

³ See Opinion of Neilsen in Gertrude P. Massey case, General Claims Commission, United States and Mexico, Opinions of Commissioners, 1927, 228, 234; also F. S. Dunn, *The Protection of Nationals*, 1932, 125-126.

dealt with, will quite satisfy his desires. The table of contents in Volume I does not intimate what is to be the scope of the full series.

Miss Whiteman has made a contribution to the literature of international law which is of great and lasting public value, and which the Department of State has generously made available to all who are conversant with the English language.

CHARLES CHENEY HYDE

The United States and the Republic of Panama. By William D. McCain. Durham: Duke University Press, 1937. pp. xvi, 278. Index. \$3.00.

To Dr. McCain goes the honor of having written the first book which presents a comprehensive narrative of the relations between Panama and the United States, from the birth of the Republic to the conclusion of the treaty of 1936, a scholarly, opportune, well-planned and ably written story.

The volume is remarkable for its conciseness, as it crowds into less than 300 pages the numerous events which occurred during the turbulent period it covers. Naturally, the author is bound to give only the most salient facts and in some instances it becomes impossible to gain a full and accurate knowledge of the question dealt with. But Dr. McCain has taken great pains to give abundant bibliographical references, so that his book is an excellent guide for more specialized and deeper studies of particular questions.

The twelve chapters into which the work is divided are devoted to the early history of the Isthmus; the major controversy of 1904; the elimination of the Army; American interventions, armed and otherwise, in Panama; investment of American capital in private enterprises; the Panama-Costa Rica boundary dispute; territorial expropriations for the benefit of the Canal; transportation and communication; the friendly attitude of Panama in the World War; hostilities between Panama and Costa Rica; the treaty of 1926; the treaty of 1936. The title of the last chapter is "Panama and the New Deal," and in it is stressed the favorable change brought about in Canal relations by the advent of the "Good Neighbor" policy.

In dealing with the independence of Panama Dr. McCain has fallen into the same error of previous writers who pay attention only to facts and neglect the underlying forces that brought about the revolution of 1903, who see nothing beyond Theodore Roosevelt, John Hay and Bunau-Varilla, and completely ignore the real protagonist in the drama of 1903, the people of Panama, whose history shows that constant tendency to autonomous life which manifested itself in six different separatist movements in the 82 years which elapsed from 1821 to 1903.

In stating controversial facts the author has drawn chiefly from American sources. Had he consulted as fully Panamanian documentation, he might have refrained from readily condemning Panama as he has done in connection with certain disputes, and let the reader reach his own conclusion. Many claims have been decided through diplomatic pressure tantamount to actual threats or *force majeure* for the weaker nation. Where real arbitration has

taken place, the awards have shown that diplomatic demands have been always excessive and frequently wholly unwarrantable. However, it is apparent that Dr. McCain has made a laudable effort to be impartial and that on the whole he has a feeling of sympathy for Panama, because of the undeniable fact that, as he says, "thirty years of irritating grievances have been the result of the Hay-Bunau-Varilla treaty."

RICARDO J. ALFARO

The British Year Book of International Law, 1937. New York, London, Toronto: Oxford University Press, 1937. pp. vi, 282. Index. \$5.50; 16s.

The arrival of a new issue of the *British Year Book of International Law* is always a pleasant event for the large number of scholars who have come to appreciate the scholarly articles and the wide range of information contained within the pages of this annual review, now in its eighteenth year. On this occasion the list of articles opens with a contribution from our own Professor C. C. Hyde, who discusses "The Supreme Court of the United States as an Expositor of International Law." Professor Hyde finds that, while individual states are free to confer upon their domestic courts a greater or less degree of power, not merely to pass upon questions of international law concerning the state, but also, in doing so, to test the propriety of governmental acts by the requirements of international law, in the case of the United States the Supreme Court has been acknowledged to have "a competence that was seemingly unchecked." Numerous cases are discussed with the object of showing how the Supreme Court conceives its duty to ascertain what is the rule of international law and how it is to be applied.

"Some Problems of the Spanish Civil War," by Professor H. A. Smith, is a critical and stimulating discussion of the question of the recognition of belligerency. The thesis is maintained that the recognition of the existence of a "state of war" necessarily carries with it the recognition of the belligerent character of the parties to the war, including their right of interference with the trade of neutrals, provided the contending factions can satisfy foreign Powers of their intention and of their ability to wage war according to the established rules. In this respect recognition has nothing to do with the merits of the cause of one or other of the contending parties, but is based upon a mere question of fact. Numerous precedents are referred to, and the Non-Intervention Agreement of 1936 is examined and criticized in the light of them. The strictures upon the "transatlantic heresy" involved in the "Stimson Doctrine" seem out of place, since that form of non-recognition has no bearing upon the status of the parties to a civil war nor indeed upon the status of belligerents in an international war. The closing paragraphs are a strong appeal for the reinstatement of the fundamental principles and the authority of international law.

Three articles deal with problems of private international law, another with the treaty of alliance between the United Kingdom and Egypt, another with the status of the Free City of Danzig, and a closing article with "Custom

as a Means of the Creation of International Law." This last, by L. Kopelmanas, is an instructive analysis of the strength and weakness of the formation of international law by custom, showing the advantages of rules growing out of the normal life of states and the disadvantages of the uncertainty attaching to rules which have not received the formal assent of states.

The Notes cover, as usual, the outstanding events of the year, those on the International Labor Office, the Treaty-Making Power of Canada, and the Straits Convention of Montreux deserving special notice. The judgment of the Permanent Court of International Justice in the *Pajzs, Csáky, Esterházy* case is analyzed, and some twenty-five pages are devoted to the decisions of national tribunals. The book reviews are up to the usual high standard.

C. G. FENWICK

The Colonial Problem. By a Study Group of the Royal Institute of International Affairs. New York and London: Oxford University Press, 1937. pp. xiv, 448. Index. Appendixes. Maps. \$8.50.

Current discussions of the return of the German colonies make this impartial and scholarly investigation particularly useful. A vital feature of the study is the effort of the writers to show that the colonial problem cannot be reduced to a simplified conflict between the "haves" and "have nots", but is an intricate problem which concerns particularly the relation between the governing and the governed.

In the first section of the volume an attempt is made to evaluate colonies from their political, military, and economic aspects. It is interesting to note that the writers, in estimating how much military and economic power are reinforced by colonial domination, find that the results are questionable, while there is undoubtedly an enhancement of prestige in the acquisition of territory. The writers point out that "insistence upon the advantages to be derived from strategic points had tended to obscure the liabilities involved." For example, security requiring concentration in home waters is diminished by commitments in distant areas; also special colonial duties such as policing and pacification require an army essentially different from one designed for a continental offensive. The difficulty of constructing the balance sheet to answer the question "do colonies pay?" is so great that a satisfactory answer is conceded to be impossible; nevertheless the writers do set forth the various items of debit and credit in a convincing fashion. The first part concludes with a careful study of the problem of redistribution of colonies, and the opinion expressed is that the diversity in the different types of colonial administration renders it impossible to find any general principle which is applicable. Therefore, alternative means of satisfying the grievances of non-colonial Powers seem more practicable.

The second part of the book, devoted to the relation between the colonizers and the colonized, discusses such questions as colonial policies, the population problem, native production, labor, and principles of colonial administration.

In examining the present status of colonies the investigators find that the old policy of brutal exploitation of colonial communities has been abandoned in favor of more enlightened policies of autonomy or assimilation. Governments since the World War take their responsibilities towards subject peoples more seriously. At this point the question might be raised whether such a finding is not based upon the policies followed by such colonizing Powers as Great Britain, France and The Netherlands rather than upon methods now being employed in the subjugation of Ethiopia.

The third and last section of the study is concentrated largely upon economic aspects of colonial development. Capital investment in colonies, colonies as sources of raw materials and markets, colonial tariff policies, opportunities for emigration are objectively considered. It is categorically stated that "white settlement in colonies . . . is not, and is unlikely ever to be, numerically large enough to provide substantial relief for pressure of population in Europe." Nevertheless, a careful survey is made by the investigators as to what colonies have undeveloped resources and a population inadequate to their full utilization. The Jewish immigration into Palestine, an influx of over a quarter of a million persons in a decade and a half, is the most spectacular illustration.

In addition to the study itself, the group has collected some very valuable information in the appendixes. Appendix X, for example, gives a concise survey of all the varied forms of government in the British Empire, as well as in the other important colonial areas. Appendix XI furnishes the statistics of colonial trade so that the percentages of imports and exports from and to colonies is shown in comparison with the total trade of the metropolitan countries.

Such a report is an invaluable work of reference, and the fact that the group headed by Hon. Harold Nicolson was assisted by more than a score of authorities in the various phases of the study enhances the value of the contribution.

GRAHAM STUART

The Problem of International Investment. A Report by a Study Group of Members of the Royal Institute of International Affairs. London and New York: Oxford University Press, 1937. pp. x, 371. Index. \$7.50.

This volume is the latest in the series of reports emanating from Study Groups of the Royal Institute of International Affairs on important problems in the field of international economics and finance. It maintains the high standard set by its predecessors and deserves to be widely read and studied. The first part of the book contrasts the salient features of long-term capital movements in the pre-war and post-war periods, explains the breakdown of the system of international investment in the last few years, and discusses the extent to which its resumption may be expected in the future. The second, and longer, part contains, as far as the reviewer knows, the best historical survey hitherto published of the post-war foreign investments of the principal

creditor nations, and brings together in convenient form a mass of useful facts and figures as to the extent, character, geographical distribution, and outcome of the lending and borrowing.

To the majority of readers the most interesting and stimulating portion of the work will probably be that dealing with the prospects for a revival of international lending. The authors point out that "so long as some countries are rich and highly developed while others are poor and ill-equipped with capital, international investment will have a valuable and constructive rôle to play." They take the view, however, that international investment in the future will, in all likelihood, be smaller in volume than in the past and also, to a large degree, different in form.

Space permits only of a brief résumé of the argument without any comment: The industrial countries will no longer afford expanding markets for the products of agricultural lands, first, because the economically advanced countries are endeavoring to make themselves less dependent for raw materials upon foreign sources of supply and, second, because their populations are approaching a stationary or even declining stage. Moreover, improvements in agricultural technique are tending to cheapen food products at the same time that the demand for them is slackening. These circumstances will make it increasingly difficult for agricultural countries to meet foreign debt obligations and so discourage the making of new loans to them. Furthermore, with the exception of the United States, the creditor nations have little prospect of developing, for several years at least, an export surplus on current account sufficiently large to permit of prudent foreign investment on any considerable scale. Paradoxically, the United States, which does have a substantial favorable balance on current account, has been since 1931 a net *importer* of long-term capital. As for the form which international investment may be expected to take in the future, the authors anticipate that the issue of long-term securities by borrowers in London and New York will tend to be increasingly replaced by direct investments, by medium-term export credits, and by the purchase of securities already issued on foreign stock exchanges.

WILLIAM H. WYNNE

International Control in the Non-Ferrous Metals. By W. Y. Elliott, E. S. May, J. W. F. Rowe, Alex Skelton and Donald Wallace. New York: Macmillan Co., 1937. pp. xxii, 801. Index. \$6.50.

It is seldom that there comes to the hands of the student of international relations a study of more fundamental importance than this most recent product of the Institute of International Research, Harvard University and Radcliffe College. In a world in which nationalist rivalries and the developments along lines of autarchy have created conditions threatening the breakdown of international society, a fundamental study of the implications of international control in the non-ferrous metals is obviously of primary importance.

In Part I of this study, to which Professors W. Y. Elliott, J. W. F. Rowe, and Alex Skelton have contributed, general conclusions are drawn as to the political and economic implications and aspects of the efforts to control production in the principal non-ferrous metals on an international scale. As is pointed out in the Introduction, "The interests which come under study of the non-ferrous metals include most of those which move the colonial and foreign offices of the Great Powers. Often this does not ripple the official surface but lies deeper." The industries, moreover, dependent upon trade in non-ferrous metals "are focal points in the international economic struggle. They will reflect in their future the play of all the major factors which determine world rivalries—or world agreements."

In Part II, comprised of separate chapters dealing with Nickel, Aluminum, Tin, Copper, Lead and Zinc, the authors have given in each case an exhaustive treatment as to the physical background and circumstances of the current production and consumption of the metals concerned. To this has been added an historical survey of their exploitation and use with particular emphasis upon the Great War and post-War periods, with concluding sections on the political implications of existing systems of exploitation.

It is no exaggeration to state that this book represents the first attempt at a really searching analysis of the technique by which international price-control in the mineral field has been attempted with results which are clearly illustrated as having major importance, political and economic, to the future of international relations. "It is certain," to quote Professor Elliott, "that if nationalism seems for the time triumphant, there must come a reaction against its methods. For nowhere more than in these vital and limited sources of raw materials of an industrial civilization, is there a need of genuine economic development both for the future of the industries and for the peace of the world."

While the 800 pages of this important work contain technical and statistical details beyond the direct interest of many students, the implications of the factual evidence presented cannot be ignored. The *International Control in the Non-Ferrous Metals* is a study which will not only be used as a primary source of reference, but should serve as a model for future exhaustive studies in the international significance of other minerals and raw materials.

BROOKS EMENY

Raw Materials in Peace and War. By Eugene Staley. New York: Council on Foreign Relations, 1937. pp. x, 326. Index. \$3.00.

This study of the problem of raw materials is especially timely in a period when so much confusion—indeed, distortion—is evidenced alike in popular thinking and national policies. The author has set out to disentangle the complex economic factors from the political motives which dominate international relations in this field and to appraise current policies in terms of their economic limits. He has succeeded in making a scholarly treat-

ment of a difficult problem not only thoroughly objective, but eminently readable.

Dr. Staley's principal thesis is that the context of raw materials policy will, in practice, be different depending on whether it is conceived in terms of war or peace. The objective of the former is national power, of the latter an improving standard of living for the nation. But, considered from the first standpoint exclusively, he goes on to show how much more important than mere political control of raw material resources are such factors as access, availability, ease of transport and the like. He indicates how nearly self-sufficing the United States is even in terms of the rarer metals, and points out the incidence of our present neutrality policy on the possibilities of preventing war (for instance, by a mineral embargo), as well as its potential influence on the raw materials policies of other countries.

Dr. Staley devotes the major portion of his book to an acute analysis of the economic consequences of the various peacetime controls which have been tried since the war in the raw materials field. He is less concerned with their political or administrative workings than with their fiscal and trade effects. He classifies the major problems as financial, in terms of loans and concessions, and trade, in terms of tariffs, artificial restrictions and quotas, and outright embargoes. His analysis is based on a general premise that the most adequate insurance of supply for any country is in the freest possible trade. Granted the premise, the conclusion is irrefutable. For the unconvinced, the author's detailed examination of the results of the various control schemes which he describes will prove the most persuasive of arguments. Whichever objective, wartime power or peacetime well-being, is pursued, artificial barriers to normal international exchange of goods in the long run work to the disadvantage of both the nation and those immediately concerned in the transactions. If any criticism is pertinent, it is that the author has not carried his analysis into the short run, where individual or group gain from control schemes may be so great as to lead them to seek to force governments into policies which lead to national disadvantage. It is here that economic considerations are so often distorted by political motives.

PHILLIPS BRADLEY

Limits of Land Settlement. By Isaiah Bowman. New York: Council on Foreign Relations, 1937. pp. viii, 380. Index. \$3.50.

The many research projects now in contemplation and in progress, aimed at a study of a transferred mass population for colonial and other purposes, makes this volume important. It comes at a time when such groups as the Rockefeller Foundation, in conjunction with the Royal Institute for International Relations, are making inquiry about the immigration and employment possibilities for mass movements in selected parts of the two hemispheres.

A few years ago this reviewer published an analysis of world attitudes toward immigration. Since then the need for more current information has

arisen because of national pressures against minorities. Davies' *World Immigration* and Taft's *Human Migration* have discussed the problems of migrations, but not with the specific objective of this volume. This book chooses to treat the problem of migration from the angle of economic, geographic, political, and social factors of today. Dr. Bowman has enlisted the aid of a group of experts, each of whom has added to the value of the volume. The book treats of the problem of population movements and considers such potential land areas as Canada, Russia, Asia, Africa, and South America. The United States is treated as part of the general problem. The subject-matter is thorough and the statistics current and well selected. In many instances specific emphasis is laid on the important topic of attitudes toward employment of aliens. Obviously, where discriminations exist, attempts at colonization are futile. A complete and well-arranged bibliography is appended to the text. Maps are furnished for many of the chapter subjects, and at the end of the book a three-page map portraying world land possibilities affords rich material for any discussion on the topic.

Some space might have been devoted to the current topic of the refugee by referring to such contemplated projects as Ecuador, Panama, Nicaragua, and some parts of Africa. These mark the latest problems in the migrations of peoples and, for that reason, justify special study. Dr. Bowman's book is timely, broad in its vision, and well written. It represents an excellent treatment of the topics of world migration and colonization. HAROLD FIELDS

The Origins of the Foreign Policy of Woodrow Wilson. By Harley Notter. Baltimore: Johns Hopkins Press, 1937. pp. viii, 695. Bibliography. Index. \$4.50.

The author has followed an interesting and somewhat unusual method in seeking the origins of President Wilson's foreign policy. Through more than two hundred pages devoted to four chapters on Wilson as youthful scholar, mature scholar, university president, Governor of New Jersey and President-elect, he studies the development of Wilson's political ideals and convictions by means of his personal correspondence, published and unpublished, his addresses, books, and miscellaneous writings, and reaches the conclusion that each of the "fundamental elements of thought which marked Wilson's foreign policy had been determined—and in several instances the specific policies built upon them had been formulated—before he entered the White House as President."

It is not difficult to show that this was the case with regard to the Mexican and Latin American policies. The statement showing a determination not to recognize Huerta as President of Mexico was read to the Cabinet three days after Wilson's inauguration, and the policy outlined in that document was followed with regard to Mexico and other nearby Latin American states as occasion arose. In Haiti, in July, 1914, hostilities must cease, Bordas must relinquish the presidency, a new provisional government must be set up, after

which the United States would support the man chosen as provisional president. In the Dominican Republic, the instructions given by Secretary Bryan, at the direction of President Wilson, were "those of an authority to whose wishes the Dominicans were expected to conform."

The protest of Great Britain concerning Panama Canal tolls, the California legislation affecting Japanese residents, the treaty with Colombia relating to our recognition of Panama, were other matters pertaining to foreign affairs with which Wilson had to deal in the early part of his administration, all of which could have been dealt with more or less in accordance with principles and convictions already formed, but when the war in Europe came on, in August, 1914, difficulties appeared which could not have been foreseen. Abstract principles had to be applied to concrete situations, practices initiated by foreign Powers and not controlled by our policies required consideration. Neutral rights were affected, American trade was interfered with, submarines destroyed American lives. Public opinion at home was divided, conflicting advice from equally trusted advisers must be weighed. Nearly four hundred pages of this book are devoted to the influences formative of the policy that at last brought us into the war. To explore the various streams of influence that flowed together to form that decision and to estimate their relative strength is an impossible task. In the last four pages of the book the author does sum up his estimate of the three essential elements which he believes dominated Wilson's foreign policy.

He mentions, first, morality, and morality as defined in Christianity. This Wilson derived from his historical studies, his conception of progress and his social-religious philosophy. The second basic element was Wilson's belief in the capacity and the right of people to rule themselves. Liberty was surpassed in his scale of values only by justice, and there was no real distinction between them wherever liberty was founded on character and order. The final great element of Wilson's foreign policy, according to our author, was his conception of America and America's mission. "To Wilson, America was founded upon ideal foundations with a singular devotion to democracy and Christianity and to the wellbeing of mankind."

Such is a very brief statement of Mr. Notter's summary of the three basic elements of Woodrow Wilson's foreign policy.

H. W. TEMPLE

A History of the Modern and Contemporary Far East. By Paul Hibbert Clyde. New York: Prentice-Hall, Inc., 1937. pp. xx, 858. Maps and index. \$6.00.

Mr. Clyde is somewhat known to students of conditions in the Far East by reason of various journal articles and his two volumes respectively dealing with the manner in which Japan has administered the islands entrusted to her under mandate by the League of Nations and with international rivalries in Manchuria. The present work is evidently intended for the general reader, as it covers ground that has been dealt with, and in much greater detail, by

other more specialized works. Little is thus added to what is already well known. It may be noted, however, that, by consulting unpublished but available archives in the Department of State, some light is thrown upon the views of certain less well-known American representatives to China, for example, J. Ross Browne and John Russell Young.

In a work as general in character as the one under review, the failure to mention fairly important facts is inevitable, but some of the omissions are rather surprising. And this surprise becomes tinged with suspicion of bias when it is observed, in so many cases, that the mention of the facts passed by would have tended to make Japan's record a censurable one. Thus, the establishment of Korea as a protectorate of Japan is simply described as resulting from a personal interview between Prince Ito and the Emperor of Korea, with no mention of the fact that the Emperor of Korea immediately caused a cable to be sent to the United States declaring that the so-called treaty of protectorate had been extorted from him at the point of the sword, and that he had not given his voluntary consent to it, and never would do so. With reference to the formal annexation of Korea in 1910 by Japan, despite her previous reiterated promises to respect the sovereignty of that country, Mr. Clyde is content to say "that Japan, like other great powers of the West, had been swept into the turmoil of imperialistic rivalry, where, as history so frequently revealed, pledges have little value." The same *tu quoque* argument is employed in defence of Japan's Twenty-One Demands upon China. When describing the Lansing-Ishii agreement no mention is made of the highly important light thrown upon it by Secretary Lansing's *War Memoirs*. When discussing Japan's actions in connection with the Allied intervention in Eastern Siberia, no mention is made of the description of those actions by Secretary of State Hughes in the Washington Conference.

In general, Mr. Clyde says that, in the West, a distorted view of China-Japanese relations prevails. Whether his presentation of these relations will tend to exhibit a truer picture, the reviewer very much doubts.

W. W. WILLOUGHBY

Origine et Technique de la Distinction des Statuts Personnel et Réel en Egypte. By Hassan A. Boghdadi. Preface by Manfredi Siotto-Pintor. Cairo: Imp. Paul Barbey, 1937. pp. xvi, 395.

In this scholarly volume one of the younger members of the law faculty of the Egyptian University addresses himself to a subject which was referred to by an American judge, in a decision rendered just a hundred years ago, as "the most intricate and perplexed of any that has occupied the attention of lawyers and courts, one on which no writers are found to agree, and on which it is rare to find one consistent with himself throughout."¹ This subject is the so-called "Statute Theory"—developed in Italy in the Middle Ages pri-

¹ Porter, J. in *Saul v. His Creditors* (1837), 5 Martin N. S., 569, 688.

marily to settle conflicts between the laws of the different cities of Italy, and which established a distinction between real statutes regulating *things*, and whose application was strictly territorial, and personal statutes governing *persons*, whose effects followed those to whom they were first made applicable, into whatever jurisdiction they might come. This ancient doctrine our author has undertaken first to examine in its continental origins, and then to trace in its long and intricate development throughout the complicated history of Egyptian legal institutions.

As the distinguished Italian jurist, who has honored the volume of his junior colleague with an interesting preface, remarks, the study of the problem determining the respective authority of concurrent legal systems finds a specially inviting field in those countries where there exist what he refers to as "composite judicial orders"—and certainly in no country is a richer variety presented than in Egypt, where an extraordinary extension of independent judicial systems has gone hand in hand with an era of exceptional prosperity. Our author is keenly alive to the wealth of material at his disposition, and has not only gone to the source for its examination—a labor open only to an accomplished Arabic student—but has conducted his examination in a spirit thoroughly responsive to recent developments in the field of conflict of laws, or, as the subject is known outside the United States, private international law.

The book divides itself into two parts. In the first the author examines successively the two historic legal conceptions which lie at the basis of the modern Egyptian legal system—the Latin conception of real and personal statutes and the Mohammedan theory of religious jurisdiction known as the principle of *rattachement religieux*. The main thesis of the first part of the volume is to exhibit the confusion in legal terms which has resulted from transporting the classical *theory of the statutes* from its own proper sphere of private international law into the Egyptian sphere of conflicts between purely internal laws. Having put the student of Mohammedan institutions on guard against the so-to-speak piratical assaults from an extraterritorial authority, the author directs himself to the prevalent, but, as he insists, totally erroneous supposition that Mohammedan Sharia law—the law applied to secular affairs—is inseparable from the religion which inspired it, and thus constitutes a judicial system applicable only to the faithful.

Space will not permit us to follow the author into the more familiar topic of the second portion of his volume dealing with modern judicial history. Suffice it to say that the book serves as an admirable background to the labors of the Conference of Montreux, which was convened shortly after its publication and which on many points gives the authority of international sanction to the doctrines for which the writer has pleaded. In fact it may be said that a large part of the labors of this conference revolved around the very problems which have formed the theme of the author's book. His work is indeed a timely and scholarly contribution to Egyptian legal history, and one

well calculated favorably to impress foreign students with the high seriousness and ability of the leaders of legal thought in Egypt at this important phase in her history.

J. Y. BRINTON

Internationales Wettbewerbsrecht. By Hermann Isay and René Mettetal. Band I: Europa. Zurich: Verlag für Recht und Gesellschaft A.-G., 1937. pp. xii, 498. 44 Sw. Fr.

This study treats of unfair competition internationally and nationally. Volume I includes international conventions and commentaries on the laws of European countries. Volume II, when published, will cover extra-European nations. This correlation of national and international aspects of unfair competition purports to fill a lacuna in legal literature and to furnish a revision basis for future conferences. The international section (38 pages) includes an introduction and selected provisions of international acts, in parallel columns of French and German text, signed at Paris (1883), Madrid (1891), Washington (1911), The Hague (1925), Washington (1929), and London (1934). The introduction traces the historical evolution of "the general clause" broadening the basic concept by prohibiting as unjust "every act or deed contrary to commercial good faith or to the normal and honorable development of industrial or business activities."

The national section (460 pages) includes chapters on the laws of 33 European countries, irrespective of their adherence to the international conventions. Each chapter names the eminent jurists collaborating in its preparation. Language treatment varies with different countries. Most chapters appear in German and French, although English and Italian are used occasionally. The divergent national comment affords opportunity for comparative study of laws of unfair competition. The authors emphasize the recently enhanced importance of unfair competition, attributing it to such international agencies as the Economic Committee of the League of Nations and the International Chamber of Commerce, as well as the new accent placed on unfair competition due to rapid growth of international trade. The United Kingdom chapter, prepared by R. A. B. Shaw and J. Reginald Jones, is the most thorough and comprehensive of the national commentaries, being supported by citations and annotations.

The place of the study is assured because it touches an unexploited field. The range and diversity of treatment add to the value and utility of the work, but necessarily involve some duplication and limitation of the authors in elaborating their thesis.

HOWARD S. LEROY

Politische Pakte und Völkerrechtliche Ordnung. By Asche Graf von Mandelsloh. Berlin: Julius Springer, 1937. pp. iv, 116. Rm. 6.60.

This is an interesting and ably written monograph on the political treaties of post-war Europe, containing also an excellent bibliography. The author seems to belong to a newer German school, which not only wishes scientifically

to treat the problems of the politics of international law, but also considers positive international law as being essentially political, not a primitive legal order, but a legal order *sui generis*. This fundamental attitude is anti-positivistic, but not on ethical lines as natural law, but on political lines. The author does not undertake to investigate these treaties from the point of view of their interpretation or their compatibility with other treaties, but from the point of view of the international legal order as a whole. His point is to look for the fundamental political intention of the contracting parties and to ask what the international legal order has to say with regard to these intentions. International law does not pretend to eliminate the natural conflict of interests of states, but to create legal machinery for agreement (*Ausgleich*) on these conflicts. No treaty can be understood legally if the concrete political situation underlying it is not taken into consideration. An arbitration treaty between Germany and China, therefore, is legally a different thing from an arbitration treaty between Germany and Poland, even if the texts of the two treaties are absolutely identical.

The international legal order is an order of peace and distribution, things which can be achieved only by bringing the natural conflicts of states to an orderly agreement. Treaties which make a contribution toward this goal are constructive, treaties which tend to prevent such agreement are destructive. From this point of view it follows that the French post-war alliances, the Little Entente and Balkan treaties, and other treaties of this type, are destructive in character, as their only intention was to prevent even a discussion of peaceful change as one means toward reaching an orderly agreement on the opposed interests of states. The author proposes, in the first place, the creation of a new legal European order by direct agreement on concrete political problems between the directly interested states. JOSEF L. KUNZ

Wurde Ostgrönland durch Dänemark in dem Zeitraum von 1921 bis 1931 okkupiert? By Wolfgang Haver. Kiel: Verlag des Instituts für Internationales Recht, 1937. pp. 144. Rm. 4.50.

The decision of the Permanent Court of International Justice on East Greenland has already produced a library of juridical comments. Although the criticism of this judgment ranges from enthusiasm (Fachiri) to bitter and irreconcilable enmity (Wolgast), everybody agrees that, together with the Palmas and Clipperton awards, it is of the highest importance for the development of the law of international occupation, and of particular importance as the first international decision concerning Arctic territory.

This study, based on an excellent and comprehensive bibliography and on a detailed examination of all the materials published by the Court, concentrates its attention to one part of the problem, *i.e.*, the question whether Denmark had occupied East Greenland between 1921 and 1931. It is therefore a study on the law of occupation; and as there is agreement that Denmark had the will to occupy and that a notification was not necessary—this requirement

being restricted to the African Continent—the study becomes an investigation into the requirement of effective occupation.

That the principle of effectiveness is basic for the valid occupation of *terra nullius*, Denmark and Norway agreed; in this sense, too, was the decision. The court also made it clear that the requirement of effectiveness applies as well to Arctic regions; the so-called "principle of sectors," applied by some states to Arctic and Antarctic regions, certainly does not constitute a norm of international law. The real problem is rather the definition, the interpretation of "effectiveness." Here again, there is agreement as to the relativity of effectiveness. But the author is against the ruling of the court, according to which mere legislation is a sufficient proof of "actual, uninterrupted and peaceful display of sovereignty." He urges that "paper legislation" cannot suffice; that, in addition to acts of legislation, the exercise of administrative control in fact is necessary.

JOSEF L. KUNZ

The Annexation of Bosnia, 1908-1909. By Bernadotte E. Schmitt. Cambridge: University Press; New York: The Macmillan Co., 1937. pp. viii, 264. Index. \$3.75.

Although nearly thirty years have passed since the Bosnian crisis, publication of the diplomatic documents on the period is still far from complete, the Italian, Russian and Serbian sources, *inter alia*, not having as yet officially emerged from the archives. Enough has, however, been revealed from Austrian, British and German sources, supplemented by monographic studies and the efforts of the eager publicists on the *Kriegsschuldfrage*, to permit a basic historic synthesis of the events. For this task no one could be better fitted than Professor Schmitt. With a sure, deft hand he constructs from the diplomatic relics a skilful mosaic which now reveals the connected, larger pattern of events. Set in a matrix of impeccable historical scholarship, they are organized, integrated and interpreted with a singular freedom from bias, yet with the net result of forecasting with appalling accuracy the larger doom that lay ahead in 1914. How what started out as a duel of wits between two aggressive foreign ministers nearly precipitated the World War in 1909 is made inexorably clear. Many of the actors were the same; and Sir Edward Grey was yet diffident of conferences! It is now evident that the basic war alignments were discovered in this Balkan proving-ground in 1909. But the most tragic note, on which the volume ends, is that the treaty-breaking of Aehrenthal, backed by von Bülow, merely sharpened the competition in rearmament—an ominous portent for our own day and age.

For those interested in international law, special significance attaches to the author's treatment of the diplomatic recognition of Bulgarian independence, here set in its appropriate historical contexts. The mercenary haggling of the Powers, their endeavors to bargain on debts, claims, and reparations, in return for recognition, reveal how sordidly the edges of legality were dulled by scraping for material national advantage. Of no less interest and value

as precedent is the emergence, after the annexation, of the doctrine of non-recognition, albeit in qualified form. Announced by Sir Edward Grey (pp. 38-39), vigorously seconded by the Sublime Porte, which, to counter Austria-Hungary's move, inaugurated a drastic boycott of the Dual Monarchy (p. 66), the doctrine gained the straightforward support of Russia and Serbia (pp. 68, 72, 76) and the timid espousal of Tittoni (p. 44). Even the thought of quarantine—then termed isolation—took embryonic form in the chancelleries of Paris and London (p. 55), only to be weakly abandoned under military threatenings from Berlin. It would appear that more than once the Avernian path has been paved with such pronouncements "in the interests of public morality."

MALBONE W. GRAHAM

BRIEFER NOTICES

Cases and other Materials on International Law. Edited by Manley O. Hudson. 2nd ed. Shorter Selection. (St. Paul: West Publishing Co., 1937. pp. xl, 622. Index. \$5.00.) This abbreviated edition of Hudson's well-known case book is issued to meet the demands of teachers who are required to cover the subject of international law in one semester. The present volume is less than half the size of the 1936 edition, containing 608 pages of text as against 1417. Miraculously, this drastic reduction is accomplished without reducing the scope of the subject-matter at all. The table of contents is practically identical with the larger edition. The number of cases is sharply reduced, and those included have been shortened wherever possible. The treaties and other materials have also been cut, although not as drastically as the cases. But all the traditional topics are retained. Furthermore, the editor's notes have for the most part escaped the scissors. It is a safe guess that Judge Hudson made the reduction with the greatest reluctance. For the merit of a case book is usually to be measured by its fullness, not by its brevity. In making this shorter selection, many old friends have had to be omitted, for example, *In re Castioni*, *Daimler Company v. Continental Tyre and Rubber Company*, *The Dogger Bank Case*, *The Eastern Carelia Case*, *Hilton v. Guyot*, the *Gagara*, the *Kim*, the *Emperor of Austria v. Day and Kossuth*. One wonders, in fact, to what extent the special virtues of the case method of instruction can be retained when the reported cases have to be spread so thinly over the ground covered. When only one case is given on a particular question, it almost inevitably takes on more of an authoritarian quality than it deserves. But the fault, if any, is with the curriculum makers. The present edition is far more than merely a scissors and paste job. It is in fact a remarkable example of skilful selection and condensation.

FREDERICK SHERWOOD DUNN

Alberico Gentili and the Development of International Law. By Dr. Gezina H. J. van der Molen. (Amsterdam: H. J. Paris, 1937. pp. xii, 342. Fl. 4.50.) In a disjointed way, the author has achieved a fresh treatment of a subject now rather worn. The book contains no preface. There is an introductory section on the political theories of the past, with primary attention given to the Renaissance. The author's reliance here is on secondary sources, though his familiarity with the subject is never in doubt. Then the reader is introduced to Gentili's family and to his career. There follows a chapter of critical analysis of *De Legationibus*, but this precedes a chapter

on the origins of international law. In two following chapters *De Iure Belli* and the *Hispanicae Advocationis* are appraised. The method here is conventional, and contains nothing new except the comments of the writer. These are made almost parenthetically, yet they are shrewd and stimulating, and in some instances corrective of received views. With these works disposed of, the author returns the reader to Gentili's character and to his relationship to his times. This is the best part of the book. Van der Molen has worked directly from the Gentili manuscripts as well as from the published material and has, at the same time, interlarded his findings with a comparative estimate of the other scholars in this field. The fault of the book is that too much was attempted in the space the author chose to command. The reader is left intellectually scattered over the ardent interests which absorbed Gentili. That the book has for frontispiece a facsimile of a manuscript page from *De Papatu Romano Antichristo* is perhaps a clue to the author's own guide.

PERCY T. FENN, JR.

The International Law Association. Report of the Thirty-Ninth Conference held at Paris, September 10th to 15th, 1936. (London: Sweet & Maxwell, 1937. pp. cxxxvi, 343. Index. £2.) The report gives full information concerning the International Law Association. The first 134 pages include a history of the organization, its constitution and standing orders, a financial statement, and lists of its officers, branches, committees, and members. It contains also a brief appreciation of the late Dr. Walter Simons. At this conference, the following topics were discussed: *La Nationalité d'Origine*; *La Nationalité des Sociétés Commerciales*; Commercial Arbitration; *Tribunaux Arbitraux Mixtes de Droit Privé*; *La Clause-Or et les Paiements Internationaux*; Conciliation between Nations; *Le Problème de la Faillite* (Insolvency); Trade Marks; *Declaration sur les Données Fondamentales et les grands Principes du Droit International moderne*; Protection of Civil Populations against new Engines of War. The discussion concerning Conciliation was limited to the right of self-defence, and it is not surprising that the matter was postponed for further consideration. The declaration of principles was that prepared by M. Alvarez. Much of the material in this Report lies on the border-line between public and private international law, and is therefore of much value, for in this domain are to be found many of our current problems.

CLYDE EAGLETON

Transactions of the Grotius Society. Vol. 22. Papers read in 1936. (London: 1937. pp. xxiv, 149. 10s.) This volume, in addition to the usual material relating to the officers, members and business of the Society, contains papers on "The Outlook for the Law of War" by Professor J. W. Garner, "Some Legislative and Administrative Aspects of the Application of Article XVI of the Covenant" by Professor Phillips Bradley, "The Nature of International Law" by Professor A. L. Goodhart, "The Significance for International Law of the Tripartite Character of the International Labour Organization" by C. Wilfred Jenks, "Comparative Law and its Relations to International Law" by Professor Avv. Mario Sarfatti, "The New Soviet Constitution" by Dr. Samuel Dobrin, "Historical Survey of the Application of Sanctions" by Dr. George de Fiédorowicz, and an appendix consisting of a letter from Grotius to the Bishop of Winchester and a *Résumé* of the Movement for World Peace by von Redlich. All of these contributions are valuable, but this reviewer was particularly interested in the opinion of Professor

Goodhart that the true basis of law, national and international, is the sense of membership in a community which the individual and nation possess, coupled with the fact of the existence and reality of that community. If that be true—and I suggest that it is—then there is a real question as to the validity of the place of the "Law of War" in international law. One can sympathize with Professor Garner and others in their desire to mitigate the horrors of war, but one might as well argue that the Constitution and laws of the United States of America should contain provisions governing the conduct of revolutions as to suggest that international law should govern the conduct of war. For war is an admission of the failure of law and an attack upon the very basis of the international community itself. Nor is "law" likely to govern the actions of hard pressed belligerents if expediency suggests that the breach of it will gain the victory. There is a place certainly for the efforts being made to reduce the suffering and loss attendant upon war, but I doubt whether law is the proper agent to perform this service.

NORMAN MACKENZIE

The Test of the Nationality of a Merchant Vessel. By Robert Rienow. (New York: Columbia University Press, 1937. pp. x, 247. \$2.75.) Mr. Rienow has performed a real service in making an excellent and thorough investigation of a subject hitherto somewhat neglected by international lawyers. That he reaches a conclusion which is not particularly novel is no reflection on the value of his careful research. His study of the statutory requirements, the treaties, and the shipping policies of maritime states shows that even before 1851, when Great Britain was apparently insisting upon national build as a test of the nationality of vessels, this criterion was not generally required. Today, national build is not considered pertinent to an enquiry concerning the nationality of a vessel. Similarly the requirement of a national crew, despite many municipal statutory provisions to that effect, is no test of the nationality of a vessel. The problem of national ownership as a test of nationality is more complicated. The author makes an admirably thorough survey of the shipping laws of maritime states and concludes that "there is actually no correlation between ownership and nationality." In this connection the author fails to make mention of the Joint Reports of the American and Canadian Commissioners in the *P'm Alone* case. A separate chapter treats of the enemy character of vessels, the author concluding that enemy character is a consequence of either enemy service, enemy nationality or enemy ownership, and that "enemy ownership is not viewed as a test of nationality in time of war." To his rejection of national build, national crew and national ownership as tests of the nationality of a vessel, the author adds the national flag, which also fails to be the distinguishing requirement. His conclusion is that national registration or documentation is the sole requirement of international law in the determination of the nationality of a merchant vessel, any other requirement being merely a matter of national shipping policy and no test of nationality. The book is clearly and simply written and gives evidence of exhaustive research and the highest standard of scholarship.

HERBERT W. BRIGGS

Grundzüge des Völkerrechts. By Norbert Gürke. (Berlin: Spaeth & Linde, 1937. pp. 67. \$1.50.) These few pages give a very brief résumé of the rules of international law in time of peace and war. As the author himself remarks, it is impossible to write anything profound on the totality of

international law in 67 pages. His intention is to show the importance of international law for the German nation. He devotes, therefore, particular attention to political problems; this all the more so, as, according to the author, international law is a pronounced political law; and the political basis, as well as doctrines, are in the most dogmatic way National-Socialist.

Die Rechtslage am Suezkanal. By Herbert Monath. (Kiel: Verlag des Instituts für Internationales Recht, 1937. pp. 89. Rm. 3.) This study, based on all documents and on a rich literature, has been inspired by the well-known problem, whether, in conformity with international law, the Suez Canal could have been closed as a measure of sanctions against Italy. After a brief survey of the history of the Suez Canal, of the situation of Egypt up to 1936, the author gives us a detailed analysis of the Convention of Constantinople of 1888, and of the influence on the legal situation of the Suez Canal of the *Entente Cordiale* (1904), of the accession of Spain, of the World War, of Britain's so-called protectorate (1914-1922), of the Treaties of Sèvres and of Lausanne of 1923, of Britain's so-called declaration of independence (1922), of her reservations to the Kellogg Pact, and of Article XVI of the League's Covenant. The new British-Egyptian Treaty of Alliance of August 26, 1936, is mentioned, but the author was not able to give a detailed analysis, especially of Article 8 and Annex. The author's conclusion is that it is legally possible only to close the Suez Canal against a state signatory of the Convention of 1888 if all signatories of this convention are at the same time members of the League of Nations.

JOSEF L. KUNZ

A History of Peaceful Change in the Modern World. By C. R. M. F. Cruttwell. New York and London: Oxford University Press, 1937. pp. viii, 221. Index. \$3.00.

Peaceful Change: A Study of International Procedures. By Frederick S. Dunn. New York: Council on Foreign Relations, 1937. pp. viii, 156. Index. \$1.50.

Legal Machinery for Peaceful Change. By Karl Strupp. London: Constable & Co., 1937. pp. xxvi, 85. 4s. 6d.

It is significant of the increasing emphasis upon the need of "peaceful change" in the existing relations of states that it should be the subject of three new volumes appearing from quite distinct sources. Mr. Cruttwell, writing at the invitation of the Royal Institute of International Affairs, undertakes to present a survey of the historical background of the present problem. He sees in the history of international relations since 1815 numerous instances in which peaceful change was actually brought about, and he finds in that fact an encouragement for the future. Obviously his conclusions in respect to the meaning of certain treaties will expose him to criticism, unless his effort be taken, as it should be, as a suggestive interpretation of diplomatic negotiations rather than a series of logical deductions. His initial definition of "peaceful change" states the limitations of his thesis. "Peaceful change" must clearly exclude "all changes which were the direct result of war between those states which were the gainers or losers by it." Would peaceful change also exclude such changes as were brought about by threat of war, the familiar diplomatic preliminary when a stronger state confronted a weaker one? Yes, if the threat were one "of overwhelming strength." No, if the threat were merely "contingent," that is, if it was merely "one of the main considerations" of a peaceful settlement, not one which left no other alterna-

tive but to yield. What if one party to a treaty should illegally denounce it and the other party were to accept the situation rather than have recourse to war? Would such a change be "peaceful"? What if a group of the great Powers should bring pressure, as in 1831, upon a relatively weaker state, such as Holland, to allow Belgium to have an independent existence? Would the resulting change be a peaceful change? The fact that these and other cases fall into a "dubious" class does not deter the author from pursuing his thesis, and he is able to accumulate a surprisingly large number of instances of peaceful change, involving chiefly the settlement of boundary disputes and the cession of territory. Looking to the future, the author finds in the plebiscite a promising form of procedure, if improvements be made in its operation; and the League of Nations should become more effective as an instrument of conciliation and revision than the old Concert of Europe.

Professor Dunn approaches the problem more realistically. He makes it his object to inquire precisely what the demands for change mean in terms of political objectives and economic redistribution. Which of the demands of the "Have-Nots" are reasonable, in the sense that it is possible to satisfy them without disrupting the existing system and giving rise to new problems equally or more difficult of settlement? Successive chapters deal with "Peaceful Change and National Policies," "Raw Materials," and "Population Pressure." In the first of these the author shows the difficulty of effecting peaceful changes when the forces behind the demand for change are such motives as power politics and prestige; and he makes clear the impossibility of meeting demands for national "self-sufficiency" through the procedures of peaceful change. The same contradictions are met with in the demands for change based upon a policy of economic nationalism, and the author emphasizes that "the only policy of economic health for most nations would seem to be a revival of world trade and a reintegration of all industrial nations into that trade." There is so much good sense in these three chapters that the reviewer could wish that they had been extended to double or triple their length. The concluding chapter surveys the "Procedures of Peaceful Change" and shows that there would be nothing to gain in creating additional procedures of the kind already in existence; but that a special procedure might be helpful by way of unofficial standing committees set up in each country for the preliminary consideration of changes in the status quo.

The slender volume by Professor Strupp contrasts sharply with the typically British and American methods of approach illustrated in the two preceding volumes. The author is a distinguished international lawyer whose contributions to the technical problems of international law are known to all scholars. Here, under the auspices of the New Commonwealth Institute, he has set himself to work out an elaborate "Draft of an International Peace Convention," abundantly annotated in footnotes and followed by an "International Peace Charter" prescribing the several procedures of mediation, judicial settlement, arbitral settlement and equity settlement. The characteristic of the Peace Convention is that it recognizes the need of specifying and elaborating the obligations of the Kellogg Pact so as to take into account the existence of unjust treaties and the changing facts of international life. With this object it provides for the creation of a Permanent Court of International Equity, the organization of which is set forth in detail in the Peace Charter. This equity tribunal would have authority to hear all disputes not submitted to the alternative procedures of mediation, arbitration or judicial settlement. Provision is also made for an amendment to Article 19 of the Covenant of the League of Nations, so as to permit a two-thirds majority to

pronounce the terms of an international award made more than ten years previously to be "no longer in accordance with existing circumstances and therefore with the requirements of a durable peace between nations." The New Commonwealth Institute realizes that the technical form in which Professor Strupp has presented his plan will confine its appeal to a limited circle. The draft is preceded by a brilliant preface by Professor Scelle, who ventures to differ fundamentally with the author in his approach to the problem. The draft proceeds upon the principle of the voluntary agreement of states; whereas to Professor Scelle the failures of Geneva were due to an attempt to set up a system of "institutional federalism," while at the same time reserving intact the sovereignty of the state and the consequent opportunity of arbitrary conduct.

C. G. FENWICK

Europe in Crisis. By R. B. Mowat. (London: Arrowsmith, 1936. pp. 120. Index. 3s. 6d.) This little volume by Professor Mowat, of the University of Bristol, stresses principally the rôles of Germany, Italy, Great Britain, and the League of Nations in the politics of Europe. Seven of the ten chapters deal with Germany and her place in the European picture. The author takes a good deal of care to show that Germany was badly treated from 1919 to 1933, especially at the point of the failure of the victorious Powers in cutting down their armaments after reducing German armaments to the bone. In this connection he does a good job, although his case could have been strengthened by a citation of the Brockdorff-Rantzau memorandum delivered by M. Clemenceau to Count Brockdorff-Rantzau on June 16, 1919, and the five-Power declaration regarding arms equality for Germany of September, 1932. The author would give Chancellor Hitler considerable latitude as a leader, in departing from some of the embarrassing statements made in his book, *Mein Kampf*, written before he took power. He takes the French to task for their blindness in riding Germany too hard, and in failing to consider seriously Germany's peace overtures at the World Disarmament Conference in 1932, as well as those later made by Chancellor Hitler in the early months of his régime. He is severe with M. Barthou, whose rejection (April 17, 1934) of the German proposal for a short service army of 300,000 men was "a tragic blunder from which Europe has continuously and for years increasingly suffered." The chief weakness of the Paris Peace Conference was its failure to consider properly the economic needs of new (and some of the older) states. Italy has dealt the League of Nations its severest blow, but the Geneva organization deserves the support of all, and "the more nearly universal the League is the better." Coming from the pen of an Englishman, this book is significant in that it serves to present the German attitude from a more tolerant point of view than has been done by most recent British or French writers.

The Road to War. By "a Small Group of Experts" [of] The New Fabian Research Bureau. (London: Victor Gollancz, 1937. pp. 207. 3s. 6d.) This volume purports to be "an analysis of the National Government's Foreign Policy"; it is written by a small group of experts as a continuation of an earlier study entitled *Inquest on Peace* by "Vigilantes." A special note indicates that "all the views expressed in this book are [not] necessarily those of the New Fabian Research Bureau." The tone of the volume is sharply critical of the present British Government. The "experts" discuss the democratization of foreign policy, the League of Nations, the fusion of economics and politics, the government's record in the Far East, the Italo-Ethiopian trouble, the Spanish war, Germany, and "the collective system,

defence, and peace." It is charged (p. 30) that "the tardy and half-hearted application of sanctions was undertaken partly in an attempt to induce Mussolini to do a deal on terms satisfactory to British Imperialism instead of taking the whole of Abyssinia at once, and partly in order to win the General Election." The "Hoare-Laval deal killed the prospect—which had been very favorable—of the United States joining in an oil embargo and destroyed international confidence in the honesty of purpose of the British Government. . . . It marked the end of the pretence by our National Government of being in earnest about sanctions" (p. 41). As to the Far East, a devastating thrust is directed at our "Tories, [who] in order to avoid the risk to the existing social and Imperial order of a revolution in Japan, preferred to default on their treaty obligations and to connive at Japanese aggression" (p. 29). The government is charged (p. 105) with "bad faith" in the Spanish civil war. After accusing the government of crippling the movement for collective security, the authors conclude that "the way to peace lies through the speedy replacement of the National Government by a resolutely Left Government—that is, by a strong Labour Government with or without 'popular front' support" (p. 181). Some twenty-five pages in an appendix carry the text of quotations from official and semi-official statements by the Labor Party and its leaders. With proper discount for political zeal, the book provides plenty of opposition material, much of which is very helpful in aiding the student to form a true judgment of British foreign policy.

J. EUGENE HARLEY

The Price of European Peace. By Frank Darvall, with preface by Lord Allen of Hurtwood, and criticisms by Count Bethlen and General Smuts. (London: William Hodge & Co., 1937. pp. xvi, 181. 5s.)

Nearing the Abyss. The Lesson of Ethiopia. By Lord Davies. (London: Constable & Co., 1936. pp. xiv, 182. Index. 3s. 6d.)

Dr. Darvall in his book, after devoting a chapter to Germany, another to Italy and still another to Hungary, Austria, Bulgaria and Lithuania, all of which he refers to as the "have nots," discusses Communism *v.* Fascism and concludes that there is room for all philosophies in Europe. He believes, however, that it is impossible to satisfy each of the European states with the existing conceptions of frontiers and sovereignty. He argues that the primary factor in the whole situation is nationality, which he conceives to be mainly a sentiment, and that nationalities will insist upon the control of all persons within their boundaries, of economic resources necessary to their survival, of all means of communication, of all geographic points vital to defense in war; and that they will fight if need be for their complete freedom from all limitations and for their equality in the realm of privileges enjoyed by other states. He then proceeds to urge that international utility and equity must be backed by international guarantees and control. He concludes that there must be revisions in the present European order for the purpose of limiting the discontent of the "have nots" and at the same time lessening the fears of the "haves." This will mean a federal association of European states without which the Continent can expect neither equality, prosperity, nor peace. What these revisions must be constitute the burden of the author's careful analyses. Since he regrets the failure of the League of Nations to carry through with its sanctions in 1935 against Italy, it is apparent that he believes, although he does not say so precisely, in some form of an international military force.

In his *Nearing the Abyss* Lord Davies is quite explicit upon this point. He nails some words by Pascal to his mast and ploughs straight ahead toward

his goal of an international organization backed by a strong right arm of military might. The French philosopher's words are: "*We must therefore put together justice and force: and so dispose things that whatsoever is just is mighty, and whatsoever is mighty is just.*" The author's thought of applying this doctrine throughout the European field is to set up an Equity Tribunal for the peaceful settlement of disputes, including the revision of treaties, on the one hand, and an International Police Force on the other. Let Milord Davies have his way, there would be a European air police force under the control and direction of a reconstituted League, a force stronger than any other air force of a European state outside the system. The breakdown of such a scheme in the case of the Italo-Ethiopian war only strengthens his belief in the necessity for a still stronger international military force. He does not tell us how such a force is to be organized, manned, supported, directed. He appears to have given little thought to the possibilities of such a force being sent, say, against England. He conceives the problem of the League of Nations to be a problem of federalism, of setting up a revitalized and remodeled League with ample power to coerce a recalcitrant state if need be by force of arms. If he has read the arguments upon an analogous proposal as carried on by the men who met at Philadelphia in the Federal Convention of 1787, and their conclusions upon it, he apparently takes no stock in them.

Here are two books representing with ability and distinction the views of that school of internationalists bent upon establishing peace between states, if need be by the processes of war. They call it the application of police power, which of course it is not.

ARTHUR D. CALL

The Legal Position of War: Changes in its Practice and Theory From Plato to Vattel. By William Ballis. (The Hague: Martinus Nijhoff, 1937. pp. xii, 188. Index. Gld. 4.) War, as the author understands it, is "the condition when public armed forces may properly be used between states." He poses five questions: With whom may it be waged? With what ceremonies must it be begun? Under what circumstances is it justified? What should be the attitude of strangers to the controversy? What restrictions are recognized with respect to time and place? For each successive stage of political evolution answers are sought, first in a brief description of state practice, then in a résumé of leading doctrinal writings. The chief topic, of course, is the evolution of the idea of the just war, from the ritual of the Roman *fetiales* through the moral systems of the schoolmen to the triumph of the positive point of view. The ground covered is familiar, the author's interest being sustained by the thought that the old questions are raised anew in our own times. The present essay is presented as preliminary to a study of the more recent period.

CHARLES FAIRMAN

An International Police Force. By W. Bryn Thomas. With a Foreword by Arthur Henderson, M.P. (London: Allenson and Co., Ltd., 1936. pp. 173. Index. 3s. 6d.) The title of this volume gives perhaps an inaccurate impression of the author's major emphasis. Although he would bring national armed forces under international control and have the Assembly of the League of Nations create an international force by the application of the Barème Formula, now employed in apportioning League expenses, he contemplates the infrequent use of force as a sanction. Rather he would give the Permanent Court of International Justice, the Council, and the Assembly compulsory jurisdiction over disputes, abolish the rule of unanimity,

subordinate the Council to the Assembly, require the popular election of national representatives to the League, and provide for periodic revision of treaties.

CHARLES A. TIMM

Attachés Militaires, Attachés Navals, et Attachés de l'Air. By Capitaine Armand Paul Beauvais. (Paris: A. Pedone, 1937. pp. vi, 214.) In this compact and well-arranged volume the learned author, especially qualified by his professional education and experience, has presented what might be termed a history of the conception, birth and growth of the office of military attaché, or technical aide, on the staff of an embassy or legation serving abroad. The study also includes, either by direct reference or by necessary implication, the analogous attachés of the naval and aéronautical services. Throughout eleven full chapters with numerous subdivisions and several annexes diligent research and painstaking care are evidenced on every side. The bibliography is comprehensive. Referential footnotes are profuse, pertinent, illustrative and, occasionally, entertaining. Historical records, ancient, medieval and modern, official archives and files both domestic and foreign, and even personal correspondence letters, have been searched and the findings faithfully recorded. The position of attachés of the Army, Navy, Aéronautics, detailed to duty with diplomatic missions is made the subject of deep study and interesting conclusions regarding that which concerns their selection, qualifications (professional, social, cultural, financial), functions, rights, duties, privileges, immunities, rank and status, precedence—all of these things as seen in both the theory and the practice of the several governments composing the membership of the world diplomatic family. The limitations of a brief review preclude more detailed consideration of many interesting features of this work.

RAYMOND STONE

If War Comes. By R. Ernest Dupuy and George Fielding Eliot. (New York: Macmillan Co., 1937. pp. xiv, 368. \$3.00.) Approaching the problems of international relations from the viewpoint of *geo-politik*, this study forecasts conditions in the next war. It takes us over the battlefields of the past, touches, in historical examples, on the immutable principles of war, the trends of military belief today, briefly summarizes the armies and navies of the world, and, in a series of keen, analytical estimates, describes what soldiers believe must be the initial moves of any major hostility. Pros and cons of military policy are well described here in the light of the objectives imposed by their respective governments. As far as the United States is concerned, we learn that "if war comes America is prepared to defend herself" (p. 330). This is a surprising statement considering the general arguments we usually hear from our military leaders. It is even more surprising when we realize that the authors are both members of the United States Army. The book represents a considerable amount of research. Although it holds plenty of interest for the military specialist, it is also a stimulating and suggestive book for the general public. In fact, it is indispensable for every student of international relations.

J. S. ROUCEK

La Terre Belge du Congo. Étude sur l'origine et la formation de la colonie du Congo Belge. By P. Jentgen. (Bruxelles: Imprimerie Bolyn, 1937. pp. xv, 434.) The African Congo has always been an area in which the United States has shown a keen interest. The United States was one of the earliest to recognize the Congo Free State flag. This volume covers the period from 1876 through the first decade of the nineteenth century. It sur-

veys the attempts at exploration, exploitation, and economic control, as well as political control which gave rise to international complications. The volume is prepared by Mr. Jentgen, who was formerly President of the Court of First Instance at Elizabethville, and accordingly he writes with much first-hand knowledge. There is a list of works consulted, authors cited, and a table of official documents, as well as an index.

Humanity, Air Power and War. By Capt. Philip S. Mumford. (London: Jarrolds, 1936. pp. 252. Index. 12s. 6d.) Recently many books upon the use of air force for the maintenance of international security have appeared. This book pictures a European condition conceived to be saner and safer than that under the present nationalistic policies. With the development of aircraft nearly every important European center is within fighting range of every other. The author does not see in present attempts to attain security through national effort any solution. He points out that at the Geneva Disarmament Conference a considerable number of states were in favor of the French proposition of internationalization of air forces. The failure to achieve disarmament seems to him an evidence that scientific development among men has advanced beyond their mental and moral apprehension. The appendices contain the French and the Spanish plans presented at Geneva in 1932 and the Covenant of the League of Nations. There is also a brief bibliography and index.
G. G. W.

Renvoi in Modern English Law. By Albrecht Mendelssohn-Bartholdy. Edited by G. C. Cheshire. (New York and London: Oxford University Press, 1937. pp. xiv, 87.) This little book is published posthumously from a manuscript revised by Dr. Cheshire. The author is perhaps best known in this country as the principal compiler of the fifty volumes of selected documents from the German Foreign Office entitled *Die grosse Politik der europäischen Kabinette, 1871-1914*. The present work is a closely reasoned essay upon the ever-recurring problem of *renvoi*. It raises the particular question whether a reference to "the law of the domicile" includes the rules of private international law which a court of the country of the domicile would itself apply in order to ascertain the competent municipal or internal law. The author's thesis is that it does not, and that the law to be applied is solely the foreign municipal law itself. In this he is in accord with the rule of the American Law Institute Restatement; but certain recent decisions in England uphold the application of the foreign law in the wider sense, including its rules of the conflict of laws. The author criticizes these cases and expresses the hope that the English courts will disregard earlier *dicta* based upon misleading evidence on the particular continental law, and thus eventually be brought to see the true light (p. 75). He also suggests that a restatement of the English law of conflicts might prove helpful in reaching a consensus with American law upon this and other questions (p. 86). The essay gives proof of the wide learning and versatility of the author, whose untimely death was deeply deplored by scholars here and abroad.

ARTHUR K. KUHN

Le Problème du Conflit des Lois. By Nils Söderqvist. (Brussels: E. Duchatel, 1935. pp. 308.) This is a profound theoretical work on the Conflict of Laws which cannot be understood without a thorough study of the author's *Droit International Maritime Suédois*, 1930, and his article "*La Double Conception du Droit International et le Caractère International du Droit dit International Privé*," in the *Revue de Droit International et de Légis-*

lation Comparée, 1923. In the article just referred to, the author challenges the fundamental conceptions separating the two principal continental schools on the subject of Private International Law—the internationalists and the nationalists. International Law, according to Söderqvist, has no higher source than national law, both deriving their force from the will of the state. Hence it is impossible for the two to be in disagreement with each other. It follows also that each state has in fact its own international law. Private International Law is regarded as dealing with the rights of individuals and as belonging to substantive international law only so far as the interests of the state intervene in the guise of the *ordre public*. In the estimation of the author the doctrine of the *ordre public* is insufficiently understood and left too vague. The first half of the present volume is devoted to its clarification, a distinction being made between genuine public order, quasi-public order, and pseudo-public order. The rest of the work consists of a discussion of the factors connecting a legal situation with a particular system of law and the application of the author's theories to various topics commonly embraced within the subject of Private International Law. ERNEST G. LORENZEN

European Treaties bearing on the History of the United States and Its Dependencies. Edited in continuation of the work of the late Frances Gardiner Davenport by Charles Oscar Paullin. Vol. IV, 1716–1815. (Washington: Carnegie Institution, 1937. pp. viii, 222. Index.) This volume completes the series projected by the Carnegie Institution. (For reviews of earlier volumes, see this Journal, XIII, 148; XXIV, 639; XXIX, 351.) The most important treaties bearing upon the United States and its dependencies since 1815 are those to which the United States is itself a party now being definitely published in the Hunter Miller edition. Those to which the United States is not a party, since 1815, are easily available in the published treaty series of European states, in Martens or in the League of Nations Treaty Series. The editor of the present volume has not attempted to include elaborate introductions and bibliographies like those prepared by Dr. Davenport for the earlier documents, with the result that it has been possible to print the 96 documents in about one-fifth as many pages as were required for the 107 documents of the first three volumes. In this volume each text is printed in the original language, with the indication of its source, and an English translation, if the original is in some language other than French or English. As only those parts of documents related to American affairs are printed, the reader will regret the lack of at least sufficient introduction to explain the significance of the document as a whole. For the student of American diplomatic history, however, easy availability of these documents in authentic text will be a great advantage. As an indication of the growing importance of America in European diplomacy during more than three centuries, the 96 documents from 1715–1815 may be compared to 78 from 1615–1715 and 29 from 1455 to 1615.

QUINCY WRIGHT

American Foreign Policy: Formulation and Practice. By Wilson Leon Godshall. (Ann Arbor: Edwards Brothers, Inc., 1937. pp. xxx, 553. Index. \$5.00.) This volume of selected readings on the history of American foreign policy provides a collection of source materials which contains much that should be of use to the teacher of international law and relations. Through the lithograph process, and the size type used on double-column pages, the quantity of material brought together in a single volume is impressive. It has been selected with a view to illustrating policies actually

adopted and basic changes subsequently made. The compiler has followed a topical grouping, but has furnished in an appendix a listing which is chronological. From the latter will appear the large relative importance assigned to the post-World War period. The greater part of the readings have been taken from official published material. In a few cases references are to instructions in diplomatic archives. The inclusion of judicial decisions (as at pp. 236, 455) is exceptional. Texts of treaties are in some cases reproduced in detail. The reader is struck with the large use made of the Department of State *Press Releases*, the value of which publication, for the study of diplomacy in recent years, is increasingly apparent. In some seventy short introductory notes at the head of as many subsections (as, for example, that on "The Civil War and After" in the chapter given to Neutrality), Professor Godshall has essayed the important but difficult task of setting the stage for a study of the texts which follow. From some of these notes (as at pp. 111, 445) the editor's own point of view seems to emerge. There is room for disagreement as to particular selections, and as to the most logical arrangement, but this should not detract from the general value of the collection provided.

ROBERT R. WILSON

Labor Treaties and Labor Compacts. By Abraham C. Weinfeld. (Bloomington, Ind.: The Principia Press, 1937. pp. viii, 136. Index.) This slim little volume by a member of the New York Bar is the first attempt to explore some of the legal implications of American membership in the International Labor Organization. The author is catholic in his adherence to the precedents in law and judicial opinion in his discussion of such questions as whether a treaty regulating labor conditions requires legislation to become effective, whether interstate compacts offer a possible formula for adherence to the terms of labor conventions, or to what extent the fifth and fourteenth amendments are barriers to national action in this field. There is a useful chapter on Canadian precedents and experience—written, however, before the final decisions of the Judicial Committee of the Privy Council on the Labor Conventions Case (Attorney General for Canada v. Attorney General for Ontario, [1937] A.C. 326). Mr. Weinfeld draws no hard and fast conclusions, but offers many interesting, and often shrewd, analyses of the questions still open in this important field of our international relations.

The Influence of Organized Labor on the Foreign Policy of the United States. By Margaret Hardy. (Liège: H. Vaillant-Carmanne, 1936. pp. viii, 270. Index.) This essay in describing and evaluating the influence of an important sector of the American people on the making of foreign policy is an invaluable addition to the literature on the effects of pressure group activities on diplomacy. While Dr. Hardy has not explored here an entirely new field, she has for the first time brought together many scattered materials in an elusive area of analysis, and given perspective to a recurrent problem in American politics and foreign relations. About one-half her study is devoted to general questions of foreign policy, such as the issues arising out of the war and the peace treaties, the recognition of Russia, American adherence to the World Court, and the recent issue of fascism in Germany. Her more specialized surveys of labor's attitude to Central American problems and to the creation of a Pan American Federation of Labor, and of certain domestic issues—the tariff, immigration, the treatment of seamen, and naval construction, the implications of which for foreign policy are evident—indicate the much more active pressure which the

A.F. of L. brought on the government as to questions of immediate interest in terms of wages, working conditions, and employment. A final chapter deals with the attitude of labor toward the International Labor Office, especially during its formative stages. The results she portrays are, as she points out, hardly measurable in specific terms. But the evidence of effective influence is cumulative over the five decades she has analyzed from the records of the labor movement itself, as well as from the press, official documents, and biographical records. Written before the rise of the C.I.O., Dr. Hardy nevertheless suggests that the future influence of the labor movement on foreign policy depends on its capacity for "more general participation in domestic government." She considers that that result will come as soon as the labor movement reconciles the conflict between the older and more conservative craft unionism and the new and more dynamic industrial unions. When that time comes, the somewhat negative attitude portrayed here on general questions of foreign policy will be supplanted by a more positive program on foreign as well as domestic issues. Labor has already forged the machinery of an active pressure group, and has gained experience in its operation. It awaits, in the author's opinion, the shaping of an effective policy which will unite the two aspects of a single interest.

PHILLIPS BRADLEY

The United States Among the Nations. Seven lectures arranged by the University of California. (Berkeley: University of California Press, 1937. pp. viii, 184. \$1.50.) A group of distinguished scholars analyze the international interests of the United States and in so doing make a definite contribution to the literature of the subject, interesting and instructive to the general reader, and valuable to the scholar. (I) Eugene I. McCormac is disposed to view the history of the foreign relations of the United States as proving Wilson's peace program to have been more "practicable" than "visionary." (II) Herbert I. Priestly indicates the growth of Pan Americanism and its general acceptance. (III) Robert J. Kerner views the relations of the United States and Europe in the light of the interaction of nationalism and economic internationalism. (IV) Henry F. Grady states that the United States must assist in rehabilitating international trade to assure its own prosperity and the prosperity of other nations, for these are conditions essential to world peace. (V) David P. Barrows, in discussing military policy, declares that the United States will fight only to protect American territory. (VI) Chester H. Rowell feels that the interests of the United States in the Pacific can only be served by coöperating in the reestablishment of order. (VII) Frank M. Russell thinks that security for democracies can be achieved by making common cause against "latter-day Caesars."

KEENER C. FRAZER

The United States and the Disruption of the Spanish Empire, 1810-1822. By Charles Carroll Griffin. (New York: Columbia University Press; London: P. S. King & Son, 1937. pp. 315. Index. \$3.75.) Students of international relations and of diplomatic history, especially of the United States and the Latin American countries, will find this book interesting and valuable. The very full bibliography and the numerous footnote citations show the author's care and wide scholarship. He has used practically all important pertinent published sources, both primary and secondary, including the important contemporary periodicals of the United States, Latin America and Europe; and in addition has drawn largely, almost exhaustively, on archives

in the United States and Spain, and also, but somewhat less extensively, in France and England. He has exhibited much skill in combining information from divergent sources into a logically connected whole. The treaty between the United States and Spain of 1819-1821, frequently called merely the Florida Treaty, constitutes the chief theme of the study. Contemporary related events in Europe, Latin America and the United States are fully treated. The influence of the treaty negotiation and ratification on possible acknowledgment of the independence of the revolted Spanish colonies, contemplated in the United States and apprehended in Spain, is skilfully woven, like a scarlet thread, through the whole fabric of the treatise; and the consummation of that recognition is the subject of next to the last chapter. A bibliography of thirteen pages and a double-column index of more than twelve pages complete the publication, contributing much to its usefulness.

WILLIAM R. MANNING

International Aspects of German Racial Policies. By Oscar I. Janowsky and Melvin M. Fagen. (New York: Oxford University Press, 1937. pp. xxii, 266. Index. \$2.00.) The present study fills the need for a comprehensive survey of the international legal problems arising out of the "racial" legislation and practice of the Third Reich. Based upon official German sources, it presents a convincing indictment of National Socialist policies from both the standpoints of international law and of public morality. The following subjects are examined and analyzed in detail: the right of humanitarian intercession in behalf of oppressed minorities, the expulsion or forced emigration of nationals, deprivation of nationality as a penalty, the kidnapping of fugitives from foreign territory, the assertion of jurisdiction over extraterritorial political crime, and the international obligations of Germany with respect to minorities. Since the purpose of the authors is frankly a polemical one, it is not surprising that they have in several instances overstated their undeniably strong case. The student of international law may dissent from certain of the conclusions, but the industry and wide research of the authors will furnish him with ample material for forming his own. The proposed solution—intercession of the League acting in virtue of Article 11 of the Covenant—seems wholly futile. An appeal made in behalf of the Jewish population of Germany would be based implicitly upon the assumption that the National Socialist Government is animated by the very humanitarian sentiments and egalitarian ideals which it has so emphatically repudiated. The appendices include the letter of resignation of James G. McDonald as High Commissioner for German Refugees and the Annex thereto. The latter is the most thorough description of the National Socialist legislation and practice which has yet appeared. Its value to the student would have been increased had the annotations been revised to the date of publication of the present work.

LAWRENCE PREUSS

La Société des Nations, Centre d'Études et Source d'Informations. By A. C. de Breycha-Vauthier. (Paris: A. Pedone, 1937. pp. vi, 105. Index. Fr. 25.) This brochure is a guide to the publications of the League of Nations arranged by subject. The method of presentation and the index direct the user immediately to the last 1936 document on a given subject. Each item is accurately identified and its content and scope indicated. The extent of series is not always mentioned. Brief chapters on the Library of the League and the system of numbering documents fulfill the promise of the title. The French edition was preceded by editions in German and Czech and is being

followed by one in Russian. The volume does for users of those languages what Marie J. Carroll's *Key to League of Nations Documents* does for readers of English, but without the bibliographic, historical and committee information of that publication.

DENYS P. MYERS

Geneva versus Peace. By Comte de Saint-Aulaire. Translated by Francis Jackson. (New York: Sheed & Ward, 1937. pp. vi, 272. \$2.50.) The thesis developed is that the League of Nations has failed to maintain peace and has undermined the international structure on which peace must depend. The League is viewed as an instrument in the hands of Germany and Russia, arch-enemies of European order. In having taken the part of Ethiopia against Italy, it is regarded as the champion of barbarism against civilization. England and France are pictured as dupes of the League and of the hypocritical international morality which it utilizes for sinister purposes. Among other things, the League is said to have given these two nations a sense of false security enabling Germany and Russia rapidly to acquire power and become serious threats to peace. The remedy proposed is the destruction of the "sophisms" on which the League lives, "the restoration of the national spirit in peaceful countries," and the conclusion of alliances and understandings "between the natural guardians of order"—France, England, Belgium, Italy, Poland, and the Little Entente.

S. D. MYRES, JR.

Gold- und Valutaklausel in deutscher und niederländischer Gerichtspraxis. By Sack and Meyer-Collings. (München and Berlin: C. H. Beck'sche Verlagsbuchhandlung, 1937. pp. viii, 336. Index. Rm. 7.50.) In recent years the effect on private debts of currency devaluation and restriction of the international movement of capital has engaged the attention of the science of private international law, and many works of theoretical importance—we cite only those of Domke, Fenwick, Neumeyer, and Nussbaum—have contributed to the clarification of this problem. "The authors of the present volume," according to their own declaration, "were not led by the intention to add to these theoretical works new speculations, theories, discussions or polemics. They were concerned rather with satisfying the demand, which has revealed itself in the German law practise, for a compilation of pertinent decisions of German courts on the gold and foreign exchange clause." Although the authors have given only the decisions rendered since 1930, and these not without omissions, such a collection of decisions will nevertheless be of service to the legal practitioner.

HANS J. MORGENTHAU

Resolutions adopted by the Inter-Parliamentary Conferences and Principal Decisions of the Council. (Geneva: Payot et Cie., 1937. pp. 232. Index.)

Compte Rendu de la XXXIIe Conférence de l'Union Interparlementaire. (Geneva: Payot et Cie., 1936. pp. xii, 649. Index. 10 Sw. fr.)

The first of these volumes makes available to scholars and statesmen the results of the deliberations of the Interparliamentary Union during the past quarter century. It is a "sequel" to the volume of 1911 which summarized the first period of the Union's history from its establishment in 1889. It includes, beside the official resolutions and decisions, a comprehensive introduction by Christian Lange, the Secretary General of the Union, in which is summarized not only the evolution of ideas and policies at the conferences, but a useful (indeed too brief) description of the organization of the Union. This edition in English of a similar French issue provides a useful introduction to the work of this unofficial but important agency for facilitating inter-

parliamentary exchange of ideas and mutual coöperation in the development of peaceful settlement and international social and economic policy.

The second volume is the report of the 1936 conference at Budapest. 340 delegates from 22 countries, all European with the exception of the United States, Egypt, and Japan, discussed three principal questions—international commercial arbitration, unemployment and the development of the possibilities of employment, and parliamentary control of public finance. Projects were drawn up for resolutions on these questions, which were adopted with only minor modifications. The debates on the resolutions are, as usual, reported in full, and indicate at many points the divergences of view of the practical limits of action set by the policies of the different countries represented. The vigorous and often outspoken comments of the Secretary General in his annual reports are perhaps the most valuable part of the *Compte Rendu*; that for 1936 reviews the world situation with admirable clarity and objectivity, without minimizing the challenge of such events as the Italo-Ethiopian conflict to the development of world order. PHILLIPS BRADLEY

Early Japanese History (C. 40 B.C.—A.D. 1167). Part A. By Robert Karl Reischauer. pp. xiv, 405, diagrams and tables; Part B. By Jean and Robert Karl Reischauer. pp. vi, 249, maps, tables and index. (Princeton: Princeton University Press; London: Oxford University Press, 1937. \$7.50 a set.) This monumental compilation of scholarship was published only a few days after the tragic death of Dr. Reischauer on August 14, 1937, during the bombardment of Shanghai. The work covers the period of earliest historical records to the overthrow of the supremacy of the feudal baron Taira Kiyomori in A.D. 1167. Part A contains an illuminating essay on early Japanese history from the pen of Dr. Reischauer, followed by diagrams and tables showing the organization of the government of Japan in the age of the court nobles (592–1167 A.D.), while the greater part of the volume is devoted to the Chronicle of Events, arranged by year, month and day. Part B contains maps, an alphabetical index and glossary in romanized Japanese and a Chinese character index, in the compilation of which the author had the more than efficient collaboration of Jean Reischauer. In compiling his chronology, Dr. Reischauer has tested the works of Koroita, Omori, Takahashi, Hiki and Kiyowara, as well as the great coöperative compilation of the *Dokushi Biyo* (Guide to Historical Literature), compiled at the Imperial University of Tokyo. He has scanned the primary sources of Japanese history, including the *Montoku Jitsuroku*, the *Sandai Jitsuroku* and the *Shiryosoran*. Every page of his chronology and index indicates the scholarly precision with which these materials have been used. An understanding of the origins of contemporary Japan on the part of Western scholars has been hampered by the small number who read Japanese and Chinese. For Western students who do not read Japanese, Dr. Reischauer has performed a great service in making available this detailed historical information compiled from authentic Japanese sources. The period that he treats begins with the Age of Deities and Legendary Heroes and ends with the overthrow of the court nobles by the feudal barons whose ascendancy was to continue until the nineteenth century and the westernization of Japan. It was a period in which the challenge of Buddhism, the introduction of Chinese culture and the growth of native literature and art profoundly moulded the future of Japan. It was a period in which the political, economic and social foundations of modern Japan are deeply sunk. The study of these antecedents is indispensable to a correct comprehension of the Japan that today so aggressively dominates the Far

East and confronts the Western World. The author was prepared at his death to follow the initial volumes with succeeding volumes bringing the chronicle of events down to modern times. It is sincerely to be hoped that the Princeton University Press will find means for completing this superb undertaking.

KENNETH COLEGROVE

Surinaamsch Staatsrecht. By J. A. E. Buiskool. (Amsterdam: H. J. Paris, 1937. pp. viii, 209.) The author, who in 1935 published a study on the independence of the Philippines, wrote this volume in order to draw attention to Surinam, where he spent his youth. Successive chapters treat the constitutional position of Surinam from 1798 to 1922, the situation presented by the revision of the Netherlands Constitution in 1922, the new regulations for Surinam promulgated thereunder in 1936, and suggestions *de lege ferenda*. Interesting questions as to the interpretation of provisions respecting the scope of the Crown's control over the Governor are involved, and may be compared with developments under the British Empire system. Surinam is not economically self-supporting, and the author believes investment there should be encouraged by increasing self-government. He considers it contrary to principle that five of the fifteen members of the assembly representative of the people are appointed by the Governor, and only ten elected.

EDWARD DUMBAULD

Introduzione Domatica al Diritto Ecclesiastico Italiano—Parte Prima. By Aldo Checchini. (Padua: Cedam, 1937. pp. 140. Index. L. 20.) Professor Checchini publishes the first part of an Introduction to Italian Ecclesiastical Law, in which he develops his views regarding the principles underlying the relations of the Roman Catholic Church and the Italian State. The second part will apply the principles which he believes he has established to the solution of concrete problems which arise out of the competition of civil and ecclesiastical law. He emphasizes the separation of State and Church in Italy, and full recognition by the State of the Church as an independent entity, entitled to legislate and to adjudicate on subjects properly within its purview. The key to the problems which arise is found by applying the analogy of the relations with a foreign sovereign state, making use of the rules of private international law. He considers in some detail the basis on which foreign (and consequently ecclesiastical) laws and judgments are recognized and applied.

JAMES BARCLAY

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PAN-AMERICANISM AND IMPERIALISM

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Pan-Americanism and imperialism appear to be mutually exclusive. Whether they are so in effect is a matter of definition. Neither term in current usage conveys a precise meaning. Pan-Americanism fails because it has not yet emerged into a distinct and easily recognizable form, and imperialism because it has evolved in the course of history through a variety of forms from which a doubtful choice must be made. In the one case the problem is to decide what meaning, and in the other, which meaning. The "what" is the more difficult to determine, since new concepts such as Pan-Americanism acquire meaning with time and circumstance. It is not strange, therefore, that the attempts at formal definition have thus far proved unsatisfactory. Not even the genus to which Pan-Americanism belongs has been agreed upon. One author calls it an advocacy, another an idea, another a sentiment, and still others an aspiration, a tendency, or a doctrine. Obviously it does not fall indifferently into all these categories. If it is a sentiment merely, it is less than a doctrine; if it is a doctrine it is more than a tendency; and to call it a tendency is not the same as to say it is an aspiration or an idea. Moreover, none of these classifications when considered separately seems to fit the case.

The concept, it may be, is not susceptible of exact classification. One other suggestion, however, is worthy of consideration. Twenty-odd years ago, Secretary of State Robert Lansing called Pan-Americanism a policy—an international policy of the Americas. Implicit in this view is the assumption of an agency of continental scope capable of formulating and promoting the policy. The assumption may have been of doubtful validity at the time Lansing made his statement, but today that objection does not hold. The international American conferences, however ineffective their early efforts may have been, now undoubtedly formulate policy. They do more. They create the machinery for carrying the policy into effect.

If, then, the existence of a Pan-American policy be admitted, does it follow that the concept policy is the genus of which we are in search? Apparently not, for the policy of the Americas is an effect back of which lies Pan-Americanism as the cause. That is, Pan-Americanism is anterior to, and more inclusive than, any definitely charted course, or declared principles, or established organs for common action. It is a force productive of policy, not policy itself. The only way to understand the nature of this intangible force is to observe its concrete manifestations in policy. It will be convenient, therefore, to employ the term policy as if it were in very essence the genus of Pan-Americanism.

What is this policy of the Americas? It is a course of action adopted by the independent states of the New World with a view to the establishment of continental unity on the basis of certain recognized principles which may be stated briefly as follows: the independence and equality of the American nations; community of political ideals;¹ non-intervention; the settlement of inter-American disputes by amicable means; no conquest; and coöperation to achieve the common aim. These principles are deeply rooted in continental thought. Leading statesmen of both Americas have repeatedly asserted them, and the international conferences have confirmed them by numerous declaratory acts. International in scope, the policy rests on national foundations; that is, it rests on the individual policies of the states comprising the Pan-American group. Thus it is the individual policy of each to promote the general policy of all.

The principles of the policy express, it is true, the ideals and not the invariable practices of the American nations. If the ideals and the practices are too much at variance, Pan-Americanism may become a mockery. This is particularly true if the practice of the United States, the most powerful of the nations concerned, is inconsistent with the ideal. It is essential, therefore, to inquire whether this greatest of the American nations does in fact respect the independence and equality of its neighbors, whether it refrains from intervention in their affairs, whether it is disposed to settle its disputes with them without recourse to force, whether it abstains from conquest at their expense, and whether it genuinely coöperates with them to achieve common aims. In short, it is essential to know whether the United States, while professing respect for the individuality and well-being of its neighbors, in reality seeks to dominate them for its own selfish ends—whether it pursues the course of Pan-Americanism or that of imperialism.

The real course is one of imperialism, say some observers. Precisely what these observers mean is not clear, for they do not define imperialism. What does the term signify? Its meaning must be sought in empire. Without empire, actual or intended, there can be no imperialism. If the empire already exists there must be measures for maintaining it; if it does not yet exist there must be measures for creating it. The measures for maintaining or for creating empire constitute policy—the policy of imperialism. Thus two policies appear: the policy of Pan-Americanism and the policy of imperialism. The one is expressly intended to create and maintain a community of equal, coöperating nations; and the other is intended, presumably, to create and maintain an empire. The two policies, the two courses of action, lead in different directions. In which of these directions does the United States move? It cannot move in both at one and the same time. It cannot serve two masters.

¹ Whatever the appearance to the contrary, the peoples of the New World are attached to the democratic ideal. Governments come and go, but the ideal remains as the unifying principle.

If the policy of the United States is to create or maintain an empire, what is the nature of this empire? What is the nature of empires in general? History furnishes many examples. They fall into two classes: first, states with vast accretions of heterogeneous outlying areas; and second, more compact states whose chief ruler happens to bear the title of emperor. Of this second class the New World provides some examples in the empires of Des-salines and Christophe in Haiti, of the Pedros in Brazil, and of Iturbide and Maximilian in Mexico. Possessing no dependent territories, these empires, so-called, were in no external respect different from the other American states that existed contemporaneously with them. The very title of emperor by its historical associations has acquired a connotation of excessive and arbitrary power. Hence the use of the term imperialism as an antonym of democratic or constitutional government. For example, the departure from strictly constitutional procedure in the United States during and immediately after the Civil War has sometimes been characterized as imperialism. The fashion of the day is to describe this phenomenon as dictatorship. The imperialism with which we are concerned is not of this sort. It seems to derive from the empires of the expansive type.

Empires of this description have flourished in every age of recorded history. Those that exist today are vaster and more powerful than any that have gone before. Of all modern empires the Roman is the prototype. Its essential characteristics were three: first, the central Roman state exercising the *imperium*; second, the outlying conquered territories—Spain, Gaul, Britain, Asia Minor, etc.; and third, control over these areas through the agency of Roman governors and Roman armies. It is worth noting that the early expansion of Rome by the progressive conquest of neighboring peoples until the greater part of Italy was united under one central authority did not constitute empire. This was the process of creating a national state, if we may use the modern terminology. It should be observed also that the larger Roman conquests were of peoples, and not of thinly settled or vacant lands. Nor did the Romans migrate to any considerable extent into the conquered outlying areas. That process, if it is controlled by the parent state, is colonization and not imperialism. Respect for the great historical example from which the very term empire is derived requires that these facts be remembered.

The empires of the sixteenth and seventeenth centuries—if the interesting examples of the Middle Ages may be passed over—were of a somewhat different type. They are usually described as colonial. Yet, in two important respects they follow exactly the Roman pattern. First, the parent states achieved the requisite unity and strength to exercise the *imperium*; and secondly, they acquired, as did Rome, distant territorial possessions. In respect to the most notable of the characteristics of the Roman Empire—the control over alien peoples—the resemblance in most cases was not striking. Portugal, for example, devoted itself primarily to trade and colonization. It did not rule over teeming millions in the Far East nor in Africa. In those quar-

ters it was content to dominate small areas about the trading stations to which its vessels resorted for their precious cargoes; and in Brazil it directed its activities not to the government of native races but to the establishment of its own people and its own culture in a new environment. England and The Netherlands followed much the same procedure. In the Orient they entered into competition with the Portuguese for commercial supremacy, and elsewhere they preferred trade and colonization to the conquest and rule of native races. Both, however, were to establish in the course of time empires of the Roman type.

France established in the seventeenth century an empire much like those of England and The Netherlands. Spain alone approximated the Roman model. Though it was not indifferent to trade and colonization, it made veritable conquests. Mexico, Guatemala, New Granada, Peru, and the Philippines were as truly the provinces of Spain as Gaul or Spain itself ever were of Rome. Nor is the similarity confined to conquest and control. It extends to the common survival of the conquered peoples and to the lasting impress left upon them by the dominant Powers. Obviously imperialism of this sort is different from the movements that resulted in the transference of peoples and institutions to a Massachusetts, a Virginia, a Quebec, a Buenos Aires, or a Cape Colony. Yet the Roman element in the overseas activities of Portugal and The Netherlands and of England and France was sufficient to justify the use of the term "empire" to describe the composite structure erected by each in its sphere of action.

The empires created in the sixteenth and seventeenth centuries suffered a great decline in the eighteenth and nineteenth centuries. In their place new and more powerful empires have risen. The most recent, officially declared less than two years ago, is not only like the Roman, it is Roman. Rome today is the seat of the *imperium* as it was in the time of the Caesars, and the recent conquests have followed with remarkable fidelity the pattern set by the ancient predecessor. About the meaning of imperialism deduced from this example there can be no doubt. And so it is with most of the other existing empires. The Netherlands, building on the foundations laid in the seventeenth century, succeeded in the nineteenth in bringing the Dutch East Indies under its complete domination. It is an empire in the Roman sense. France, with its millions of subjects spread over enormous areas in Africa and Asia, is likewise a true empire. Belgium is another example. The population of its African domain is greater than that of Belgium itself and the area is nearly eighty times as great. Nor is this disparity exceptional. It is a characteristic of all present-day empires as it was of the Roman model.

The British Empire cannot be characterized with like simplicity. From its exceedingly complex structure no precise notion of British imperialism can be drawn. The relation of the United Kingdom to the different parts varies as the parts themselves vary. To the self-governing Dominions the relation is one thing; to India it is another; to the other Asiatic possessions it

is another; to the Caribbean colonies it is another; and to the African dependencies it is still another. In respect to the first of these relationships, imperialism does not apply. An essential element is lacking. There is no subordination between the United Kingdom and the self-governing Dominions. This group of states is, as it has happily chosen to call itself, a commonwealth of nations. We must search elsewhere for British imperialism. It exists in divers forms in the relation of the United Kingdom to the vast aggregate of dependent states and territories. In India, it appears to be developing in the direction of less and less subordination; in the West Indies, it remains of the seventeenth century colonial type; and, in Africa, where native races are subject to British rule, it is more nearly of the Roman pattern.

We may now inquire into the nature of the alleged imperialism of the United States. Some writers maintain that it dates back even to the first English settlement on American shores. Since imperialism is a policy, it could hardly have existed before a nation capable of formulating and directing the policy came into existence. Was the United States from the beginning of its independent existence an empire? It had, to be sure, territory lying beyond the bounds of the constituent members of the Union, but that territory was wholly unlike the outlying areas of true empires, since it was marked from the beginning for admission into the Union on a basis of equality. Nor did the presence of a relatively small Indian population give it the character of an imperial domain. Many of these Indians, it may be admitted, were unwilling subjects of the United States. To reason from that to empire leads to confusion. On this basis every national state becomes an empire, for all national states in the course of their development have been compelled to incorporate to greater or less degree recalcitrant elements of the population. We must conclude, therefore, that the United States in the early years of its independence was not, under any proper definition of the term, an empire.

Even so, perhaps the policy of the United States was from the beginning to create an empire. Witness the additions of territory at the earliest opportunity. Did not the annexation of Louisiana and the Floridas make of this nation an empire? Not if our definition of empire is valid. Louisiana and the Floridas possessed at the time they were purchased a sparse population, a goodly portion of which was already American. These areas were contiguous and they were more intimately related to the United States than imperial provinces ever are related to the dominant Power. Given the territorial form of government and then erected into states, the new acquisitions were in the end fully incorporated into the Union. That was a process of national growth, a process of expansion, not of imperialism. So it was with the subsequent annexations. Nowhere was there any considerable alien population. Texas, with a population predominantly American, took its equal station among the older states; California was admitted with little delay; and the rest of the ceded territory was marked for ultimate statehood.

To inject the question of ethics serves only to confuse the issue. Let it be

admitted that the conduct of the United States in respect to some or all of the annexations was not above reproach. Does it follow that the reprobated acts were imperialistic? Wrong may be done in the interest of national growth as well as in the interest of imperial growth. It does not conduce to clear thinking to make imperialism do duty as an opprobrious epithet. Imperialism is a question of fact and not of ethics; and likewise expansion is a question of fact and not of ethics. Here the purpose is not to assess right and wrong, but to determine whether the United States is, or ever has been, an empire. Certainly it had not become an empire as the result of these vast acquisitions. Nor did the United States pursue its policy of expansion with a view to the creation of an empire at some future time. It had the choice between nationalism and imperialism. It is well known that at the close of the Mexican War there was some sentiment, in the United States and in Mexico as well, for the annexation of the whole of Mexico.² If that idea had been carried into effect the United States would have been converted at once into an empire, for it would have had under its rule several millions of alien people. All of the conditions of empire would have been fulfilled. The choice, and it seems to have been a deliberate choice, was against the creation of such an empire.

The dozen years immediately following the Mexican War were characterized by the strange obsession known as "Manifest Destiny." Yet the exuberance of that period resulted in no further expansion. Nor did the terrible years of civil war permit of any additions to the national domain. The experience of the conflict demonstrated, however, the desirability of naval outposts, particularly in the North Pacific and in the West Indies. To meet the need in the Pacific, Secretary of State Seward revived an earlier scheme for the annexation of Alaska. Successful in achieving his purpose in that quarter, he turned his attention to the Caribbean, where an opportunity seemed to offer in an apparent desire on the part of the Dominican Republic for annexation to the United States. The negotiations which Seward initiated to effect this end were continued in the administration of President Grant. Though the President himself lent the proposal the weight of his fame and the prestige of his high office, he could not induce the Senate to give its approval. The Senate may have been moved in some degree by partisan rancor. It was moved more powerfully no doubt by its belief that the Dominican Government's proffered annexation did not represent the real desires of the Dominican people, toward whom the duty of the United States, as Charles Sumner phrased it, was as plain as the Ten Commandments.³ Sumner and his colleagues in the Senate feared, moreover, that one annexation would lead to another; that, in effect, the Dominican annexation would be the first step in the creation of an empire. Like objections did not hold in

² For an interesting discussion of this subject, see an article by E. G. Bourne in the *Annual Report of the American Historical Association* for 1899, pp. 155-169.

³ See speech delivered in the Senate on Dec. 21, 1870, *Complete Works*, XVIII, 292.

respect to Alaska. The obligations of "good neighborhood"—again in Sumner's phrase—did not apply to that trackless waste.

To some minds the Spanish-American War in its objects and results provides indisputable evidence of American imperialism. It provides in fact the most convincing proof to the contrary. The United States had in 1898 a magnificent opportunity to lay the foundations of an empire, if it had so desired. Spain's possessions in the New World and in the Far East fell into the hands of the armed forces of the United States without difficulty. A considerable body of opinion, both lay and official, desired to have the government embark frankly upon an imperialistic career; but the idea did not prevail. From the beginning the Congress committed itself as far as Cuba was concerned by declaring that the people of that island "are, and of right ought to be, free and independent." It was expected by some observers abroad and perhaps by the imperialists at home that a way would be found to evade the obligation implicit in that declaration. The imposition of the Platt Amendment as a condition precedent to the withdrawal of the American troops may have left the impression that the evasion had been accomplished. Cuba, despite the restrictions, took its place in the family circle of nations, where the subordinate parts of an empire are not welcome. Moreover, the Platt Amendment, proving to be a constant source of friction, has been abrogated;⁴ and if anything more needs to be done to prove that the United States really desires that Cuba shall be in the fullest sense free and independent, that too, no doubt, will be done.

The Philippines present an analogous case. No declaration of policy, it is true, accompanied our seizure of those islands, but when such a declaration was finally made, in the Jones Act of 1916, it was couched in these terms: ". . . It is, as it has always been, the purpose of the people of the United States to withdraw their sovereignty over the Philippine Islands and to recognize their independence as soon as a stable government can be established therein."⁵ That declaration of purpose is now in the process of fulfillment under another act of Congress passed in 1934. Ten years after the date of this act the sovereignty of the United States over the Philippines will come to an end. Whatever may have been the aims of some of our statesmen or the hopes of some of our people, the sum total of our relations with those distant islands denies rather than affirms imperialism.

Puerto Rico, like the Philippines, was ceded to the United States at the close of the Spanish American War; unlike the Philippines, it has never been given the promise of independence. Though its area is not great, its population is more than a million and a half. Here, then, on a small scale, are the apparent conditions of empire; that is, an cutlying territory inhabited, indeed saturated, by a population whose language, culture, and institutions are different

⁴ By a treaty signed at Washington, May 29, 1934. See this JOURNAL, Supp., Vol. 28 (1934), p. 97.

⁵ Statutes at Large of the United States, XLVIII, 456.

from those of the dominant country. Yet in area and population Puerto Rico is insignificant compared with the United States. If a swallow does not make a summer, neither does one small island make an empire. Alaska and the Hawaiian Islands cannot be added to it to swell its amount, for they are Americanized areas already seeking admission as states. If the other American islands in the Caribbean and the Pacific be added there still is no empire in the proper sense of the word. These lesser islands are not even way stations to empire. They are outposts of national defense. Puerto Rico is different. If it is unhappy under its present relation to the United States, that relation will in the course of time be changed to one satisfactory to the Puerto Ricans. A people who deeply believe, as the people of the United States believe, that governments derive their just powers from the consent of the governed will see to that.

The asserters of imperialism contend, however, that the empire of the United States is not confined to definitely annexed areas. It embraces vastly more, they say. They enumerate: the Dominican Republic with such and such an area, so much population, so much trade; Haiti with such and such an area, so much population, so much trade; Nicaragua with such and such an area, so much population, so much trade; and so on the Caribbean round. These, they assert, are within the imperial domain. Add them to all the other dependencies, big and little, from Alaska to Wake Island, and from Liberia to Samoa. The result will be a very respectable empire. So it would be if the areas involved were really under the imperial sway of the United States. Alaska and some of the others that figure in the addition, clearly are not imperial territories. Furthermore, the Caribbean republics, the enumerators themselves admit, are not genuine dependencies: they are only "virtual" or "nominal" dependencies. To this, then, the empire of the United States is reduced: one or two real dependencies, little ones at that, and an indeterminate number of virtual dependencies.

It remains to inquire why certain of the Caribbean republics are designated by some observers as parts of an empire of the United States. The explanation can be expressed in a single word: intervention. Not that these observers are content to characterize the interference by using a word so clearly defined in public law; not that they are willing to withhold judgment as to its results; not that they accept any official declaration as to its ultimate purpose. They assume the object to be empire and point to the armed forces as the proof of empire. Withdrawal makes no difference. If the Marines are brought home today they will be sent back tomorrow. Empire, like Time, marches on. With it march the ghostly auxiliaries "virtual" protectorate and "nominal" dependency. It is all very confusing.

For this state of affairs the Government of the United States must take its share of the blame. The repeated interventions have aroused doubts on the one hand and fears on the other. That is not strange in a world where like proceedings have usually marked the course of empire. It is not strange that observers at home and abroad should fail to discern beneath the surface

a purpose as different from empire as day is from night—a purpose of assisting the weak to assume their proper station in the concert of the New World, and not a purpose of merging their sovereignty in that of the United States. Whatever the purpose, the performance has been bad. The interventions have been productive of more harm than good. Moreover, they have contravened the Pan-American rule and the historic policy of the United States as well. Of all this, the Government and people of the United States seem now to be well convinced. If interference in the internal affairs of our neighbors is not yet entirely at an end, it is undoubtedly in the process of coming to an end.

The accusers have, however, another leg to stand on. It is economic imperialism. Here also is encountered extreme indefiniteness of meaning. How does this new imperialism differ from the historic kind? A close analysis may well leave one in doubt. According to some authorities the three essential elements are present: that is, the dominant state, the outlying areas, and control by the dominant state. The only difference appears to be in the underlying motives, or in the process of acquiring or exercising dominion. These are only differences in detail, the end being annexation as in the old imperialism. According to another view, the concept is more conveniently vague. The *imperium* is a capitalistic combination of vast connections and international reach; the outlying areas embrace the whole field of trade and investment; and the control is a manifestation of power as sinister, as mysterious, and as relentless as the source from which it emanates. This fanciful view of economic imperialism need not detain us. It is enough to say that it is set forth as an attack not primarily on imperialism but on capitalism. The purpose of this paper is not to discuss Pan-Americanism in relation to capitalism. Its purpose is to discuss Pan-Americanism in relation to imperialism, and to that subject it must be confined.

Despite difficulties and doubts, the search for the economic imperialism of the United States must be pursued. Like political imperialism, this kind of imperialism can only be understood in relation to empire. If there is an economic empire of the United States it must exist somewhere; it must have bounds; it must be open to view; and it must be subject to control, else it is no empire. The asserters of economic imperialism should be able to throw light on this point. If they be asked to do so, however, they are likely to revert first of all to the Marines and to virtual or nominal dependencies. If it be maintained that this is the old and not the new, the rejoinder is economic motive: bankers, loans, concessions and the like. If it is objected that whatever the motive, the empire described is still political, and if evidence of economic empire pure and simple be demanded, the reply is likely to be more or less as follows: "Behold the billions of dollars of loans to the Hispanic-American countries, the oil interests in Mexico, the copper interests in Chile and Peru, the sugar interests in Cuba, the banana industry in Central America, banks in numberless cities, and trade to correspond."

Despite this formidable array, the asserters of economic imperialism do

not contend that the whole Hispanic area is the economic province of the United States. They will readily admit some exceptions and if they are pressed they will admit more. These admissions leave the bounds of the empire very uncertain. This is disconcerting. It is impossible to detect the symbols of possession in a domain whose limits are unknown; and it is equally impossible to distinguish the agencies of control. Whoever insists on being shown some part of this economic province where the symbols of possession and the agencies of control are clearly in evidence will be taken back to the Caribbean; again the political empire. If, in despair of finding the marks of purely economic imperialism in the outlying area, one turns to the United States in search of the central directing authority, the result will be the same. The international combination, which will be suggested as the directing force, is unconvincing. Neither Wall Street nor any other national economic agency seems to gather into its hands the threads of supreme economic control. The national government fails to meet the requirements. Despite innuendo, it does not, it seems, exercise the *imperium* in the interest of the varied and conflicting economic forces. If it does pretend to that function, it fails miserably. The economic province over which it is thought to have control sprawls in disorder, buying and selling freely, paying and defaulting at will, taxing without fear, and performing every other economic act without the slightest regard for its supposititious master.

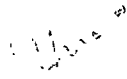
To contend that the United States is free from imperialism is not to contend that it is free from the evils often associated with imperialism. The evils exist without empire and doubtless empire can exist with few of the evils. The use of imperialism, especially where none exists, as a catch-all for everything hateful, leads to muddled thinking. In international relations, as in every other relation of life, terms ought to be employed as far as may be with scientific accuracy. If, for example, wrongs arise from intervention, intervention and not imperialism should be made to bear the blame. If absentee ownership is at the bottom of some economic ill, to talk of economic imperialism will not set matters right. If American capitalists employ unethical means to achieve their ends, it will do no good to stigmatize imperialism. If the strength of the United States overrides the just cause of a weaker state, the false cry of imperialism will bring no redress. So in numberless instances the mind is diverted from the real to an imaginary ill. Cure, if that is the object, would be more likely to follow correct diagnosis.

Unfortunately to alarm the victim is quite as often the purpose. Across the Atlantic certain interests look with concern on the steady trend toward New World unity. They seem to see in American solidarity an obstacle to the attainment of their peculiar aims—aims which look to the reaping of a material advantage, to the accomplishment of a national ambition, to the imposition of a political system, or to the inculcation of a social philosophy. These non-American interests know that a contented, unfrightened, stable, unified America is not likely to look to them for social panaceas, for economic

security, or for political protection. Hence their cry of imperialism. Hence their constant warnings to the weaker countries of this hemisphere against the dangers that surround them; hence their repeated assertions that the real aim of the United States is empire; hence the fiction, endlessly iterated, that Pan-Americanism is a mask of imperialism.

These alarms are not taken too seriously, either in the United States or in the other countries concerned. Foreign influences, it is well understood, will not determine the fate of Pan-Americanism. The New World states themselves will determine that. They will decide whether mistrust, or self-aggrandizement, or petty jealousies shall stand in the way. They will decide—indeed they have decided—that there shall exist on this continent a union of equal, freely coöperating nations. Consequently they are not deterred by the arguments of those who attempt to prove that the ideal has neither been realized nor can be realized. They know that the differences in language, culture, and racial characteristics, which are sometimes urged as obstacles, are not incompatible with international unity. They know that Pan-Americanism imposes no economic or other restraint on the free exercise of national sovereignty. They know that the fears, suspicions and hatreds that are supposed to actuate some of the states in their relations with some of the other states do not obscure the larger aims. They know that in Pan-Americanism lie the hopes of a continent.

That Pan-Americanism was the choice of the United States rather than imperialism is a fact of great moment to the independent states of this hemisphere, and it may prove ultimately to be of vast significance to the world at large. If imperialism had been the choice, the map of the continent would have taken on a different appearance. The republics within the reach of the United States would have been absorbed, while those at a distance would have been driven to seek safety in foreign alliances. America would have become the meeting place of empires. Its vital principle would have become the balance of power and not a concert of nations; its frontiers would have been fortified; its vast area would have been overrun by alien armies; and its peace would have been disturbed by wars of alien origin. Happily the peoples of this continent do not confront any such situation. Secure under their separate flags, they are free to demonstrate to the world that nations can live together as good neighbors.



CLEANSING SOVIET INTERNATIONAL LAW OF ANTI-MARXIST THEORIES

By JOHN N. HAZARD

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No more acrid struggle raged in Soviet legal circles during the year 1937 than that over the search for a suitable theory of international law. For eight years lawyers had turned to Eugene B. Pashukanis as the leading Soviet theoretician in this field, but today his position is gone, his books are banned, and he is called an enemy of the people.

This is not the first occasion of a transition from one theoretician to another. Pashukanis himself had risen to prominence on criticism of the ideas of Professor Eugene A. Korovine, whose books ¹ had made him the accepted theoretician of the first decade of the revolution. After Pashukanis began his criticism, Korovine gradually recanted over a period of years, but not until 1935 did he fully acknowledge his errors and adopt the new principles which had partly replaced his own ideas.²

The repudiation of Pashukanis has been of a more violent and sudden sort, covering but a few months and resulting in the complete annihilation of his ideas as not alone harmful but as the ideas of the enemy. The field has been cleared for an entirely new interpretation. Critics have counseled against a return to Korovine's earlier explanations as not fitting the needs of the day. To be sure, some of Korovine's ideas which Pashukanis had denounced now seem to have been more nearly correct than the principles propounded by his critic, but writers demand a reworking of the whole subject. Only months after the first attacks on Pashukanis appeared did material begin to find its way into print hinting at an interpretation which jurists may now be willing to accept.³ When read in the light of previous theories these articles provide a suggestion as to the future progress of Soviet theoretical work in the sphere of international law.

No theory in this field can be termed an official one, for each represents only

¹ *Mezhdunarodnoe Pravo Perekhodnogo Vremeni* (Moskva, 1924) [International Law of the Transition Period]; and *Sovremennoe Mezhdunarodnoe Publichnoe Pravo* (Moskva, 1926) [Contemporary International Public Law].

² See letter of May 5, 1935, *Sovetskoe Gosudarstvo* (1935), No. 4, p. 171. Also see E. Korovin i L. Ratner, *Programma po Mezhdunarodnomu Publichnomu Pravu* [Program for International Public Law] (Moskva, 1936), p. 12.

³ See M. Yakovlev i G. Petrov, *Protiv burzhuaznykh teorii mezhdunarodnogo prava* [Against Bourgeois Theories of International Law], *Pravda* (1937), No. 116 (7082), April 27, 1937, p. 3. Also see M. Rapoport, *Protiv vrazhdebnykh teorii mezhdunarodnogo prava* [Against Hostile Theories of International Law], *Sovetskoe Gosudarstvo* (1937), No. 1-2, p. 92. This issue was not distributed until September, 1937.

the opinion of a single legal theoretician or his school.⁴ In consequence, Soviet jurists would hasten to explain in the present transition that it would be incorrect to say that the official theory of international law is undergoing a change. Communists point out that what has happened is no more than the exposure of theories presented by poorly trained self-styled Marxians and the acclaiming of principles propounded by persons better versed in fundamentals. Even though this is but a transition within the unofficial scholastic world, it is calling forth such comment in the Party press that those who would understand the Soviet approach to international law cannot ignore it.

Both Korovine and Pashukanis might present from their works statements showing a grasp of the essential idea of Marxian legal science: that law is a class tool, and international law as an extension of internal law must likewise perform its part in the struggle between classes.⁵ Although scattering this idea throughout their books, they did not formulate it concretely in their definitions, and today's attacks show that the giving of a general impression is not enough.

Pashukanis' two major additions to Soviet literature on international law were in the form of an article on the subject in the *Encyclopedia of the State and of Law*, published in 1929,⁶ and a textbook published in 1935.⁷ Comparison of the two works shows that even the author himself had changed his theories over the years intervening between publication dates.

Attempting in the earlier work⁸ to define the substance of international law, he found it to be a struggle of capitalist states among themselves, organized into several isolated competing state-political trusts in order to put into practice their rule over the proletariat and over colonial countries. In the textbook⁹ he varied this, although not essentially, to say that international law as practiced between capitalist states was one of the forms with the aid of which imperialist states carry on the struggle between themselves, consolidating the division of booty, i.e., territory and super-profits. He had

⁴ See Eugene A. Korovine, book review, 49 *Harvard Law Review* (1936), p. 1392.

⁵ For example—"As the single source of international law in the first meaning of this term we recognize *class* (at a given stage in the historical process) *consciousness* of the ruling groups as the source of all existing law, including international law." See E. A. Korovine, *Sovremennoe Mezhdunarodnoe Publichnoe Pravo*, pp. 8-9, *cit. supra*, note 1. Also—"The new quality which international law has acquired as a tool and formulation of the policies of the proletarian state is to be found in the fact that for the first time in history a state has appeared in the international arena where power belongs to the proletariat, a state which reflects the interests of the toilers and sees in the international solidarity of the toilers one of its chief supports." See E. B. Pashukanis, *Ocherki po mezhdunarodnomu pravu* [Outlines for International Law] (Moskva, 1935), p. 18.

For a documented non-Soviet interpretation of some aspects of this period in the Soviet theory of international law, see T. A. Taracouzio, *The Soviet Union and International Law* (New York, 1935).

⁶ See II *Entsiklopediya Gosudarstva i Prava* (Moskva, 1929-1930), p. 857.

⁷ *Op. cit.*, *supra*, note 5.

⁸ See *op. cit.*, p. 862, *supra*, note 6.

⁹ See *op. cit.*, p. 9, *supra*, note 5.

retrogressed, for although some slight mention of the purpose of international law as a means of ruling the proletariat appeared in his first definition, he left out all mention of it in the second. Here it is pointed out that he made a great mistake, and critics castigate him for failure to show that the struggle of capitalist states, although having the outward manifestations of a division of profits and territory, is certainly not carried on with that as its ultimate aim. Territory and profits would not be desired unless they performed some function and satisfied some need, and he is criticized for failing to show the underlying reasons for this fight for colonies. Explanation should have made clear that these struggles are the result of the crying need faced by every capitalist state to increase production, reduce costs, and satisfy the demands of its people, who are constantly being pauperized by a system which is no longer capable of meeting their needs. He failed to emphasize Lenin's teaching that foreign policy cannot be separated from internal policy,¹⁰ and that international law as practiced by capitalist states in their relations among themselves is directed towards a consolidation of the ruling position of capital. New definitions will not be accepted unless they can cover the whole field and show the link between exploitation of the worker, the growing mass discontent, and the consequent search for new territory and new profitable relationships which may facilitate temporarily the dulling of this discontent by the satisfaction of popular needs at home through the exploitation of weaker and colonial peoples abroad. International law must be defined as class law in terms so simple and expressive that no one could possibly be deceived.¹¹

The Soviet press has long rung with revelations of this character. Every Soviet reader knows of the conflict of British and Japanese interests in India and China, both states seeking colonial markets to make possible continued employment and lower cost mass production. Soviet readers find these explanations supported by Japan's military advance into China where her conflict with other imperialist Powers, long waged by peaceful tools of international law, at last broke out into the open so that all could see its nature. Soviet economists have linked these military moves with Japan's deteriorating internal economy bringing with it the increasing discontent and unrest of the masses. The Soviet reader finds simple proof of the theoretician's argument that foreign policy is shaped to fit the demands of the struggle between the classes, and that international law as the tool of that policy is no more than a reflection of class conflicts calling for some attempts at solution.

¹⁰ "There is no more erroneous nor harmful idea than the separation of foreign and internal policy." See leading article published in *Pravda* (1917), No. 81, June 27 (14), 1917. Also published in *Leninskiĭ Sbornik* (Moskva, 1935), Vol. 21, p. 66. While the article was unsigned, the editors of the *Sbornik* have reached the conclusion that beyond a shadow of a doubt Lenin was the writer. See *idem.*, pp. 60-61.

¹¹ Taracouzio draws this general conclusion, although Soviet jurists would not now concur with his formulations. See *op. cit.*, p. 12, *supra*, note 5.

In considering the next step, and treating of international law as used not between capitalist states alone, but by the Soviet Union in its relations with the imperialist world, Pashukanis set forth a definition which is now the butt of criticism. In the *Encyclopedia* ¹² he called the law used in these relationships a temporary compromise between two antagonistic class systems—a compromise concluded when the bourgeois system can no longer secure for itself absolute control and the proletarian-socialist system has not yet conquered the field. For him it was a law *between classes*, and as such he thought that it might be termed a law of the transition period. Here he was treading perilously close to a law above class and having a palliative effect upon the class struggle. He is criticized because this definition concealed the class nature of law. He saw the error himself, for in his later publications he repudiated the first theory by saying that international law as used in the relations between the Soviet Union and imperialist states was not a compromise but one of the forms in which the struggle between the two systems flows along.¹³ He saw it as a struggle between two different and opposed economic and social systems, and as reflecting the basic fact that the whole world is breaking into two camps, capitalist and socialist. Now he is criticized because he merely stated the conflict as between systems and did not declare in unmistakable terms the class aims distinguishing these systems.¹⁴ Any definition in the future must contain an explanation of the contrasting basic class interests which international law is serving in the soviet socialist state and in the imperialist capitalist states or it will not meet the demands of today's critics.

Soviet writers find a wealth of illustrative material on this point in the Spanish conflict. Every Soviet reader knows of the maneuvers within the League of Nations, led, on the one hand, by Italy and her bloc supporting the landlord, Church, and wealthy bourgeois elements, and, on the other hand, by the Soviet Union supporting the democratic groups—the worker, peasant, petty bourgeois and intellectual elements. Both sides rested their actions on alleged principles of international law, but writers find the basic contrasting class interests so near the surface that their influence upon the use of international law norms is apparent. Soviet readers have little trouble in drawing the conclusion that international law is being used to further class aims, and from that point the step is short to call it in substance class law.

Any writer cannot limit his explanation to the importance of class interests in the formulation of international law as used in these relationships between the Soviet Union and other states. He must go further and show how these class interests have developed so far within recent years as to bring about a change in the substance of international law as used by imperialist

¹² See *op. cit.*, p. 862, *supra*, note 6.

¹³ See *op. cit.*, p. 17, *supra*, note 5.

¹⁴ See Taracouzio, *op. cit.*, p. 3, *supra*, note 5. The author does not, however, analyze the facts supporting the Marxian contention that before the proletarian revolution all states were slaveholding, feudal, or bourgeois dictatorships. Marxian authors will be required to make this analysis before they will now be accepted for Soviet students.

states even among themselves. He must show the increasing class conflicts within France and England and link them to the policy of these states in permitting Japan to begin her advance into Manchuria unchallenged, even though it occurred in violation of all the principles which international law held sacred at the time. He must explain that French and British ruling groups reckoned on a stronger Japan as an Eastern thorn in the side of the only socialist state. He must review the attitude of a certain part of the French and British press which has looked on in Spain without objection while a kindred economic class began its fight to regain its lost control while violating all of the rules formerly generally accepted by French and British leaders as the norms of international law.

Pashukanis' errors as to the substance of international law were serious, but critics find even more dangerous his treatment of the form of international law applied by the Soviet Union. Quite in the face of Professor Korovine's theory that the Soviet Union had brought with it a new form of international law which he dubbed the international law of the transition period,¹⁵ Pashukanis saw no change in form at all. He was merciless in his criticism of Korovine, saying that no new form had been created, but that quite the contrary was the case in that the Soviet Union was applying many forms analogous to those applied by capitalist governments.¹⁶ He called attention to the Soviet espousal of generally accepted principles, such as the exchange of diplomatic representatives, the immunity of diplomatic persons and correspondence, and the use of international treaties as proof of his thesis. At the same time he recognized that in substance the law was class law even though he did not put this into his definitions. To explain the contradiction of bourgeois form and socialist substance, he outlined the theory that the exterior similarity of forms does not stand in the way of the Soviet foreign policy differing in principle from the policy of any capitalist state. He thought that in many cases one and the same form might be used with different class aims, and for different class purposes.¹⁷

Korovine had previously pointed to the innovations practiced by the Soviet Union in her international relations—to the refusal to recognize capitulations and extraterritoriality in Turkey, Persia, Egypt and the Far East, to the reclassification of ambassadors and ministers as equally ranking representatives of the Soviet Union, to the creation of the trade delegation demanding rights of diplomatic immunity, to the advocacy of complete and general disarmament, to the espousal of the right of self-determination, and to non-aggression pacts. These innovations had led Korovine to the conclusion that form had changed with substance, and that when international law became a tool of the proletariat it was no longer even in form the same international law used before. He had good Marxian theory to support him, for dialectic materialism rests one of its corner-stones upon the principle that

¹⁵ See *Sovremennoe Mezhdunarodnoe Publichnoe Pravo*, p. 8, *cit. supra*, note 1.

¹⁶ See *op. cit.*, p. 16, *supra*, note 5.

¹⁷ See *idem*, p. 17.

form and substance progress together. A change in form must of necessity follow a change in substance.¹⁸ Even some non-dialectic materialists had long ago recognized that such a change occurs.¹⁹

Pashukanis, fearing apparently that a negation of the continuation of old forms would lose for the Soviet Union the protection afforded by diplomatic immunity and the exchange of representatives, as well as other privileges conferred by established international law, was loath to claim a change in form.²⁰ The innovations introduced by the Soviet Union did not seem to him to amount to an evolution of international law, a change from bourgeois to socialist law after having passed through a transitional period.

He overlooked the philosophical meaning of a change in form, and, being without a philosophical turn of mind, he struck out against any statement defining a change. This same approach was used by him in his treatment of Soviet municipal law, which he declared to be bourgeois in form although socialist in substance.²¹ That error had led to his misinterpretation of the principle of the withering away of the state, and by this error he proved to Soviet administrators the practical danger in what may have appeared earlier to be only a tempest over theories. While his errors in the field of international law do not have as immediate practical danger as the error in the field of municipal law, they are nevertheless criticized because of potential harm.

Critics now point to this threat of harm by declaring that Pashukanis' line on the identity of form and substance was an attempt to prove that Soviet legal forms were merely the successors of bourgeois legal forms. They find this approach an attempt to subordinate Soviet policy to the practice of

¹⁸ "Substance and form are in dialectical unity: one grows into the other, one manifests itself in the other, the development of one depends upon the development of the other. Hegel says that form is substance converted into form, and substance is form converted into substance. Therefore, form is not passive in the process of development: as an essential element of substance, form actively reacts upon the course of development of substance and upon its modification." See *Dialekticheskiĭ i Istoricheskiĭ Materializm (Chast 1)*, *Kollektiv Instituta Filisofii Komakademii pod rukovodstvom M. Mitina* [Dialectic and Historical Materialism (Part 1), by the Collective of the Institute of Philosophy of the Communist Academy, working under the direction of M. Mitin.] (Moskva, 1933), p. 179.

¹⁹ "The customs, beliefs, or needs of a primitive time establish a rule or a formula. In the course of centuries the custom, belief, or necessity disappears, but the rule remains. The reason which gave rise to the rule has been forgotten, and ingenious minds set themselves to inquire how it is to be accounted for. Some ground of policy is thought of, which seems to explain it and reconcile it with the present state of things; and then the rule adapts itself to the new reasons which have been found for it, and enters on a new career. The old form receives a new content, and in time even the form modifies itself to fit the meaning which it has received." See Holmes, *The Common Law* (1881), p. 5.

²⁰ See *op. cit.*, p. 15, *supra*, note 5.

²¹ For criticism of this aspect, see P. Yudin, *Protiv Putanitsy Poshlosti i Revizionizma* [Against Confusion, Platitudes and Revisionism], *Pravda* (1937), No. 20 (6986), Jan. 20, p. 4. Also see P. Yudin, *Sotsializm i Pravo* [Socialism and Law], *Bolshevik* (1937), No. 17, Sept. 1, p. 31.

bourgeois international law. They link it with the attempt of Trotsky and Zinoviev to bring the Soviet system down to the level of the capitalist system. Pashukanis' theory is thought to be dangerous because it would require the U.S.S.R. to delimit its foreign policy by that order of relationships which imperialist states adopt for the purpose of consolidating the hegemony of imperialism. Theoreticians now demand recognition that the Soviet Union has developed a new form of international law, so that the Soviet Union may be free to develop its own forms and use them as it finds necessary in its struggle to prevent war. This policy has borne fruits in the pact defining aggression, in the increasing number of non-aggression pacts, in the tendering of cultural, medical, and technical aid to backward neighbors, and in the sponsorship of international policing of troubled zones.

Pashukanis is criticized not only for his errors in the realm of general theory, but also because of his espousal of specific principles long controversial in international law circles. He is now particularly belabored because he called the principle of *rebus sic stantibus* "healthy." Critics announce that this amounts to support of the German declarations to the effect that various previous treaty obligations are no longer binding due to the changed conditions resulting from the *faits accomplis* with which the Germans have presented the world. Pashukanis' views are in direct conflict with the oft-repeated demand of the Soviet Commissar for Foreign Affairs that any change in existing obligations occur only with the approval of all parties concerned, as was the case at Montreux, 1936, when refortification of the Straits was considered.

In reading that unilateral application of the principle of *rebus sic stantibus* is not acceptable to Soviet theoreticians, an international lawyer may ask whether Pashukanis was also wrong in citing with approval acts of the French National Assembly of 1790 annulling certain Bourbon treaties.²² This principle had been used in framing the instructions given the Soviet delegation to the Genoa Conference of 1922 as to the argument to be used in explaining the government's refusal to honor Tsarist debts.²³

In 1922 it was argued that after a class revolution conditions change to such an extent that the new class cannot be expected to pay the very debts contracted to keep the old order in the saddle in the face of revolutionary pressure from beneath. There is no reason to believe that this argument has lost its support within the Soviet Union, and the conclusion presents itself that this part of Pashukanis' theory was correct and that his error lies in failing to distinguish between the usual application of the principle and repudiation after a class revolution of obligations contracted to prevent that revolution. The very fact that German lawyers cite Pashukanis in support of their repudiation of World War obligations is taken as a measure of the

²² See *op. cit.*, p. 864, *supra*, note 6.

²³ See *Materialy Genueszkoi Konferentsii* [Material of the Genoa Conference] (Narkomindel, 1922).

danger of Pashukanis' theory, especially at a time when the Soviet Union is struggling for strict observance of international agreements as the last barrier against world-wide war.

As a parting shot, critics suggest that they are substantiated in their claim that Pashukanis mouthed socialist phrases while espousing bourgeois ideas because of his explanation as to the source of international law. In the *Encyclopedia* ²⁴ he advocated the theory propounded earlier by Professor Korovine that international law arose with exchange between tribes in preclass tribal society. This would mean that class elements need not be present in international law, and, in consequence, it would negate the basic principle of Marxism that all law has been and will continue to be class law. Pashukanis saw this basic error himself and discarded this interpretation in the textbook, ²⁵ in which he declared that the earliest international law appeared with the earliest class society, i.e., with the development of the slaveholding state which grew out of the tribal civilization of primitive man as division of labor and acceptance of the concept of private property stratified society into classes. With this change he brought himself more nearly into keeping with Marxian theory, but his delayed correction is not helping him with his critics today, for they still decry the error of his first position.

With these criticisms in mind, the American lawyer may piece together the elements which Soviet theoreticians are now demanding in any treatment of international law. They are declared not as new elements but as principles as old as Marxism. The need for reëmphasis today arises from the fact that they had been lost sight of as theoreticians distorted and concealed them. Soviet jurists demand that the errors of the past be corrected.

The author of the future must show in no uncertain terms the definite class nature of international law as practised by bourgeois states, outlining in detail the connection between internal and foreign policy. He must explain that both are directed towards consolidation of the rulership of the bourgeoisie and the suppression of the proletariat. He must make clear what the Marxian defines as the difference between the policies of the worker's socialist state and the bourgeois imperialist state and show by concrete example how international law relations between these states and the Soviet Union are those of class conflict. He must show how the Soviet Union uses and creates principles of international law to serve the worker's socialist state and to advance constantly its position at the expense of the imperialist states trying to bring about its annihilation.

Most certainly of all he must make clear that the Soviet Union has developed its own forms and is not merely using bourgeois international law. This will involve explaining that the change in substance has caused form to change as well in accordance with the principles of dialectic materialism. The future theoretician must show that the Soviet Union is unfettered in its choice of forms and in its ingenuity in developing new ones, and as illustra-

²⁴ See *op. cit.*, p. 865, *supra*, note 6.

²⁵ See *op. cit.*, p. 20, *supra*, note 5.

tions of that creative genius there must be an outline of the Union's additions to the body of international law.

Throughout the whole of any future discussion, the writer must reemphasize the struggle for peace which is being waged by the U.S.S.R., and show how this struggle rests upon the sanctity of treaties and the observance of international obligations.

THE CHARGE OF PIRACY IN THE SPANISH CIVIL WAR*

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Among the numerous problems of an international interest which have been raised by the Spanish war, there is one which has attracted the attention of jurists to a lesser degree than certain others, such as the question of the recognition of belligerency, or that of non-intervention. Yet this problem is not without interest from a strictly juridical point of view, for it poses an important question of terminology and, at the same time, permits the clarification of a notion which, although simple, clear and formerly well understood, has been so obscured by erroneous thought that it is difficult to realize that its actual meaning seems to have been lost by our contemporaries. The problem to which we refer is that of *piracy*, and it is as a result of the misunderstanding and distortion of this term that the civil war in Spain has first come to be inscribed in the annals of maritime warfare.

Since Spain is the extreme point of the European continent and an exposed peninsula whose shores are washed on one side by the Mediterranean and on the other by the Atlantic, war upon its territory has necessarily given rise to problems of a maritime nature. The major part of the problem of non-intervention grows out of the peninsular character of the country, inasmuch as it is the supplying of the contending parties by sea which the Powers have especially undertaken to submit to control. If this non-intervention should be replaced in the near future by an attitude of neutrality declared by these same non-intervening Powers, as it might logically and legitimately have been many months past, this neutrality would be effective within the field of maritime neutrality, except in the case of Portugal and France, the sole nations with land borders contiguous to Spain. In view of the avowed intention of the insurgent authorities of Salamanca, supported by superior sea force and translated into action by unequivocal declarations of blockade which have been rigorously applied, the principles and rules of maritime warfare with regard to blockade would be applicable as soon as third states admit, in law or in fact, that the adversaries are acting in the character of belligerents.

It is not surprising, therefore, that the word "piracy" has been used in speaking of the Spanish conflict, since piracy is essentially an act of a maritime character. And it is not surprising that the present writer, among others, has had the occasion to point out the erroneous use of this term,¹

* Translated from the French by courtesy of Professor Lawrence Preuss, University of Michigan.

¹ "La qualification de 'pirates' et le dilemme de la guerre civile," 3 *Revue internationale française du droit des gens* (1937), pp. 13-25.

In addition to the older works on piracy, some of which are cited in the writer's *Droit*

which is here employed in a wholly false sense, since the acts which are qualified as *piracy* today represent an unjustifiable extension of the meaning which has been attached to the term from time immemorial, an extension which is now so well established in our juridical vocabulary that the best writers do not hesitate to use it. As best proof of this we may offer the use of the term by an eminent jurist, one of the most distinguished contemporary French specialists in international law, and a man justly reputed for his intellectual probity. He makes the statement that "since [the Nationalists] were not yet recognized as belligerents, [the] blockade [which they have declared] must be considered wholly irregular and assimilated to an act of *piracy*."² This, in our opinion, is entirely incorrect in fact and in law. To take the very hypothesis envisaged by the eminent jurist, a blockade applied by the insurgents to vessels of its Spanish adversaries or to those of third states would be, at most, an act of rebellion. It would never be an act of piracy for, as we hope to show later, it does not embrace the constituent elements of the act of piracy which the experience of centuries has permitted us to define and to list in the catalogue of criminal actions. We may add that to misqualify the act of rebel as that of a pirate is to assume a singular responsibility, since one thereby passes from the municipal sphere and consequently from the sanctions provided and enforced solely by the internal law of the state, to the incomparably more severe sanctions provided by international law. A rebel, in fact, is subject only to punishment by the authority against whom he rebels, and to the extent to which that authority is in a position to exercise its right; the pirate, on the other hand, is beyond the pale of the *ius gentium*, is an outcast from mankind, an international criminal who may be pursued, destroyed or captured by any vessel, public or private.

This preliminary observation suggests the fundamental importance of questions of terminology in any juridical discussion. From the lowest local tribunal to the highest international jurisdictions, the magistrate who is invested with the function of stating the law in applying it is aware that one of the gravest preoccupations that rest upon the conscience of the judge is to weigh with infinite care the terms of his decision. He must ensure with the utmost scrupulousness that a given term shall include only the strict idea which may and should be comprised therein, both quantitatively and qualitatively, in order that his thought should be rigorously defined and that no

maritime pour le temps de guerre (1937), p. 184, n. 265, see the Draft Convention on Piracy, with comment, prepared by the Harvard Research in International Law and reproduced in this JOURNAL, Supp., Vol. 26 (1932). Among recent writers upon the subject, see Carl Schmitt, "Der Begriff der Piraterie," 4 *Völkerbund und Völkerrecht* (1937), pp. 351-354; R. Sandiford, "Les guerres civiles internationales et le droit maritime," 3 *Revue internationale française du droit des gens* (1937), p. 113 ff.; and George A. Finch, "Piracy in the Mediterranean," this JOURNAL, Vol. 31 (1937), pp. 659-665.

² Louis Le Fur, "La guerre civile d'Espagne et le droit international," *Revue politique et parlementaire* (1936), pp. 385-598.

later interpretation should, unknown to him, falsify or weaken his intention. Here, within the domain of international law, it appears an especially serious matter to misconstrue, even involuntarily or by repeating a growing and mischievous tradition, a term so important as that which designates the criminal action of the pirate. It has seemed to us that in protesting against a veritable abuse of language, our voice, however modest, might be heard, and that an effort might be made in the future to reserve the term of "pirate" to qualify and to stigmatize those criminal acts alone which national and international morality, both public and private, have condemned since the most remote times, and which have an established definition permitting of no error or confusion.

Everyone will recall the efforts made ten or fifteen years ago to attribute the qualification of *piracy* to certain illicit actions committed at sea. It was a few years after the terrible war which had thrown the entire world into a state of confusion, and in the course of which, for reasons into which we shall not enter here, surface vessels and especially submarines belonging to one of the belligerent Powers, engaged in a merciless and barbarous destruction of ships of all flags and categories which were supposed to be furnishing their adversaries with supplies. This had already been spoken of as a war of privateering, although it was again incorrect from the standpoint of terminology, in order to define in a sense which would incite to disapproval this sort of desperate and merciless conduct of a belligerent brought to bay.³ It was certainly not a privateering war, and to assimilate to a privateer the conduct of a ship which destroyed for the sake of destruction and whose sole aim was to spread terror along the sea lanes, was to vilify unjustifiably an historic and legitimate method of combat which is, in our opinion, entirely defensible. Furthermore, privateering implies a motive of gain or personal profit which was not present in the minds of the authors of these unpardonable torpedos.

Nevertheless, it was with the high intention of ultimately and finally condemning such acts in the future that the proposals known as the Root resolutions were incorporated in the treaty relative to the use of submarines signed at Washington on February 6, 1922.⁴ These proposals declared guilty of *piracy* and made punishable as such every individual who had violated the rules applicable to surface vessels in seizing and destroying merchant vessels, whether or not he was acting under formal instructions. The well-known recommendations of the Grotius Society concerning the status of submarines, December 8, 1917, carefully guarded against such an error of qualification. In the eleventh and final article they laid down the principle that "the officer responsible [for the destruction of a merchant vessel] shall be considered as a *war criminal* and subjected to punishment when he shall

³ See J. Louvard, *La guerre sous-marine au commerce* (1934), which retains this false terminology. See also the writer's *Droit maritime* (cited above), and especially p. 126 ff.

⁴ This JOURNAL, Supp., Vol. 16 (1922), p. 57.

have been captured." The notion of "war criminal" is a confused one, and the crumbling of the provisions of the treaties of 1919-1920 has not contributed to its clarification; it would be still more confused had the traditional qualification of "pirate" been applied to the notion. The Havana Convention on Maritime Neutrality of 1928,⁵ which adopted certain parts of the treaty signed at Washington, February 6, 1922, did not take up the idea of inculcation of piracy for violators of the rules of maritime warfare; and the Treaty of London, April 22, 1930, Part IV of which established the positive law of the subject⁶ and was renewed by the protocol signed at London, November 6, 1936,⁷ did not find a place for the Root recommendations. One may conclude that at the present time it is no longer a question of treating as pirates those who infringe the rules regarding seizure and destruction at sea; this represents an advance in clarity of language and of juridical ideas. During the negotiation of the treaty signed at Washington, France (which, however, did not ratify) had contended that the commanders of submarines could not be held personally responsible for orders which they had received from their hierarchic superiors. It may be noted in passing that England probably thought the same, since, not long ago, certain war-time commanders of German submarines were cordially welcomed by their British colleagues, who assured them that they did not deem them responsible for the execution of orders received from their Admiralty. One could find no better demonstration of the fact that a commander who commits a reprehensible act within the limits of his express instructions cannot be a pirate.

If a pirate is not that, it is perhaps time that we should ask what is the criterion of a pirate; and, that criterion having been discovered, we may return to the events in Spain in order to see whether one may speak of piracy with reference to various acts ascribed to the Spanish insurgents or even to vessels of an undetermined nationality.

What, then, is a pirate? A pirate is, in general terms, a ship, or, if one prefers, the commander of a ship, which is engaged on the sea and in a professional manner in attacks against property and persons. Piracy, therefore, presupposes the combination of three essential and inseparable elements: (1) an act of criminal violence; (2) an illegal attempt against goods or persons (with its implicit corollary, the *animus furandi*); and (3) a menace directed against the security of general commerce (aggravated, also implicitly, by voluntary repetition of the action and persistence in the condition). Finally, the scene of the piratical action is necessarily the sea. Whether this includes also territorial waters will not be discussed at this point, since doctrinal views upon this subject are not in accord. Logically, it would seem that piracy could be committed only on the high seas, over which no state has jurisdiction.

When we have added that the ship engaged in acts of piracy is *ipso facto*

⁵ This JOURNAL, Supp., Vol. 22 (1928), p. 151.

⁶ *Ibid.*, Vol. 25 (1931), p. 63.

⁷ *Ibid.*, Vol. 31 (1937), p. 137.

denationalized, that is to say, withdrawn from the authority of any state whatever, we shall have delimited the main contours of the characteristics of the pirate and shall have constructed a positive criterion of the notion of *piracy*. As we have written elsewhere, "one does not become a pirate by mere intent alone; there is a strict status of piracy. Within its limits one is a pirate; outside of them he is not."⁸

The pirate is "the bandit of the sea." Although ideas do not gain in being excessively schematized, if one wished to reduce to a minimum the elements of the notion of piracy, one would almost be able to say that, as in the case of a privateer, it is the *animus furandi* that is the essential mark of the pirate. But in spite of this similarity, privateering is radically different from piracy, since the former is a military act. The privateer, although he scours the sea, does so with his national colors flying, and acts against the enemy of his country in the course of a declared war by virtue of a commission which he holds from his sovereign or chief of state. If it were not to commit an abuse of terms, we might almost describe the privateer as a pirate engaged in a public and legalized war. Consequently, there is no piracy without the *animus furandi*, and it is indeed impossible, even for the most disordered imagination, to conceive of a ship which would suddenly attack merchant vessels for the pure pleasure of shooting at a target, without committing acts of violence and rapine, and would send them to the bottom with no motive whatever. This would be the act of demented persons, but it would not be piracy, for piracy is assassination or armed robbery committed upon the sea by a vessel, that is, by a seditious parcel of the national territory inhabited by an association of malefactors, upon another ship and the goods or persons which it carries.

An Italian author, whose special competence in subjects of international maritime law is well recognized, has crystallized these observations in the following formula: "Piracy, in the strict sense, consists of acts of violence committed upon the sea for the purpose of robbery and depredation by a vessel which is not under the jurisdiction of a recognized state; the pirate is considered as an outlaw and an enemy of humankind."⁹

One may perhaps object that although the French law of April 10, 1825,¹⁰ concerning the safety of navigation and maritime commerce, speaks of piracy in the first title, it nevertheless goes far beyond our criterion in its characterization of piracy. In fact, there are two overlapping ideas in this text which, it must be remembered, is merely one of internal law reserved for internal use. It contains acts of authentic piracy (*ex jure gentium*) and acts assimilated to piracy either because they resemble it or have a certain connection with it, or because the legislator was at a loss to know where to place

⁸ "La qualification de 'pirates' . . .", *loc. cit.*, p. 22.

⁹ Roberto Sandiford, *Diritto marittimo di guerra* (4th ed.), p. 29.

¹⁰ Text in "A Collection of Piracy Laws of Various Countries," prepared for the Harvard Research in International Law and printed in this JOURNAL, Supp., Vol. 26 (1932), p. 964.

these acts in a precise juridical category without creating a new crime. In the case of these assimilated acts, therefore, the accused is prosecuted and condemned *as though he were* a pirate. If one examines Article I,¹¹ for example, he will readily note that the legislator of 1825 had in view the hidden intent of the criminal: why has the suspected vessel not been furnished with documents which establish the legitimacy of its expedition; why does the commander possess two or more commissions from different foreign Powers, if the vessel, its crew or its commander have no intent to commit harmful acts against life or property? Passing to Article II, paragraphs 1 and 2, we find the very criterion of piracy: "outside of a state of war," "acts of depredation or of violence . . . against ships of a Power with which France is not at war." Likewise, in Article IV, paragraph 2, which provides against the surrender of a ship to pirates by a member of the crew. But, on the other hand, the hypothesis envisaged in Article IV, paragraphs 1 and 2, and Article IV, paragraph 2 (surrender to the enemy) are not acts of piracy, properly speaking, but crimes of forfeiture, of rebellion or high treason. It is only because of the needs of repression and by reason of their common character as crimes relating to ships and capable of being committed at sea, that these acts are here assimilated to piracy. The schedule of penalties which follows will fully demonstrate this, if there is need.

¹¹ The pertinent parts of the law are the following:

"Article 1. The following shall be prosecuted and condemned as pirates:

"1. Every individual belonging to the crew of any ship or vessel whatsoever, armed and navigating without being or having been equipped, for the voyage, with passport, crew list, commissions or other documents proving the legitimacy of the expedition;

"2. Every commander of a ship or vessel which is armed and carries commissions issued by two or more different powers or States.

"Article 2. The following shall be prosecuted and condemned as pirates:

"1. Every individual belonging to the crew of a French ship or vessel who commits with armed force acts of depredation or of violence, either against French ships or ships of a Power with which France is not at war, or against the crew or cargo of such ships;

"2. Every individual belonging to the crew of a foreign ship or vessel, who outside of a state of war and without being equipped with letters or marque or regular commissions, commits the acts aforesaid against French ships, their crew or cargo;

"3. The captain and officers of any ship or vessel whatsoever who may have committed acts of hostility under a flag other than that of the state by which he has been commissioned.

"Article 3. The following likewise shall be prosecuted and condemned as pirates:

"1. Every Frenchman or naturalized Frenchman who, without the authorization of the king, accepts the commission of a foreign Power to command a ship or vessel armed for privateering;

"2. Every Frenchman or naturalized Frenchman who, having obtained, even with the authorization of the king, the commission of a foreign Power to command an armed ship or vessel, commits acts of hostility against French ships, their crew or cargo.

"Article 4. The following also shall be prosecuted and condemned as pirates:

"1. Every individual belonging to the crew of a French ship or vessel, who, by fraud or violence against the captain or commander, takes possession of the said vessel;

"2. Every individual belonging to the crew of a French ship or vessel who surrenders the same to pirates or to the enemy."

Testa, in citing by way of example the slave trade, which did not constitute the crime of piracy by the law of nations, although certain legislative texts already condemned it as such, very judiciously said that "Some nations regard as acts of piracy certain practices condemned by their own special legislations. In such cases the qualification *results only from an assimilation*, and, since it is made only by virtue of *internal laws*, it applies only within the jurisdiction of the state which considers it as such. Consequently, it creates no rule for nations which do not accord the same importance or the same *signification* to these acts." ¹² And Sandiford states: "The attempt has been made to assimilate to piracy various other illicit acts imputable to private vessels on the high seas, such as the traffic in slaves and arms, and the destruction or the damaging of submarine cables, *but they have a different juridical foundation*. Likewise, certain states chose, during the Great War, to consider the actions of German submarines as piracy. But since these submarines acted under the orders and the responsibility of a sovereign state, such an assimilation was devoid of any foundation," ¹³

But, in all strictness, one might still conceive of the assimilation of the act of a slave-trader or of one who damages a submarine cable to piracy, for the greater part of the constituent elements of such a crime are to be found in their acts, whether the criminal act is directed against a human being or against private property. This becomes a difficult assimilation if it concerns (and here we return to the situation in Spain) the act of the insurgent who engages in open combat with the government in power, if civil war, as Vattel states, takes place "between a body of the citizens on the one hand, who have some reason for taking up arms . . . and the sovereign, together with those loyal to him on the other." ¹⁴ Is the situation changed because a part of these insurgent citizens carry on their rebellious activities on board public or private vessels? On land, as on the sea, we are in the presence of what is at first a rebellion, which may, however, rapidly become an insurrection. Between the two there is only a difference of degree: insurrection is rebellion raised to a national scale.

A recent example of rebellion has been furnished us by the exploit of the crews of the Portuguese despatch-boat and destroyer *Alfonso de Albuquerque* and *Dao*, who, having mutinied at the instigation of "Red" propagandists, imprisoned their officers and descended the Tagus on September 8, 1936, with the intention of joining the Spanish Loyalist fleet. They did not get far, for the river forts compelled their surrender.¹⁵ The act of these sailors was in no sense piracy, and would not have been even if their exploit had been entirely successful and the vessels thus removed from Portuguese sovereignty had been taken over into the ranks of the Loyalist fleet. One might hope

¹² *Le droit public international maritime*, p. 94.

¹³ *Diritto marittimo* (cited above), p. 30.

¹⁴ *Le droit des gens*, Bk. III, Ch. 18, Sec. 292 ff.

¹⁵ 2 *Revue internationale française du droit des gens* (1936), p. 164.

that in this event one of the beneficiary "governments," whether that of Valencia, of Barcelona or of Santander, would have refused the gift of the mutinous sailors, for in accepting it they would likewise have accepted the opening for a splendid *casus belli*.

A week after the beginning of the insurrectionary activities of July 18, 1936, the Madrid Government announced in a decree of the Ministry of Marine that "the ship *Almirante Cervera*, belonging to the official naval authorities, has placed itself beyond the law in rising against the Government of the Republic, the sole legitimate power and representative of the national sovereignty." Up to this point, the position of the Madrid Government apparently corresponds to the logic of the situation, but it becomes impossible to follow the course which it pretends to outline for other nations when it continues in the same text in saying that "by reason of this act of high treason, the Government declares that the said warship is excluded from the navy, that it no longer has the right to fly the Spanish flag, and that its crew no longer belongs to the naval forces, and, [finally] that it is to be considered as a pirate vessel. . . ." ¹⁶

If a third state, acting upon the invitation to pursue Insurgent Spanish vessels thus implicitly extended to it, should have undertaken to stop, to capture or to condemn such vessels, "in conformity with the rules of international law governing the punishment of piracy," it would have committed a reprehensible act, both from the standpoint of morality and from that of the duty of non-intervention in political differences which occur in another state.

The Spanish Loyalists could have avoided the repetition of such a serious error had they examined the history of their own country. All students of international affairs will recall the incident of the naval frigates *Almanza* and *Mendez-Nunez* and the steamship *Fernando el Catolico* which rose in rebellion at Carthagena and were declared to be pirate vessels by a decree of June 20, 1873. Acting without prior agreement, the Governments of Great Britain, France and Germany issued similar instructions to their respective fleets as to the attitude to be taken with respect to this incident. The German and French naval commanders were expressly instructed not to interfere with the insurgent vessels so long as they did not endanger the lives or property of German or French nationals. The British commander received equivalent instructions.¹⁷

This is not the first time that rebellions, followed by insurrections, have occurred within a state, and it will certainly not be the last. Third Powers well know that "the sovereign never fails to stigmatize as *rebels* all subjects who openly resist his authority; but when the latter become sufficiently strong to make a stand against him, and to force him to make formal war

¹⁶ The text of this decree, published in the *Gaceta* for July 27, 1936, is reproduced in the writer's *Droit maritime* (cited above), p. 185, n. 270.

¹⁷ See the writer's "La qualification de 'pirates' . . .", *loc. cit.*, p. 20.

upon them, he must necessarily submit to have the contest called civil war."¹⁸ It may be held to be definitely established by doctrine, positive international law and the constant practice of states, that it is absolutely impossible to consider and treat as pirates insurgent vessels and their crews. This established principle of the law of nations is supported by abundant authority. Perels, a specialist upon maritime law of the last century, said with regard to the above-mentioned Spanish incident of 1873 that "the naval commanders of non-intervening Powers will have *no motive to treat such [insurgent] vessels as pirates*, so long as there has been no criminal action against the peace of the seas within the meaning of international law";¹⁹ and Sandiford, who has already been cited, has recently stated that "the government against whom the insurgent vessels are armed is naturally impelled to view them as pirate vessels in order to justify acts of violence against them and their crews . . . ; [however], other states have no reason to adhere to a similar point of view, in the absence of a violation of their rights or of those of their nationals."²⁰

This is also the point of view of positive international law. We may point to Article II of the Convention on the Rights and Duties of States in the Event of Civil Strife adopted at Havana on February 20, 1928, which provides that "The declaration of piracy against vessels which have risen in arms, emanating from a Government, is not binding upon the other States."²¹

Furthermore, this position is in accord with most evident teachings of state practice, and one could fill a volume with an enumeration of all the cases in the history of international law in which third Powers have refused to regard insurgent subjects or citizens as pirates. The Government of Brazil in 1873 and in 1877 refused to treat as pirates insurgent vessels: on the first occasion it concerned the Spanish ship *Montezuma*, seized by Cuban insurgents, renamed the *Cespedes* and employed to attack Spanish vessels in the Rio de la Plata; on the second it concerned the Argentine insurgent ship *Portena*.²² We may finally point to Article 423 of the British *Queen's Regulations*,²³ in which it is provided that "In the case of an attack by a ship in the possession of insurgents against their own domestic government upon merchant ships belonging to its subjects, or upon its cities, ports, or people within the territorial limits of their own nation, Her Majesty's ships have no right to interfere, except in the case mentioned in Article 421,²⁴ and in any such case the operation must be restricted to such acts as may be necessary to attain the precise object in view."

¹⁸ Vattel, *op. cit.*, *loc. cit.*

¹⁹ *Manuel de droit maritime international*, p. 138.

²⁰ "Les guerres civiles . . .", *loc. cit.*, p. 114.

²¹ This JOURNAL, Supp., Vol. 22 (1928), p. 151.

²² See also the cases of the *Kniaz Potemkine*, Clunet (1906), p. 951; and *The Ambrose Light* (D.C.N.Y., 1885), 25 F. 408.

²³ Text in Perels, *op. cit.*, p. 139, n. 1.

²⁴ Art. 421 concerns the protection of British subjects by landing forces and their asylum on board British vessels.

These principles being consecrated by doctrine, positive law and state practice, it is not excessive to state at the conclusion of our observations concerning the notion of piracy, that the too frequent occasions upon which the term has been applied to acts of rebels or insurgents represent a veritable and regrettable abuse of language. Our discussion could now be completed had not the term "piracy" been pronounced with reference to the Spanish conflict at an important international meeting.

We refer to the Conference of Nyon of September 10, 1937, and to the arrangement which resulted from it on September 14,²⁵ a rare example of promptitude in the conclusion of a multipartite international agreement. The Spanish conflict had lasted more than a year when the British and French Governments announced that the situation which had arisen in the Mediterranean out of the repeated attacks by submarines against non-Spanish vessels had created an emergency which demanded prompt action against such acts of "piracy." On September 6, invitations which set forth the "intolerable" situation in the Mediterranean were addressed to twelve interested Powers: France, Great Britain, Albania, Italy, Greece, Germany, Egypt, Turkey, Yugoslavia, Bulgaria, Rumania and Soviet Russia.

If piracy existed, one is led to ask in what manner the pirates manifested themselves and in what respect the acts condemned constituted piracy. In fact, if one takes the period between June 3 and September 8, 1937, for example, one can find at least thirty maritime incidents arising in the Mediterranean.²⁶ So great a number of "aggressions" might properly have caused grave concern to the interested states had not the seizures been perfectly legitimate and correctly carried out. In a civil war in which third states had had the grace to accord the usual rights of belligerency to the contending parties, these acts would have been legitimate. The naval action, whether Governmental or Nationalist, acquired an illicit character solely because the "neutrals" in the conflict had, for the most part, not yet taken a stand upon this fundamental question of the recognition of belligerency.

Even before the Nyon Conference met, the British Cabinet, the French Ministry of Marine, and the Turkish Cabinet had instructed their fleets patrolling the Mediterranean to open fire at once upon any ship or airplane which attacked without notice. But there had also been alleged attacks by submarines, and it was for the purpose of combating this more insidious form of aggression that the Conference of Nyon met.

As we have seen, the conference resulted in the signature, on September 14, 1937, of an arrangement in which it was stated that

Whereas arising out of the Spanish conflict attacks have been repeatedly committed in the Mediterranean by submarines against merchant ships not belonging to either of the conflicting Spanish parties; and

²⁵ This JOURNAL, Supp., Vol. 31 (1937), p. 179.

²⁶ For an account of these incidents, see the "Chronique de la guerre d'Espagne," 4 *Revue internationale française du droit des gens* (1937), p. 61 ff.

Whereas these attacks are violations of the rules of international law referred to in Part IV of the Treaty of London of April 22, 1930 with regard to the sinking of merchant ships and constitute acts contrary to the most elementary dictates of humanity, which should be justly treated as acts of piracy. . . .

the participating Powers decided upon the destruction of any submarine which should attack a ship in a manner contrary to the Rules of 1930 or which should be found in the vicinity of a position where such a ship had been attacked. They further agreed, with two reservations, not to send their own submarines to sea within the Mediterranean.

In fact, during the period stated above, there occurred only six submarine attacks, and in the case of one, the Loyalist ship *Ciudad de Cadiz*, which was sunk by a Nationalist submarine near Tenedos on August 18, there is no mystery. The five other attacks were as follows: against the *Ciudad de Reus* (Loyalist) by an unknown submarine, August 31; the *Paramé* (French), August 13; the *Timiriasev* (Soviet), August 30; the *Molakieff* (Soviet), September 2; and the *Havock* (British), August 31. The *Paramé* and the *Havock* were not damaged; the *Molakieff* alone was sunk near Skyros; the *Timiriasev* disappeared near the Algerian coast and its crew were picked up by fishermen. The "pirate" attacks, in fact, were of little importance, and one might say that there resulted much ado about nothing, although the interested Powers were, of course, fully justified in taking precautionary measures.

Did these attacks constitute piratical acts? One is obliged to reply in the negative and for the same reasons that made objectionable the inculpation of piracy introduced by the Root resolutions of 1922 into a text of positive international law. Certain of the determinant elements of the criterion of piracy are lacking. One can contend with the best show of reason that the Nyon accords would have lost nothing had they omitted the qualification of piracy in stigmatizing the rare exploits attributed to certain mysterious submarines. The Powers, rightfully desirous of maintaining in the Mediterranean the order and security without which maritime life and intercontinental communication are impossible, could have attained the same result in employing another terminology. This would have left to the ancient crime of piracy the distinguishing characteristics which it has possessed for many centuries, and would have clarified both juridical language and ideas. It would in no way have prevented the application of the most severe sanctions against the disturbers of the peace of the Mediterranean.

FOREIGN SHIPPING DURING THE SPANISH CIVIL WAR

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Among the problems most frequently arising in connection with insurrections and civil wars, are those relating to the status of foreign vessels in the areas of hostilities, and the rights of contesting factions to interfere with such vessels. According to international rules of conduct gradually evolved during the nineteenth century and generally enforced in time of civil disturbance, contending factions enjoy the right to control the movements and activities of foreign shipping within territorial waters, but are not authorized to go upon the high seas and there interfere with foreign vessels unless the states having jurisdiction over such vessels have recognized the belligerency of the contestants.¹

Notwithstanding the reiteration of these rules on numerous occasions during the contemporaneous Spanish civil strife since July, 1936,² and in spite of consistent protest by the states concerned, extensive interference with foreign shipping has taken place. This interference has been carried out in four ways: by surface war vessels stopping foreign vessels for visit and search according to the customary methods of naval practice; by the sowing of automatic contact mines; by unwarned bombings from aircraft; and by unwarned submarine torpedoings.

Reference has already been made in this JOURNAL to molestation of the first type during the early part of the struggle.³ All attempts on the part of the Spaniards to legalize the large number of cases of visitation, search, and seizure,⁴ and to obtain recognition of the legality of announced and *de facto* blockades,⁵ were met by protest and opposition, the British Government going so far as to provide active naval protection up to the three-mile limit for all British merchant vessels going to or coming from ports declared to be under blockade.⁶

¹ Wilson, G. G., "Insurgency and International Maritime Law," this JOURNAL, Vol. 1 (1907), p. 54; Wilson, G. G., in Naval War College, International Law Situations (hereafter cited as N. W. C.), 1902, p. 72; *ibid.*, 1904, p. 39; 1912, p. 20; 1935, p. 82; Padelford, N. J., "International Law and the Spanish Civil War," this JOURNAL, Vol. 31 (1937), p. 226 *et seq.*

² See statements quoted in New York Times, Aug. 21, Nov. 24, 26, 1936; March 24, Apr. 2, 13, May 2, July 16, Aug. 27, 1937.

³ Padelford, *loc. cit.*

⁴ 20 British, 17 Russian, 7 Norwegian, 5 French, 4 Dutch, 3 Danish, and smaller numbers of vessels belonging to many other countries were reported to have been interfered with in this way between July, 1936, and March, 1938.

⁵ London Times, Apr. 13, 15, 20, Nov. 29, 30, 1937.

⁶ *Ibid.*, Apr. 13, 15, 20, 21, 22, 24, 27, 29, Nov. 29, 30, Dec. 1, 8, 1937. The Naval Instructions of Spain on the Right to Visit recognized the propriety of the position taken by the British and foreign governments: "1. Right of visit can only be exercised by belligerents;

The sowing or sighting of automatic contact mines began to appear in marine notices as early as September, 1936, and has continued during the hostilities.⁷ Notwithstanding the dispersal (or alleged dispersal) of large numbers of mines on the high seas in the Mediterranean and the Bay of Biscay, only one foreign vessel is known to have been damaged by contact with a mine outside the three-mile limit,⁸ and only three foreign vessels have been damaged or destroyed inside that limit.⁹ While some of the mine fields reported may have been fictitious, the fact remains that mines were planted and floating upon the seas and that foreign ships and lives were not only endangered but were actually injured and destroyed. For all damages the Spaniards were held "strictly accountable."¹⁰ The situation at one time was deemed so serious that the British Government contemplated mine-sweeping outside the three-mile limit.¹¹

The first use of mines in time of civil warfare seems to have been in the Mississippi River operations during the American Civil War.¹² During the Spanish Civil War in 1873 it was reported that mines were laid at the mouth of the harbor of Bilbao. When asked whether the British Government would join that of France in preventing the laying of mines, Lord Lyons, British Ambassador to France, replied: "His Majesty's Government considered that as it would take no part in the internal affairs of Spain, His Majesty's ships would not be warranted in interfering respecting torpedoes further than to require that due notice should be given so that British ships might receive timely warning . . ." ¹³ The opposite policy was followed during the Brazilian insurrection of 1893 when the foreign naval commanders stationed at Rio joined in demanding a cessation of hostilities while they searched the harbor for such devices.¹⁴ In the Cuban insurrection of 1898, the United States demanded satisfaction from Spain on the allegation that the United States battleship *Maine* had been blown up by a submarine mine

hence it can evidently be only resorted to during international conflicts by one or other of the states at war, as also during internal civil or insurrectionary wars, when one or more foreign Powers have recognized the insurrectionary party as belligerents. In such circumstances right of visit can be exercised by the mother country, but it is restricted to the merchant vessels of the nation or nations who have given this recognition, and who are for such reason in the position of neutrals." United States Foreign Relations, 1898, p. 775.

⁷ Such reports were contained in the Notice to Mariners issued by the United States Hydrographic Office; the bulletin of the same title issued by the British Admiralty; the French *Avis aux Navigateurs*; the Spanish loyalist *Avisos a los navegantes. Publicación semanal. Instituto y observatorio de Marina, Servicio hidrografica de la Armada*; the Spanish rebel *Publicación provisional de avisos a los navegantes, Servicio hidrografico de la Armada. Buque-hidrografica 'Tofino' de la flota republicana*.

⁸ London Times, May 14, 1937.

⁹ New York Times, Feb. 26, Mar. 2, 5, 1937.

¹⁰ *Ibid.*, April 15, 1937.

¹¹ London Times, April 14, 1937.

¹² Mahan, A. T., *The Navy in the Civil War*, Vol. 3, pp. 116, 118, 231, 232.

¹³ Lord Lyons to the British Office, Aug. 12, 1873. British Archives, F. O. 72/1392.

¹⁴ U. S. For. Rel., 1893, p. 75.

in the harbor of Havana.¹⁵ Mines were laid in the Gulf of Salonika during the Greek revolt of 1935, but no foreign vessels were damaged.¹⁶

In spite of the efforts of writers on international law and of the Hague Convention of 1907 to condemn the uncontrolled employment of automatic contact mines,¹⁷ these instruments of destruction have been generally utilized by belligerents in all of the international wars since 1900, notice being customarily given to neutrals concerning the general areas subjected to mining.

It is difficult to deny that the Spaniards had the right to anchor automatic contact mines within their territorial waters even if their belligerency were not recognized, provided they gave adequate notice to and established reasonable safeguards for foreign vessels.¹⁸ Considering, however, the inability of the contact mine to distinguish between friend and foe, and the ease with which such devices may be swept away from their moorings by heavy seas, there is no question but that the foreign Powers whose vessels were damaged were lawfully entitled to demand from the Spanish authorities reparation and satisfaction for all losses.

A third type of interference with foreign shipping has been executed by means of aerial bombardment. Between July, 1936, and March, 1938, seventeen British, six French, three Italian and a large number of merchant vessels of other nationalities, together with eight foreign warships, were bombarded from aircraft without any warning and without efforts having been made to visit and search the foreign vessels either where located or at some adjacent port before subjecting them to attack. In view of the fact that belligerency had not been recognized and that therefore absolutely no right of interference existed at all, it is immaterial that heretofore the Powers have not found it possible to conclude an international convention governing the conduct of belligerent aircraft toward foreign vessels.¹⁹ Long-standing naval instructions forbid all Spanish war vessels even in time of war to direct armed force at a neutral vessel until normal methods of summons

¹⁵ U. S. For. Rel., 1898, p. 1036.

¹⁶ New York Times, March 5, 7, 1935.

¹⁷ Fauchille, P., *Traité de droit international public* (Paris, 1922), Sec. 1316(2); Garner, J. W., *International Law and the World War* (London, 1920), I, pp. 336, 353; Hall, W. E., *International Law* (8th ed., Cambridge, 1923), pp. 640-641; Hyde, C. C., *International Law* (Boston, 1922), II, p. 414; Hershey, A. S., *Essentials of International Public Law and Organization* (rev. ed., New York, 1927), p. 643 n.; Møller, Axel, *International Law in Peace and War* (Copenhagen, 1935), II, p. 188; N. W. C., 1913, p. 147, 1914, p. 112; Oppenheim, *International Law* (2nd ed., London, 1912), p. 190; Rolin, A., *Le Droit Moderne de la Guerre* (Brussels, 1921), II, Secs. 635-42; Scott, J. B., *Resolutions of the Institute of International Law* (New York, 1916), pp. 167, 178; Stockton, C. H., "The Use of Submarine Mines and Torpedoes in Time of War," *this JOURNAL*, Vol. 9 (1915), p. 277; editorial comment, "Mines, Submarines and War Zones," *ibid.*, p. 461; N. W. C., 1914, pp. 100-138, 1933, pp. 99-110.

¹⁸ It may be observed that none of the reports mentioned the existence of mines off Cape Creus where three foreign vessels were seriously damaged.

¹⁹ Efforts to reach such a convention were made at Washington in 1922, The Hague in 1923, Havana in 1928, and London in 1930.

have proved ineffective in bringing a vessel to, for visitation and search.²⁰ Protests and notes having failed to produce a cessation of such attacks, orders were given to the naval vessels of Britain, France, Germany and Italy to fire upon aircraft bombing their respective merchant vessels.²¹

Following the unprovoked bombing of British, German and Italian naval vessels anchored in Spanish waters on May 24, 26, and 29, 1937, by Valencia airplanes,²² two agreements were reached by the four western European Powers for safeguarding their warships and for consultation in the event of further attacks. The first agreement was designed to effect an undertaking between the four Powers on the one hand, and each of the Spanish parties acting separately, on the other hand. According to the London *Times*, the substance of this agreement was as follows:

(a) That the two parties should be asked to give a specific assurance that they will respect foreign warships on the high seas and elsewhere, and will take steps to see that their naval and air forces give effect to this assurance.

(b) That, in order to avoid accidental attacks on or damage to foreign warships participating in the patrol when lying in the ports of either party, the two parties should be asked to come to an agreement with the four Powers on a list of Spanish ports to be made available for use as bases for their patrol ships and on a definition of the safety zones which should be established in those ports.

(c) That the two parties should be informed that any infraction of the aforesaid assurances or any attack upon foreign warships responsible for the naval patrol will be regarded by the four Powers participating in the control as a matter of common concern; and that the four Powers, irrespective of any immediate measures of self-defence considered necessary by the forces of the Power actually attacked, will immediately seek agreement among themselves concerning steps to be taken in concert, taking into consideration the views which the Government concerned is naturally entitled to express as to further appropriate measures.²³

The second agreement related to the procedure of consultation, and ended with the provision that "if, failing agreement through consultation on concerted action, the Power attacked decides to take independent measures, the other Powers will not share in the responsibility for such action and a new situation will have arisen necessitating reconsideration" of the whole matter.

Unfortunately the June 12 agreements presently came to nought when the four Powers failed to come to a common viewpoint on the line of action to be taken in reply to a torpedo attack on the German cruiser *Leipzig*,²⁴ and

²⁰ See Art. 4, Spanish Naval Instructions, U. S. For. Rel., 1898, pp. 775, 776.

²¹ New York Times, July 23, 1936; Jan. 18, May 28, Aug. 27, 1937.

²² See London Times, May 15, 17, June 1, 4, 9, 18, 1937. See letter of Spanish Government to the Secretary-General of the League of Nations, Official Journal, July, 1937, pp. 602, 603. The preponderance of evidence indicates that the Spanish contentions contained in this letter were baseless.

²³ London Times, June 16, 1937.

²⁴ *Ibid.*, June 21, 22, 1937. The German Government demanded the staging of a united naval display in Spanish territorial waters off Valencia, together with delivery of all Spanish

in view of the rejection by the Valencia government of the guarantee proposals.²⁵

Further aerial bombings having occurred during the summer of 1937, another attempt was made to cope with the problem at the Nyon Conference in September.²⁶ Following the conclusion of the arrangement regarding submarines, a supplementary agreement was signed by the ten states represented, which provided that any naval patrol vessel engaged in the protection of merchant shipping in conformity with the Nyon Arrangement, witnessing an aerial attack upon any non-Spanish merchant vessel in violation of the rules of attack on merchant vessels laid down for submarines in the 1930 London Naval Treaty, should open fire upon the aircraft.²⁷ This agreement differed considerably from the earlier one of June 12, inasmuch as no guarantee was asked of the Spanish contestants, and no provision was made for consultation, while a special International Naval Patrol was created for the protection of all non-Spanish merchant vessels against unlawful attacks.

Certain features of the Nyon Supplementary Agreement require underlining. According to paragraph one, this instrument was made an "integral part" of the arrangement regarding submarines. By the terms of the submarine arrangement, British and French naval vessels were not authorized to engage in protective duty in the Adriatic and Tyrrhenean Seas. In the Supplementary Agreement these patrol vessels were ordered to open fire upon aircraft

submarines to the four Powers for neutralization for the balance of the strife. The customarily well-informed diplomatic correspondent of the London Times wrote on June 23, that none of the German proposals were "discussed in detail," that there was never "an approach to an agreement on the naval demonstration," and that the submarine proposition "never came within the scope of practical discussion." The British and French proposed instead merely the sending of a protest to Valencia and the institution of an international commission of inquiry to examine the facts of the case.

In terminating the four-Power agreement and withdrawing from the International Naval Patrol off Spain, the German Government advised the British that: "The German Government, after being notified of the attacks on the cruiser *Leipzig* on June 15, and 18, have immediately informed the Powers engaged in the Spanish sea control that they are not willing to expose their naval forces, while entrusted with an international task, to further target practice off Red Spain.

"The German Government have limited to a minimum the guarantee which had to be asked for the safety of the German ships in requesting a naval demonstration of the four control Powers in order thus to express a definite and obvious solidary warning.

"Since the British and French Governments are not ready to agree even to this minimum request, the German Government regret to state that among the control Powers that spirit of solidarity which is an indispensable condition for the execution of the common international task is lacking. The German Government have therefore decided to withdraw finally from the Control Scheme." London Times, June 24, 1937. The Italian note expressed the same views.

²⁵ Text in *L'Europe Nouvelle*, Oct. 9, 1937, p. iv.

²⁶ The invitations to the Nyon Conference provided for discussion of both submarine and aerial attacks. Text in London Times, Sept. 7, 1937.

²⁷ League of Nations Doc. C.409.M.273.1937.VII; this JOURNAL, Vol. 31 (1937), Supp., p. 182.

attacking merchant vessels anywhere in the "Mediterranean." In view of the political considerations which lay behind the Nyon Conference, it seems probable that the term "Mediterranean" was to be understood as not including the Adriatic and Tyrrhenean Seas.²⁸ Differentiation was made between the protective measures which might be adopted toward aircraft and surface vessels and those to be taken against submarines. According to the submarine arrangement, submarines seen or believed to have been guilty of torpedoing merchant vessels without warning were to be counter-attacked and "if possible destroyed." Against aircraft actually seen to have attacked a merchant vessel without warning and justification, the patrol vessels were directed to "open fire." Against surface warships seen to be attacking non-Spanish merchant vessels, the patrol vessels were ordered to "intervene to resist" further attack. Patrol vessels were given no mandate by the Supplementary Agreement to counter-attack aircraft or surface vessels with a view to their complete destruction. No provision was made for the capture of any offending craft or their personnel.

No mention was made in either of the documents signed at Nyon of cases of merchant vessels being ordered under threat of force to deviate from their regular course into Spanish territorial waters for visitation and search. While controversy has prevailed over the right of aircraft and submarines to require deviation in time of public war,²⁹ there would appear to be no doubt but that deviation under duress by a craft belonging to or in the employ of the Spanish contestants was unlawful under the prevailing conditions, and hence to be resisted by the International Naval Patrol, even though no actual bombing, shelling, or torpedoing had been or was taking place. The preamble to the submarine arrangement expressly recited: "whereas without in any way admitting the right of either party to the conflict in Spain to exercise belligerent rights or to interfere with merchant ships on the high seas even if the laws of warfare at sea are observed . . ."

Attention may now be turned to the fourth type of interference with foreign shipping, to wit: unwarned torpedoings by submarines.³⁰ Submarines played a considerable part in the revolution in Greece in 1935, but the Spanish civil war marks the first time that they have been employed against foreign commerce on the high seas during civil strife.

The total fleet of submarines possessed by Spain at the outbreak of hostili-

²⁸ No convention has been adopted delimiting the geographical extent of the Mediterranean. See "Limits of Oceans and Seas" (International Hydrographic Conference, Special Publication No. 23, Monaco, 1928); Report of the Proceedings of the First Supplementary International Hydrographic Conference held at Monaco, 1929 (Monte Carlo, 1929), pp. 187-189.

²⁹ General Report, Conference of Jurists, 1923, British Parliamentary Paper, Cmd. 2201, pp. 43-48; N. W. C., 1924, pp. 136-142; Moore, J. B., *International Law and Some Current Illusions* (New York, 1924), pp. 202-206; Spaight, J. M., *Air Power and War Rights* (London, 1924), pp. 465-473; N. W. C., 1930, p. 65.

³⁰ Finch, G. A., "Piracy in the Mediterranean," *this JOURNAL*, Vol. 31 (1937), pp. 659-665.

ties in July, 1936, numbered twelve.³¹ The majority of the submarines are understood to have remained in the control of the Government, the insurgents securing possession of only three.³² Notwithstanding the division of the fleet, no insurgent vessels have been reported to have been torpedoed by submarines, while at least a dozen loyalist merchant and war vessels have been declared to have been torpedoed in widely-scattered areas of the Mediterranean including the Aegean Sea.³³ Far more serious were the submarine attacks upon German,³⁴ British,³⁵ and Russian³⁶ warships and merchant vessels which took place during 1937 on the high seas and in foreign territorial waters. Had the British and French Governments been willing to accede to the suggestion of the German Government (following the attack upon the cruiser *Leipzig* in June, 1937)³⁷ and demanded that all Spanish submarines be handed over to the four Powers for neutralization and internment, the submarine attacks upon British and Russian vessels in August and September might never have occurred. Aroused by the submarine attacks, the Powers at first sought to deal with the situation by unilateral measures. The French Government instituted a system of patrol and convoy along the north African coast.³⁸ The British Government ordered all of its warships to counter-attack submarines attacking British merchant ships.³⁹ The Turkish Government organized a special naval patrol for the Dardanelles with orders that

³¹ Armaments Yearbook of the League of Nations, 1936, p. 752. Three larger submarines were under construction at Cartagena at the outbreak of the war. It is understood that no one of these has been completed due to inability to obtain certain necessary parts as a result of the non-intervention accord.

³² See statement of Mr. Duff-Cooper, First Lord of the Admiralty, in the House of Commons, June 7, 1937, *London Times*, June 8, 1937; *ibid.*, Aug. 19, 1937.

³³ *New York Times*, May 30, 31, June 4, July 29, Aug. 12, 15, 19, 31, 1937. See appeal of the Spanish Government to the League of Nations, Aug. 21, 1937. League Doc. C.335.M. 226.1937.VII; minutes, third meeting, 98th Session of the Council, Sept. 16, 1937, pp. 10-12, 99th Session, Oct. 5, 1937, pp. 5-6.

³⁴ *London Times*, June 19, 21, 22, 23, 1937.

³⁵ *Ibid.*, Sept. 2, 3, 8, 1937.

³⁶ *Ibid.*, Sept. 1, 3, 1937.

³⁷ *Ibid.*, June 22, 23, 1937.

³⁸ *Ibid.*, Aug. 17, 1937.

³⁹ *Ibid.*, Aug. 18, 1937. A significant editorial entitled "Piracy in the Mediterranean" appeared in the *London Times*, Aug. 25, reading in part:

"The British Government has made it abundantly clear that it does not regard the existence of civil war in Spain as conferring license upon any Spanish forces to interfere with British shipping on the high seas, and that it will not tolerate even such interference as the visiting of British ships in order to establish their character. Still less, of course, does it tolerate any more violent interference, and the British Navy has orders to afford protection to all British shipping against attack upon unarmed merchantmen provided they are its own. It has persistently advanced the principle that international law no less than the dictates of humanity and civilization forbids such attacks even in time of war . . .

"It is no justification of these crimes to plead that neither Spanish Government has acceded to the *Procès-Verbal* adopted by the rest of the world; or that since they are not accorded the belligerent right of visit and search of merchant ships at sea, knowing that their enemies' ships are using false colors, they have no alternative but to attack at sight. A new government seeking recognition does not recommend itself to the world by flouting the principles adopted by the world, even on the plea that its rival has not formally adopted them; and even the accordance of belligerent rights would not carry license to subject the ships even of the rival Government in its own country to the treatment inflicted of late upon all and sundry . . ."

any submarine encountered should be called upon to surrender and, if it did not comply, should be attacked with a view to destruction.⁴⁰ The Russian Government presented a note to Italy charging it with responsibility for the torpedoing of its vessels in the Aegean Sea, claiming an indemnity, and demanding that the officers in charge of the submersibles be punished.⁴¹

In the face of an international situation characterized as "fast becoming intolerable," France and Britain took the initiative in summoning a special conference at Nyon.⁴² Invitations were sent to the Governments of Albania, Bulgaria, Egypt, Germany, Greece, Italy, Rumania, the Soviet Union, Turkey and Yugoslavia.⁴³ Regardless of the desire of Germany and Italy to have the question of the submarine menace taken up in the Non-Intervention Committee in London instead of at a separate conference, and their refusal to attend such a conference,⁴⁴ Britain and France determined to hold a conference without them for the purpose of condemning submarine activity in the Mediterranean, and providing sanctions for its punishment. Proceeding rapidly on the basis of a plan presented by the British delegation which was founded upon Part IV of the London Naval Treaty of 1930,⁴⁵ already adhered to by nine of the states invited to the Conference,⁴⁶ the Conference was able to conclude its labors within four days by the signature of the Nyon Arrangement.⁴⁷ This provided for the creation of an International Naval Patrol empowered to counter-attack, and, if possible, to destroy all submarines attacking, or believed to have attacked, non-Spanish merchant vessels in the Mediterranean (excluding the Adriatic and Tyrrhenean Seas)

⁴⁰ London Times, Aug. 27, 1937.

⁴¹ *Ibid.*, Sept. 7, 1937. The Italian reply flatly rejected the imputation of responsibility and refused to meet all demands. *Ibid.*, Sept. 14, 1937.

⁴² The invitations read:

"1. The French and British Governments are of the opinion that immediate consultation between and action by the Mediterranean and certain other interested Powers has now become necessary to deal with the intolerable situation created by the attacks recently and illegally carried out against shipping in the Mediterranean by submarines and aeroplanes without disclosure of their identity.

"2. The two Governments accordingly propose that a meeting should be convened on September 10 to end the present state of insecurity in the Mediterranean and to ensure that the rules of international law regarding shipping at sea shall be strictly enforced.

"3. They suggest that Nyon would be a suitable place for the meeting, since the representatives of many of the Governments concerned will soon be at Geneva in the normal course of events.

"4. While the invitation is being addressed to 10 Governments, so that those to be represented from the first will number 12 in all, it will be open to any of them to propose the inclusion of other Powers."

⁴³ France originally desired membership in the Conference to be restricted to states bordering on the Mediterranean, but the British opposed this move.

⁴⁴ London Times, Sept. 10, 1937. Attention was called to the fact that the British and French Governments had shown little interest in collective measures of self-protection at the time of the attacks on the German war vessels.

⁴⁵ British Treaty Series, No. 29 (1936).

⁴⁶ Albania, Britain, Bulgaria, France, Germany, Greece, Italy, Soviet Union, Yugoslavia. United States Treaty Information Bulletins, Nos. 88-95.

⁴⁷ League Doc. C.409.M.273.1937.VII; this JOURNAL, Vol. 31 (1937), Supp., p. 179.

without warning and without first having placed the crew, passengers, and papers in safety according to the terms of Part IV of the 1930 Naval Treaty.

It is to be noted in passing that the protective measures ordained by this arrangement were limited to the present civil war. No attempt was made to formulate rules of international law applicable generally to all cases of insurgency and civil war. It is of course conceivable that the rules and system may be readily re-adapted to other situations in the future. The arrangement was also limited to the extent that Spanish vessels were not included within the protective work of the International Naval Patrol. Against this the Spanish Government complained bitterly.⁴⁸ To have granted protection to Spanish vessels would have involved "intervention" in the war which all Powers were pledged to avoid. No provision was made for the protection of non-Spanish war vessels. Such vessels were already in possession of instructions and means adequate for their own defense.

The point of greatest interest in connection with the Nyon Arrangement is its designation of unwarned submarine attacks as "acts of piracy."⁴⁹ Piracy customarily has been considered to involve plunder, robbery, or destruction upon the high seas by private parties acting without state authorization, although precise definition has always been difficult since piracy may involve many acts differing in nature and moral value.⁵⁰

It has long been a moot point whether vessels of contesting parties in a civil strife whose belligerency has not been recognized should be regarded as piratical. The view has generally prevailed that a parent government cannot by municipal decree make insurgent vessels pirates *jure gentium*, so far as other states are concerned.⁵¹ Publicists have inclined to the tenet that while the interference with foreign vessels on the high seas by vessels under the direction of parties whose belligerency has not been recognized bears semblance to piracy, the vessels should not normally be dealt with as pirates under the law of nations since their aim is to influence the outcome of a political contest.⁵² Hall says "it is enough that the power must always

⁴⁸ Minutes, 3rd meeting, 98th Session of the Council of the League of Nations, Sept. 16, 1937, pp. 10-12.

⁴⁹ Finch, *loc. cit.*

⁵⁰ Calvo, C., *Le Droit International* (5th ed., Paris, 1896), Sec. 485; Fauchille, *op. cit.*, Sec. 483(50); Hall, *op. cit.*, Sec. 81; Harvard Research Draft Convention and Comment on Piracy, Art. 3; Møller, *op. cit.*, I, pp. 211-212; Moore, Digest, II, Sec. 311; Oppenheim, *op. cit.*, Sec. 275; Ortolan, *Diplomatie de la Mer*, Lib. II, Cap. 11; Phillimore, *International Law* (2nd ed., London, 1876), Lib. I, Sec. 353; Report of the subcommittee of the League of Nations Committee of Experts for the Progressive Codification of International Law, pp. 116-117 (C.196.M.70.1927.V); Steil, *Der Tatbestand der Piraterie*, pp. 73-76; Westlake, *International Law* (Cambridge, 1910), I, p. 177; Wheaton, *Elements*, Pt. II, Chap. II, Sec. 15.

⁵¹ Madrid decreed the rebel naval vessels to be outlawed and piratical, July 27, 1936, but the Powers refused to accept the decree *ipso facto*, so far as their international status was concerned.

⁵² See, in addition to preceding reference: Weisse, C., *Droit International Appliqué aux Guerres Civiles* (Lausanne, 1898), p. 119 *et seq.*; Rougier, *Les Guerres Civiles et le Droit des Gens* (Paris, 1903), pp. 284-297; N. W. C., 1900, p. 8, 1904, p. 37.

exist to treat them as pirates so soon as they actually overstep the limits of political action." Public officials and courts, on the other hand, have taken the more positive stand that any interference or depredation not only technically constitutes piracy but may be forcibly proceeded against as such by states whose commerce has been molested.⁵³ It should be added, however, that full punishment has not been frequently inflicted by foreign states.

The appellation of unwarned torpedoings of merchant vessels by submarines as "piratical acts" commenced during the late World War,⁵⁴ although, as Professor Garner has pointed out, the German and Austrian submarines technically were not pirate ships, as their commanders bore lawful commissions issued by fully recognized belligerent states.⁵⁵ Scrupulous care was obviously exercised in the notes and speeches of the President and Secretaries of State of the United States between 1914 and 1917, to avoid designating submarine activities resulting in the loss of

⁵³ *United States v. Smith* (1820), 5 Wheaton 153; *The Magellan Pirates* (1853), 1 Spinks Ecc. and Adm. R. 81; instructions of British, French and German Governments to their fleets in Spanish waters in the civil war of 1873, British Foreign and State Papers, Vol. 65, pp. 770, 777, 786; the case of the Argentine rebel vessel *Portena* (1873), Calvo, *op. cit.*, Sec. 502; the case of the Peruvian *Huascar* (1877), Parliamentary Papers, Peru, No. 1, 1877; the case of the *Cespedes* (1877), Calvo, *op. cit.*, Sec. 503; *United States v. The Ambrose Light* (1885), 25 Fed. Rep. 408; instructions to the American naval officers in Chilean waters in 1891, H. Ex. Doc. 91, 52nd Cong., 1st Sess., pp. 245-246; instructions to British naval officers during same insurrection, Parliamentary Paper, Chile, No. 1 (1892); *The Three Friends* (1897), 166 U. S. 1; the case of the Haitian rebel vessel *Crête à Pierrot* (1902), Pitt Cobbett, *Leading Cases on International Law* (London, 1922), Vol. I, p. 302.

Reference may be made to several similar cases found in the archives of the British Foreign Office but hitherto unpublished. Certain Spanish privateers seizing British vessels in West Indian waters in 1822, British naval vessels were ordered to take summary action to put a stop to the interference. Canning to Sir Wm. à Court at Madrid, Oct. 18, 1822. F. O. 72/254. Same trouble complained of in dispatch of July 17, 1824. F. O. 72/284. Spanish insurgent vessels having been decreed to be outlawed as pirates by the Spanish Government, the Law Officers of the Crown advised the Secretary for Foreign Affairs, July 24, 1873, that British vessels should treat them as such in any cases of interference. F. O. 83/2378. This advice was passed on by the Foreign Office to the Admiralty the same day in the following language: "His Majesty's Government consider that if Spanish ships of war which have revolted commit any acts of piracy affecting British subjects or interests they should be treated as pirates, decree of the Spanish Government having deprived them of the protection of the Spanish flag." F. O. 72/1391. During the insurrection in Cuba in 1884, a Spanish gunboat stopped and searched a British vessel, *The Scud*, on the high seas, believing her to be engaged in filibustering. Upon the basis of an opinion of the Law Officers, dated Sept. 22, 1884, the Foreign Office demanded apologies, disavowal and compensation, since Spanish warships were not possessed of belligerent rights. F. O. 72/1836, 1837.

⁵⁴ Higgins, A. P., *Defensively Armed Merchant Ships and Submarine Warfare* (London, 1917), pp. 25-26; *Proceedings of the American Society of International Law*, 1916, p. 66; Mr. Sarraut at the Conference on Limitation of Armaments, 1921, Conference on Limitation of Armaments (Washington, 1922), p. 598.

⁵⁵ Garner, J. W., *International Law and the World War* (London 1920), Vol. I, pp. 382-383.

American life and property as piratical acts, although they were spoken of as violating international law, the sacred principles of justice and humanity, the incontrovertible rights of neutrals, the immunities of non-combatants, as waging warfare against mankind, and finally as outlaws.⁵⁶

The treaties of peace in 1919 contained no provision concerning or condemning submarine warfare. It may have been the intention of the authors of the treaties to deal with the matter through Article 228 of the Treaty of Versailles requiring Germany to recognize the right of the Allied and Associated Powers to bring to trial persons accused of having violated the laws of war. The Report of the Commission on the Responsibility of the Authors of the War and the Enforcement of Penalties, declared the destruction of merchant ships without prior visit and placement of the crew and passengers in safety to be a violation of the laws of war, but it did not declare it to be piracy.⁵⁷ The three German officers eventually placed on trial before the Supreme Court of Germany under Article 228 for their part in the torpedoing of the British hospital ships *Dover Castle* and *Llandoverly Castle* were tried for violations of the laws of war and the commission of homicide, but no mention was made of their having committed an act of piracy.⁵⁸

Submarine warfare and piracy were definitely linked together in the resolutions presented by Mr. Root at the Conference on Limitation of Armaments in Washington in 1922. As presented, Mr. Root's proposal sought to prohibit all use of submarines against merchant vessels and to attach the penalty of piracy to any such employment.⁵⁹ As finally embodied in the unratified Treaty Relating to the Use of Submarines and Noxious Gases in Warfare, the destruction of merchantmen without prior visit, search, and placement of the personnel in safety was declared to be a violation of the laws of war subjecting any person in the service of any Power who should violate such a rule, whether or not such person is under orders of a governmental superior, to trial and punishment as if for an act of piracy.⁶⁰ This conclusion was reached in spite of the consensus of opinion that it was not competent for the five Powers present at the Conference to establish new rules of international law, including the branding of such action as piracy *jure gentium*.⁶¹ The decision was also taken in spite of the fact that only one delegate, Mr. Hanihara of Japan, raised a question as to the exact meaning of "punishment as if for an act of piracy," which was brusquely pushed aside by Mr. Hughes and Mr. Root who made no adequate answer and immediately cut off further debate.⁶²

⁵⁶ See the *Lusitania* note, Secretary of State Bryan to Ambassador Gerard at Berlin, May 13, 1915, U. S. For. Rel., 1915 Supp., pp. 393-396; the *Sussex* note, Secretary of State Lansing to Mr. Gerard, April 18, 1916, *ibid.*, 1916 Supp., pp. 232-234; address of President Wilson to Congress, Feb. 3, 1917, *ibid.*, 1917 Supp., pp. 109-112; address of President Wilson to Congress, April 2, 1917, *ibid.*, pp. 195-203.

⁵⁷ Report printed in this JOURNAL, Vol. 14 (1920), pp. 95, 113.

⁵⁸ *Ibid.*, Vol. 16 (1922), pp. 704-723.

⁵⁹ Conference, *op. cit.*, p. 556.

⁶⁰ *Ibid.*, p. 1605 *et seq.*

⁶¹ *Ibid.*, pp. 700, 702, 704, 708, 718-726.

⁶² Mr. Root's answer was that "such a person would not be subject to the limitations of

While the treaty was not ratified, it may be pertinent to point to the carefully studied observation in the comment on the Draft Convention on Piracy of the Harvard Law School Research in International Law that "properly speaking . . . piracy is not a legal crime or offense under the law of nations."⁶³

Part IV of the London Naval Treaty of 1930 invited states to accede to the proposition that according to international law submarines must conform to the rules of surface craft, and that, except in case of resistance to visit and search, merchant vessels must not be destroyed without first placing the crew, passengers, and ship's papers in safety.⁶⁴ Non-conformity by submarines was not branded an act of piracy, nor was any state authorized to bring to trial or to inflict the punishment for piracy upon the officers or crew of any submarine violating the rules. While nine of the states invited to the Nyon Conference had agreed to abide by the rules of this treaty, the Spanish Government had not done so.

The conclusion which must be drawn from this brief résumé of practice and conventional agreement is that in September, 1937, the unwarned torpedoing of merchant vessels was not an act of piracy according to accepted international law.⁶⁵ Might the nine Powers meeting in conference at Nyon make the interference with foreign vessels by surface, air, and submarine craft, piracy *jure gentium* by the adoption of an arrangement to which the majority of the states of the world, and Spain in particular, were not parties?

On the basis of state practice in the past, considering that belligerency had been consistently withheld, considering that Spanish naval instructions forbade the employment of armed force in such a manner as it was utilized in 1936-1937, and in view of the fact that the submarines and aircraft refused to reveal their identity, attacking in a summary and stealthy fashion, there would seem to be little doubt that the foreign Powers had a right to regard and to treat such attacks as being assimilated to acts of piracy which might be resisted by any means. Self-preservation alone justified the resort to the use of such force as might be necessary to repel and to resist such attacks.

On the other hand it may be argued conversely that no small group of Powers had the right to make the vessels of a state not represented at the conference pirates *jure gentium*, and to subject them to extreme summary punishment without investigation and trial. Acting as they did, these Powers set themselves up as legislators, plaintiff, judge, jury, and executioner at one

territorial jurisdiction. The peculiarity about piracy was that, though the act was done on the high seas and not under the jurisdiction of any particular country, nevertheless it could be punished in any country. That was the really important point." Conference, *op. cit.* p. 728.

⁶³ This JOURNAL, Vol. 26 (1932), Supp., p. 759.

⁶⁴ British Treaty Series, No. 29 (1936).

⁶⁵ If, as charged in the Russian notes to Italy, and in the public press, Italian submarines were responsible for some of the attacks upon foreign vessels in 1937, it would be proper to hold that there had been a violation of the 1930 Treaty. These charges cannot be proven, and the Italian Government expressly denied them. London Times, Sept. 7, 8, 1937.

and the same time. Such a determination of a crime of piracy amounted to a dictation to Spain and an intervention in its internal affairs, since piracy was admitted by international law only to be a crime and punishable under municipal law. The Nyon Arrangement prescribed a punishment exceeding in severity that laid down by the laws of Spain or of any foreign state.⁶⁶ Whereas pirates had been regarded heretofore as *hostes sui generis* but not beyond the pale of the law, the Nyon Arrangement made them *hostes ex lege*, to be denied the benefits of arraignment and trial.

It is believed that the weight of propriety lies upon the side of the first set of arguments. The submarines and other craft unquestionably infringed the international rights of foreign states in an arbitrary manner, which repeated diplomatic notes and threats failed to stop. In failing to reveal their identity, the unknown craft conveyed the impression that, like pirates, they had no authority for being upon the high seas. In dealing with foreign vessels as they did, they not only violated their own naval instructions, but also rules of procedure accepted as law by a considerable number of states. The Nyon Arrangement did not specifically state that the objectionable craft were pirates or guilty of the crime of piracy. It merely stated that their actions "should be justly treated as acts of piracy." As there may be a difference between an act of war and war itself, so there may be a difference between an act of piracy and the crime of piracy. Whether this be a tenable distinction or not, the fact remains that the Nyon Arrangement did not assert as a *fiat* that the craft or their personnel were pirates. It did not establish a punishment for piracy. Rather it authorized the taking of certain measures "with a view to the *protection* of all merchant ships," which was essentially of a deterrent and negative nature and not of a punitive character for the punishment of a wrong already completed. Considering that the unlawful bombings and torpedoings produced their effects upon foreign vessels, the states having jurisdiction over such vessels were entitled to adopt and to apply such rules and penalties as their own laws determined.⁶⁷ Legal reasons aside, it is easy to understand why the conferees at Nyon did not choose to provide for possible capture and trial for the crime of piracy. As privateering was declared to be illegal, and was abolished by the states participating in the Declaration of Paris (while it was still being resorted to and upheld by other states),⁶⁸ a declaration which has long since been hailed for its furtherance of international

⁶⁶ For Spanish laws, see this JOURNAL, Vol. 26 (1932), Supp., pp. 1006-1009.

⁶⁷ The Permanent Court of International Justice in the case of *The Lotus* said that "if a guilty act committed on the high seas produces its effects on a vessel flying another flag or in foreign territory, the same principles must be applied as if the territories of two different states were concerned, and the conclusion must therefore be drawn that there is no rule of international law prohibiting the states to which the ship on which the effects of the offense have taken place belongs, from regarding the offense as having been committed in its territory and prosecuting, accordingly, the delinquent." Publications of the Court, Ser. A., No. 10, p. 25.

⁶⁸ Smith, H. A., *Great Britain and the Law of Nations* (London, 1932), Vol. I, pp. 10-12.

law, so may the Nyon Arrangement and Supplementary Agreement be extolled in the future for their advancement of rules of international law dealing with submarines and aircraft in time of insurgency.

It may be worth noting that the Nyon Arrangement authorized the naval vessels assigned to the anti-piracy patrol to navigate and to perform their protective functions within the territorial waters of all of the signatory states, without requesting permission to enter in each instance, without first inviting the littoral state to counter-attack any offending craft, and without asking the permission of the littoral state to fire upon or to destroy the said craft within its jurisdiction.⁶⁹ Such permission was given, of course, only for the duration of the present exigency. From the point of view of European diplomacy it may be recalled that the British Government united these same Powers bordering on the Mediterranean in a Mutual Assistance Agreement in 1935 at the time of the crisis over the question of sanctions, in which mutual resort to and use of each other's territorial waters was provided for.⁷⁰ Taken altogether, the Mutual Assistance Agreement of 1935, the Observation and Control Scheme of March, 1937, and the Nyon Arrangement established important precedents of collective naval action in the Mediterranean.

The adoption of the Nyon Arrangement resulted in an immediate cessation of concerted submarine and aerial attacks upon foreign vessels, although after some lapse of time sporadic attacks recurred.⁷¹

Few civil disturbances can rival the present Spanish strife in the number of legal problems to which it has given rise by interference with foreign shipping. The introduction of automatic contact mines, aircraft, and submarines, revealed the lack of adequate provisions of law covering the employment of such devices in time of insurgency and civil war. While objection has been made to the refusal of the Powers to accord recognition of belligerency to the parties in Spain, and to the non-intervention accords,⁷² it would appear, nevertheless, that significant progress was made in the enunciation and clarification of rules of international law dealing with the status of, and interference with, foreign shipping during civil strife. From public statements and practice, it would appear that the following were held to be rules of international law during the Spanish Civil War:

⁶⁹ See Harvard Research Draft Convention on Piracy, Arts. 7 and 8, together with comments and references.

⁷⁰ Official Journal, Spl. Supp. 150 (Geneva, 1936), pp. 332-335; British Parliamentary Paper, Ethiopia, No. 2 (1936), Cmd. 5072. This agreement was terminated in July, 1936, just prior to the outbreak of the Spanish civil disturbance. London Times, July 12, 1936.

⁷¹ The British destroyer *Basilisk* was reported to have been attacked by submarine in October, 1937. London Times, Oct. 5, Nov. 4, 1937. The Dutch vessel *Hannak* was torpedoed and sunk seven miles off the Spanish coast, Jan. 11, 1938. New York Times, Jan. 12, 1938. The British freighter *Endymion* was torpedoed and sunk eleven miles off Cartagena, Jan. 31, 1938. *Ibid.*, Feb. 1, 1938.

⁷² Smith, H. A., "Some Problems of the Spanish Civil War," British Year Book of International Law, 1937, pp. 17-31; Garner, J. W., "Recognition of Belligerency," this JOURNAL, Vol. 32 (1938), pp. 106-113, and citations therein.

(1) Contestants whose belligerency has not been recognized may interfere with and control the movements of foreign vessels venturing within territorial waters.

(2) Municipal decrees closing ports in the hands of the enemy to foreign vessels are binding only when supported by an adequate force in front of the designated port or ports, and foreign vessels attempting to enter may not be penalized as if for the violation of a blockade.

(3) Municipal orders purporting to establish a blockade outside the 3-mile limit are to be respected only if belligerency has been recognized; otherwise, freedom of navigation may be enforced up to the 3-mile limit.

(4) No right exists to interfere, in any way, by any device or weapon, with foreign shipping beyond the 3-mile limit, in the absence of recognition of belligerency by the foreign states having jurisdiction over the vessels concerned.

(5) Automatic contact mines may be placed within territorial waters in time of civil disturbance, provided adequate notice of the same is given to foreign shipping, and provided safe-conducts are supplied to foreign vessels entitled to pass through the mined areas on lawful errands.

(6) No right exists in time of civil disturbance to sow automatic contact mines in or upon the high seas, and parties placing mines may be held strictly accountable for any damages resulting to foreign vessels upon the high seas by mines planted therein or drifting thereupon.

(7) Submarines are subject to the same rules as are surface vessels in their treatment of merchant vessels, and to the limitations set forth in Points 2, 3, and 4 above; they may never torpedo foreign vessels without warning and without first calling upon the vessel to stop or to deviate under escort to a designated point for visit, search, and ascertainment as to liability to capture, and without having allowed the crew and passengers to take to life-boats under conditions of weather and proximity to shore or rescue which may be regarded as safe.

(8) The bombardment of foreign vessels from aircraft is lawful only when the same rules, conditions, and limitations applying to submarine torpedoings have been complied with and fulfilled.

(9) The failure of a foreign merchant vessel within territorial waters, to stop or to deviate under escort for visit and search when called upon to do so in accordance with the proper summons, may result in its being fired upon by gun-fire, torpedo, or aerial bomb, without further liability being attached to the craft resorting to such means of compulsion.

(10) War vessels or craft of contestants in a civil disturbance whose belligerency has not been recognized may be proceeded against as pirates by foreign states whose vessels have been attacked or interfered with upon the high seas.

(11) The failure of submarines or aircraft subject to the jurisdiction of civil contestants whose belligerency has not been recognized or whose identity is not ascertainable, to abide by the rules set forth above, may result in counter-attack and possible destruction without capture and trial, as if for the commission of an act of piracy.

(12) Foreign states may take such forcible and summary measures as may appear to them to be necessary to deter or to terminate unlawful interference with their vessels upon the high seas, or legitimately within foreign territorial waters, when remedies sought through normal diplomatic channels have been unattainable.

It may be agreed that the more normal path to have pursued during the Spanish disturbance would have been to recognize the belligerency of the contestants. Such a course would not necessarily have been incompatible with the Non-intervention accords, or with the Observation and Control Scheme.⁷³ Recognition might not, however, have reduced the interference with foreign vessels upon the high seas. On the contrary, it might have resulted in a material increase in the amount of such interference through giving the contestants the legal right to roam the high seas at will. Recognition might not have resulted in averting or eliminating unwarned bombings or torpedoings. It might well have further stimulated such summary procedure.

Given the circumstances surrounding the Spanish insurrection from July, 1936, and admitting the shortcomings and limitations of the Non-Intervention Accord, the Observation and Control Scheme, and the Nyon Arrangements, it seems fair to admit that these three agreements, whether or not adopted in other civil disturbances, stand as important experiments in and contributions to international coöperation and administration, and as significant attempts to bring some of the international aspects of civil war within the realm of international regulation and law.

⁷³ Padelford, N. J., "The International Non-Intervention Agreement and the Spanish Civil War," this JOURNAL, Vol. 31 (1937), pp. 578-604. See statement by Secretary Eden in the House of Commons, Nov. 1, 1937. London Times, Nov. 2, 1937.

THE SEIZURE OF THE DANISH FLEET, 1807

THE BACKGROUND

By CARL J. KULSRUD

In 1805 Napoleon was confronted by the naval power of England, on the one hand, and by the vast military strength of Austria, Russia, and presently Prussia, on the other. The armies of the Continental states he had often defeated, but after every defeat these armies had been reorganized and augmented with the help of English gold. The source of that gold had to be destroyed. A military defeat of the British would accomplish that end and probably decide the issue of the war. Napoleon's first idea was, therefore, to invade England. That dream was shattered by the English naval victory at Trafalgar, October 21, 1805.

The defeat of England had to be sought through other means: the exclusion of her commerce from all connections with the mainland. To achieve this end the opposition of the Continental Powers must be eliminated. In the extensive campaign that followed, Napoleon defeated Austria at Austerlitz, December 2, 1805, Prussia at Jena and Auerstadt in October, 1806, and Russia at Friedland, June 14, 1807. He was again free to strike at England. By the Berlin Decree of November 21, 1806, he inaugurated the Continental System. The Treaty of Tilsit, July 7, 1807, provided that England should be requested to make peace. If she refused, France and Russia were to make common war against her. They also were to compel Denmark, Sweden, and Portugal to close their ports to her merchandise and navigation, and to join in the war against her.

England, on her part, had surmised in advance what the stipulations of any treaty made in that year between France and Russia would be.¹ The English Ministry, fearing that Napoleon would seize the Danish fleet, decided to strike first. By the time the reports of Tilsit reached England in the middle of July a powerful expedition was about ready to sail for Denmark. This armament appeared before Copenhagen on August 2. Military operations began on August 16, and the city, which for several days had been subjected to a severe bombardment, capitulated on September 7. On October 21 the English departed with the seventy-six ships of the Danish Navy that had been at anchor in the harbor of Copenhagen. They reported a loss of only forty-two men in a campaign that had lasted twenty-four days and had broken the last hope of Napoleon to assemble a fleet to cope with the English Navy.²

"This transaction has been visited with the most severe, yet uncalled for,

¹ Cf. Heckscher, E. F., *The Continental System* (1922), p. 81.

² Fortescue, Sir John W., *History of the British Army* (1899-1930), Vol. VI, p. 72, note.

condemnation," writes Captain Mahan,³ who finds ample justification for it in the fact that Napoleon had intended to invade Denmark and force her into the war against England. It has been unanimously condemned by Continental writers upon the law of nations and diplomatic history, and almost as unanimously upheld by British and American commentators, who seem to follow the interpretation of Mahan.

Unfortunately, the history of the Anglo-Danish and the Franco-Danish relations in the years preceding the expedition to Copenhagen in 1807 has never been told in sufficient detail to warrant an authoritative appraisal of the policy followed by the parties involved—England, France, and Denmark. Nearly all commentators have based their conclusions upon their observation of the events which occurred in the summer of 1807, particularly after the Treaty of Tilsit. Danish policy has been neglected, and Denmark has accordingly been regarded as an innocent victim of the unmeasured ambition of two imperial Powers.

After a thorough investigation of the policy followed by Denmark the writer believes that such an interpretation is untenable. Denmark occupied a precarious position. For a number of years preceding the summer of 1807 that country had followed an equivocal policy, making the intervention of England well-nigh inevitable. It is the aim of the present study to describe the conditions which prevailed in northern Europe in the years from 1803 to 1807, with particular reference to the relationship between France and Denmark, on the one hand, and Denmark and England, on the other. The circumstances which led directly to this celebrated intervention of one country into the affairs of another and which indicate the juridical basis of that intervention constitute the subject of this paper.

Within this scope the following discussion must stress the diplomatic and military history of the incident, even at the cost of neglecting some of the legal principles involved. Such treatment is inevitable if the aim is to dispel the prevailing misapprehension concerning the immediate effect of the Treaty of Tilsit, the innocence of Denmark, and the seemingly precipitate action of Canning. It is hoped that through this treatment the paper may make some contribution toward resolving the wide discrepancy between the views of Continental and Anglo-Saxon writers on these points.

The seizure of the Danish fleet by England is a "good example of intervention on the ground of self-preservation or imminent danger."⁴ It has been described as a precipitate action, and justified on the ground that to maintain its sovereign rights, or even its existence, England, like other states, had to depend on its own resources, and that under the stress of warfare hasty decisions were often inevitable. A study of the records seems to show that

³ Mahan, Captain A. T., *Influence of Sea Power upon the French Revolution* (1894), Vol. II, p. 277.

⁴ Hershey, A. S., *The Essentials of International Public Law* (1930), p. 238, note 12.

the action taken by England was not precipitate, but was a deliberate choice considered months before the event, when it was apparent that her national existence might be jeopardized.

The right of such intervention is at least tacitly recognized. According to a principle of international law the most comprehensible right of a state is the right to exist as a sovereign unity. To preserve that right it may intervene in the affairs of another state, and by means of armed force coerce it in its national action, for "the duty of self-preservation is even more sacred than the duty of respecting the independence of others. If the two clash, a state naturally acts on the former."⁵

In the course of the nineteenth century the doctrine of intervention underwent some fundamental changes. It is now possible to deny that intervention, even for self-preservation, is a legal right, and to hold that it is but a political act, "a summary procedure above the law."⁶ Before the Congress of Vienna assembled in 1814, however, intervention was generally recognized as a right established by international law.⁷ It had been a common practice among the rulers of antiquity. In the Middle Ages popes, emperors, kings, and feudal lords had never hesitated to intervene in the affairs of a neighbor. Their example was followed by the rulers of the national states when these emerged in the modern era.

This practice was recorded and sanctioned in the pages of historians and commentators on the law of nations. Machiavelli recommended it on the ground of self-interest.⁸ Grotius admitted that in a righteous war a nation might lawfully seize a place situated in a land which was not at war.⁹ According to Vattel, imperative necessity might warrant a belligerent in seizing temporarily a neutral town and placing a garrison there, for the purpose either of protecting itself against the enemy or of anticipating the designs of the enemy upon the same town when its sovereign is unable to defend it.¹⁰

The right of intervention was sanctioned not only by publicists, but also by diplomats and statesmen.¹¹ One of these was George Washington. In a letter to General Lafayette, December 25, 1798, he wrote:

My politics are plain and simple. I think every nation has a right to establish that form of government, under which it conceives it shall live

⁵ Lawrence, T. J., *Principles of International Law* (1915), p. 127.

⁶ Fenwick, C. G., *International Law* (1924), p. 161.

⁷ Hershey, *op. cit.*, p. 243, points out that the doctrine of intervention was probably first set forth by Kant in his *Essay on Perpetual Peace* (1795).

⁸ The Prince, Ch. 21.

⁹ Grotius, Hugo, *De Jure Belli ac Pacis* (Kelsey ed., 1925), Bk. II, Ch. 2, Art. 10. See also *ibid.*, Bk. III, Ch. 17, Art. 3.

¹⁰ Vattel, Emmerich, *The Law of Nations* (1787), Bk. III, Ch. VII, sec. 122.

¹¹ Cf. letters of Major von Schöler, the Prussian representative at St. Petersburg, to the King of Prussia, Oct. 13, 14, 1807, quoted in Hassel, J. P., *Geschichte der Preussischen Politik* (1881); in the same connection see the letter of Comte de Stedingk, the Swedish Minister at St. Petersburg, to his King, Oct. 10, 1807, in *Mémoires Posthumes du Feld-Marschal Comte de Stedingk* (Clason, ed.).

most happy; provided it infracts no right, or is not dangerous to others; and that no government ought to interfere with the internal concerns of another, except for the security of what is due to themselves.¹²

Washington expressed this opinion less than nine years before the English seized the Danish fleet. Together with the other citations and facts given in the preceding paragraphs, it must serve as a basis on which to make an appraisal of the English invasion of Denmark in the summer of 1807, and likewise of the censure of that action by some modern publicists who think rather in terms of the twentieth century than in those of the first decade of the nineteenth.

In actual practice the right of intervention was applied only in the case of a state too weak to protect itself from the aggression of either belligerent, or to circumscribe the actions of its own subjects. A nation at war would not wait while its adversary violated, or even threatened to violate, the territory of a weak neutral, thereby obtaining sufficient advantage to win the war. "In this situation, the belligerent who has ground for apprehension will anticipate and offer the neutral too weak to defend its neutrality the choice of being with him or against him."¹³ Such a choice the English Government presented to Denmark in August 1807.

The strategic importance of straits and artificial waterways, such as the Dardanelles, the Suez Canal, the Strait of Magellan, and the Panama Canal, transcends the interest of the littoral states, and various international agreements have for that reason been concluded to regulate the navigation upon them in time of peace and in the course of a war. If one group of belligerents should attempt to gain exclusive control of such a waterway, the jurisdictional Power or Powers remaining neutral, the other group of belligerents could certainly protest, and perhaps anticipate the enemy by an act of intervention, provided they commanded sufficient resources for such action and the neutral state appeared unable to maintain the inviolable character of the waterway.¹⁴

The Danish Sound is one of these important waterways. In the Middle Ages Denmark obtained control of both littorals and jurisdiction over the Sound, as well as over the two Belts. At the beginning of the seventeenth century she lost control over the eastern shore, but continued to exercise jurisdiction over the Sound and to collect Sound dues until 1857, when the European nations paid her a sum of money for the relinquishment of this prescriptive imposition upon Baltic commerce. During one phase of the

¹² The Writings of George Washington (Ford, ed.), Vol. XIV.

¹³ Stowell, E. C., *Intervention in International Law* (1921), p. 406.

¹⁴ Cf. the Straits Convention of 1923, the Suez Canal Convention of 1888, and the Hay-Pauncefote Treaty of 1901. In 1879 the United States deemed it advisable to protest against the exclusive claims to the Strait of Magellan, and the treaty which Chile and Argentina signed in 1881 guaranteed the free navigation of that strait to the ships of all nations.

Napoleonic Wars, however, the Sound and the position of Denmark were held to be of such importance as to lead both belligerents to seek to obtain control of them. It was at that point that the policy of Denmark called forth the intervention of England.

At the beginning of the nineteenth century Denmark was one of the weaker states of Europe. Her geographic position and her diplomacy became matters of major concern to the belligerents in the Napoleonic Wars after France had occupied Hanover and defeated Prussia in the Battle of Jena in 1806.¹⁵ This concern was accentuated by the introduction of the Continental System, and it became critical when Russia indicated that she would abandon her allies unless they gave her substantial support in the form of subsidies and a powerful diversion in the north of Germany.¹⁶ The climax came with the Battle of Friedland.

Situated at the gateway to the Baltic Sea, Denmark occupied one of the most strategic positions in Europe. From the plains and forests of the north came the timber and naval stores with which England and France equipped their navies, and the grain and other products that made the waging of the great maritime wars possible.¹⁷ In the second half of the eighteenth century the struggle for the possession of these resources was an essential part of European diplomacy.¹⁸ Since the trade in these supplies must of necessity pass through the Sound or the Belts, there was a possibility of its being interrupted by Denmark, particularly if Danish policy should become subservient to a great military state desiring to close the Baltic to the ships of its enemy.¹⁹

¹⁵ The line of demarcation of 1795, by which Prussia secured the neutrality of the German Princes north of the River Main, had also served as a guarantee against the invasion of Danish territory.

¹⁶ Cf. the correspondence between Lord Howick, British Foreign Secretary, and the British representatives at St. Petersburg, Charles Stuart and the Marquis of Douglas, in Hansard, Parliamentary Debates, Vol. X (1808).

¹⁷ Ekegard, E., *Studier i Svensk Handelspolitik under den Tidigare Frihedstiden* (1924), *passim*; Clason, S., "Vårt Hundradsårsminne: Krisen 1808-1809," in *Historisk Tidskrift* (1909), p. 801.

¹⁸ *Recueil des instructions données aux ambassadeurs et ministres de France*, Vol. 13 (Denmark), the instructions to Marquis de Verac, 1775, and to Baron la Houze, 1769; *ibid.*, Vol. 9 (Russia), the instructions to Durand, 1772, and to De Juigné, 1775.

¹⁹ For the current ideas and policy of employing the Danish navy to close the Baltic to the ships of belligerents, which at that time meant the ships of England, cf. the letter of Napoleon to Marshal Bernadotte, Aug. 2, 1807 (*Correspondance de Napoleon I^{er}*, Vol. XV), instructing him to complain to the Danish Government that it had failed to prevent the violation of a sea that to Denmark ought to be as sacred as her own territory. See also Napoleon's letter to Talleyrand, of the same date (*loc. cit.*).

The Armed Neutrality Convention of 1780 had declared the Baltic to be a closed sea, and this stipulation reappeared in Art. 10 of the Dano-Swedish Treaty of March 27, 1794, for which see *Danske Traktater, 1757-1800 (Udenrigsministeriets Udg., 1882)*. In an interview with Joachim Bernstorff, Aug. 5, 1807, the French Minister to Denmark held that the Baltic was a closed sea. The situation had changed, and Bernstorff felt constrained to argue that "the principle, *Maris Baltici Clausi*, was nowise *a priori* a clear and allowable principle." Not all the states bordering on the Baltic were at that time neutral. See Sörenson, C. Th.,

Moreover, Denmark might be forced to abandon her policy of neutrality and to take a position by which she would materially affect the Anglo-French duel for empire.

In her foreign policy Denmark seemed to indicate that in order to placate the French she found it advisable to take an indifferent attitude toward her agreement with England. Thus, the Anglo-Danish difficulties that arose from the maritime controversies during the War for American Independence were composed by the Convention of July 4, 1780,²⁰ but a few days later Denmark disregarded the terms of this agreement and joined with Sweden and Russia to establish the Armed Neutrality of 1780. In a similar fashion the Danish Government ceased to honor the terms of its Convention with England of August 29, 1800,²¹ when it became a party to the Armed Neutrality of that year. When England remonstrated against such an abandonment by Denmark of her international agreements and of her neutrality, the Danish Government responded that it was unable to resist "the operation of external influences and the threats of a formidable neighboring power."²² Here is evidence that Denmark did not possess sufficient military strength to enforce respect for her neutrality.²³

That fact was recognized during the wars of the Third Coalition, especially after Prussia abandoned her policy of neutrality in 1806, and through her defeat exposed Danish territory to the inroads of the armies of Napoleon and his enemies. In the years immediately preceding the seizure of the Danish fleet by England, not only England, but Prussia also, and Russia and Sweden as well, believed that Denmark would obsequiously yield to the pressure which Napoleon began to exert along the Baltic littoral after his army had occupied Hanover.²⁴ Severally and jointly these Powers sought to induce

Den Politiske Krise i 1807 (1887), pp. 20-23. For the Swedish attitude see Grade, Anders, *Sverige och Tilsit-Alliansen, 1807-1810* (1913), p. 136. The Russian view is stated in a letter of M. de Romanoff to the Swedish Ambassador to Russia, de Stedingk, Sept. 24, 1807, which is included in *Mémoires Posthumes de Stedingk*. Perhaps the Countess Schimmelmarm made the most pertinent observation: "Cette Baltique fermée me a fait rire; le grand belt est oblié, et Nelson a dit justement qu'il eut passé certainement malgré les canons des deux côtes avec un certain vent qu'il connaissait, que les anglais n'ont pas oblié." Letter to Countess Stolberg, Feb. 10, 1810, in Bobé, Louis, *Efterladte Papirer fra den Reventlowske Familiekreds* (1895-1922), p. 20.

²⁰ Martens, G. F., *Le Recueil des traités des puissances et états de l'Europe* (2d ed.), Vol. III, p. 177.

²¹ *Ibid.*, Vol. VII, p. 149.

²² The London Chronicle, Sept. 29, 1807. For Canning's summary of this phase of Danish policy, see Hansard, Parl. Debates, Vol. X, p. 269.

²³ For statistics on the composition of the Danish army and an explanation of its inadequacy for the task of guarding the frontier see Raeder, J. V., *Danmarks Krigs-og Politiske Historie fra Krigens Udbrud 1807 til Freden til Jönköping den 20de December 1809* (1845), Vol. I, pp. 1-5. Raeder concludes that resistance to French aggression was hopeless, and adds: "If, therefore, the status of neutrality is to have any significance, it must be defended; but, as explained above, such defense requires altogether different strength on land and sea than that which Denmark developed in the years from 1805 to 1807."

²⁴ In 1803 it was expected that Napoleon would order his armies to march into Holstein.

Denmark, even by the threat of using force, to join them in the struggle against the common enemy.²⁶ These efforts were made in vain. In the words of Ranke, "the unfortunate egoism which at this time characterized the policy of Denmark, as previously it had characterized that of Prussia, served to prevent the states of Europe from uniting at the proper moment to resist successfully the French domination of the European nations."²⁶

Several events tended to confirm the suspicion of these states that Denmark was yielding unnecessarily to Napoleon and was indifferent, if not hostile, toward England and her allies. These events led directly to the subsequent intervention in Danish affairs by one of the contending forces.

The first of these events occurred in 1803. With the French occupation of Hanover in May the war was brought into a territory contiguous to the Danish frontier. This violation of German territory evoked anger in Berlin and bitterness in St. Petersburg. Several of the smaller states in Germany armed, and Denmark sent an army to her border. In an article published in *Le Moniteur*, August 28, 1803, Napoleon challenged the attitude of Denmark and recommended that the Danish army be disbanded, for it would not afford any considerable obstacle to the advance of the French armies.²⁷ The Danish troops were accordingly withdrawn at the beginning of September.

The withdrawal of the troops, apparently at the suggestion of Napoleon, was carefully observed by contemporary publicists. Some declared that Denmark had again evinced her disinclination to follow a policy displeasing to a powerful neighbor,²⁸ while others came to believe that Holstein might now become prey to the aggression of France. The substance of the former view was expressed in the columns of the *Annual Register* for 1803,²⁹ and the latter view was discussed by Tsar Alexander I and Frederick William III at their interview at Memel in that year.³⁰

Cf. Holm, *Danmark-Norges Udenriske Historie* (1895), Vol. II, p. 45 ff. The Danish reply to the Russian proposal of coöperation between Denmark, Russia, and Prussia for the purpose of protecting northern Germany and Denmark against French aggression is given in Holm, *op. cit.*, Vol. II, p. 46 ff. See also *Meddelelser fra Krigsarkiverne* (issued by Danish General-staben, 1883-1896), Vol. I, p. 402 ff. This work is hereinafter cited as *Krigsarkiv*.

²⁶ For notes on the precarious position of Denmark and the various attempts to induce her to join in the war against Napoleon cf. the letter of Haugwitz to the Duke of Brunswick, Sept. 9, 1806, in Baileu, P., *Preussen und Frankreich*, Vol. II; a letter of Frederick William III to Alexander I, Nov. 30, 1806, and a letter of the latter to the former, Dec. 1, 1806, in Baileu, *Briefwechsel Friedrich Wilhelm III mit Kaiser Alexander I*; Hardenberg's Memorial to the King of Prussia and the Tsar, April 7, 1807, in Ranke, L. v., *Fürst Hardenberg*, Vol. III. The Convention of Bartenstein between Russia and Prussia provided for concerted action among the Great Powers for the purpose of inducing Denmark to become a party to the Convention and to aid in the execution of its provisions. Cf. the correspondence between Lord Howick and Benjamin Garlike, the English Minister to Denmark, during November and December, 1803, in Hansard, *Parl. Debates*, Vol. X.

²⁶ Ranke, *Fürst Hardenberg*, Vol. III, p. 256.

²⁷ Bedrow, G. G., *Chronik des Neunzehnten Jahrhunderts* (1805-1837), Vol. I, p. 575.

²⁸ *Parl. Debates*, Vol. X, Feb. 3, 1808.

²⁹ The *Annual Register* (1803), p. 287.

³⁰ Alexander told the King that he had been duped by the caresses of Napoleon, and "que

That Denmark might become the victim of French aggression was again suggested by the events of 1806. In October Prussia had been crushed at Jena and at Auerstadt, and Blücher was retreating toward Lübeck, hotly pursued by a French army, whose columns skirted and at times crossed over the Danish boundary. For a time there was danger that the pursuit might be terminated in Danish territory.

To assert her position as a neutral state Denmark had again stationed her army in southern Holstein. Blücher, who had no confidence in the policy of Denmark, feared that the French would advance through Danish territory and surround him. He wrote to the Danish commander, Major General von Ewald, inquiring whether Denmark was prepared to resist the armies of Napoleon in the event they should cross the frontier, and received a disdainfully evasive answer.³¹ He immediately wrote a second letter to Ewald, in which he declared that if he failed to receive a definite and satisfactory reply he could see no valid reason why he should respect the neutral position of Denmark.³² In answer to this Ewald wrote bombastically that he was commanded to defend the frontier and that he would have to be trampled to the ground before he would allow any alien armies to enter Danish territory.³³

The Prussians carefully respected the neutrality of Denmark, but the French were less scrupulous.³⁴ Early in November some French troops crossed the Danish line and stumbled into a confused encounter with the native soldiers, in which a few Frenchmen were killed and some wounded. The invaders then began to pillage the countryside, "where they burnt a village, plundered the estate and destroyed the cattle belonging to Count Christian Bernstorff."³⁵ The Danes, who also suffered some casualties,³⁶ remonstrated with the French commander concerning this invasion of their territory and violation of their neutrality. The remonstrance, however, was made in vain. Ewald, the Danish spokesman at the French camp, was insulted and threatened with the firing squad,³⁷ and only with great difficulty was he able to return to his headquarters.³⁸

les françois ne borneraient pas là leur occupations; que le raison que les poussait à fermer aux Anglais le continent les porterait plus loin que le Hanovre, et les conduirait jusqu'au Danemark, afin de s'emparer du Sund, qu'alors les Anglais bloqueraient la Baltique comme ils bloquaient l'Elbe et le Weser, et fermeraient la dernière issue restée au commerce du continent." See Thiers, A., *Le Consulat et l'Empire* (1845), Vol. IV, p. 445.

³¹ Blücher to Ewald, Nov. 6, 1806, in *Krigsarkiv.*, Vol. II, p. 200.

³² *Krigsarkiv.*, Vol. II, p. 200.

³³ *Ibid.*, Vol. II, p. 202, the message of Ewald to Blücher, Nov. 6, 1806.

³⁴ The Prince Regent of Denmark to Prince Christian August, Nov. 21, 1806, in *Krigsarkiv.*, Vol. II.

³⁵ Garlike to Lord Howick, Nov. 11, 1806, in *Parl. Debates*, Vol. X.

³⁶ Raeder, *op. cit.*, Vol. I, pp. 13-14, gives the Danish losses as four killed and thirteen wounded. Seven horses were killed and one cannon was lost.

³⁷ Raeder states: "General Murat modtog General v. Ewald saare uvendig, Ja! truede endog med at lade ham füsilere og vidste ham saa meget Overmod og stolthed som muligt."

³⁸ Raeder reports the story in considerable detail. Canning's account (*Parl. Debates*,

This effort on the part of Denmark to preserve her neutrality was fruitless indeed. The French generals took the stand that it was Denmark that had been the aggressor, for her troops had without provocation fired upon the French.³⁹ They admonished the Danes to avoid such encounters in the future, either by demobilizing, or by withdrawing their main army from the frontier.⁴⁰ The further to induce a compliant mood in the Prince Regent of Denmark, perhaps also to detach Gustavus IV from the Third Coalition, Bernadotte now began to suggest that Norway belonged more fittingly to Sweden than to Denmark.⁴¹ Denmark, having no choice, heeded the pointed suggestions of Bernadotte and Napoleon. The main part of the army was withdrawn from the frontier, and the commanders of the outposts on the border were instructed to counteract all suspicion of the French which the soldiers might entertain, and to inculcate in them a friendly feeling toward the foreigners.⁴² No effort was to be spared to convince the French that Denmark felt no hostility toward them.

While the French armies that marched toward Lübeck were thus violating Danish territory, General Mortier's occupation of Hamburg and Cuxhaven, and the measures he was directed to adopt in order to enforce the Continental System along the Elbe and the Weser, occasioned still greater embarrassment to Denmark in her efforts to maintain her neutral position.⁴³ They led to a new Anglo-Danish controversy upon the matter of neutral trade,⁴⁴ and tended to confirm the belief that the French would occupy Denmark.

There was at first a panicky fear among the people along the Danish border, who circulated various reports about an impending French invasion. The morale of the army was affected. One of the officers wrote to Ewald that the French were preparing to invade Holstein with a force of 30,000 men.⁴⁵ He understood that they would close the ports of Tönning and Husum to the

Vol. X) was substantially correct: "Ewald was conveyed to the headquarters of the French general, where, in place of being treated with the distinction to be expected from an officer of a friendly power, he met with no very flattering reception; and was sent back, after his horse had been stolen and his pockets robbed, under every species of injury which a licentious soldiery could inflict." Cf. Garlike's letter to Howick, Nov. 11, 1806, *Parl. Debates*, Vol. X.

³⁹ General Berthier to the Prince Regent, Nov. 10, 1806, and General Belliard to the Prince, Nov. 8, 10, 1806, in *Krigsarkiv.*, Vol. II. See also the account of the interview of Liliencrone with Bernadotte, *ibid.*, Vol. II, p. 188 ff.

⁴⁰ Berthier to the Prince Regent, Nov. 10, 1806, *loc. cit.* Cf. Garlike's letter to Howick, Nov. 15, 1806, *Parl. Debates*, Vol. X. Napoleon said that four or five thousand men would be sufficient for policing the country. Letter to Talleyrand, Nov. 21, 1806, in *Correspondance de Napoleon I^{er}*, Vol. XV.

⁴¹ *Krigsarkiv.*, Vol. II, p. 288; *Parl. Debates*, Vol. X, p. 252 ff.

⁴² The Prince Regent to Berger, Nov. 21, 1806, *Krigsarkiv.*, Vol. II.

⁴³ Napoleon to Mortier, Nov. 16, 1806, *loc. cit.* Letter 11,268 (*Cor. Napoleon*), directed Mortier to occupy Hamelin.

⁴⁴ Cf. the notes exchanged by the Danish Ambassador in London and Lord Howick, March 9, 11, 1806, in *Parl. Debates*, Vol. X.

⁴⁵ Wegner to Ewald, Nov. 17, in *Krigsarkiv.*, Vol. II. See also Wegner's memorials of the two following days, *loc. cit.*

British flag and then proceed to occupy the Danish Islands, whence they would operate against England and Russia.⁴⁶ The generals in command of the troops on the border became uneasy. Major General Berger asked the Prince Regent for more specific instructions. Should he, if the French army advanced with overwhelming force, allow himself to be disarmed, or begin a general retreat? The Prince replied: "Overwhelming force cannot be resisted. The honor of His Royal Majesty's army must not be compromised. Besides, it seems extraordinary (for the French) to attack a nation that has not yet taken a single warlike measure. Your retreat will take you by the way of Regensburg to the right side of the Eyder. The squadron at Poppenbüttel will retreat by the way of Segeberg to the Eyder. However, all instructions must be given orally, for the written word is dangerous on an occasion such as this. The common people must not become acquainted with the situation."⁴⁷ A few days later Berger sent the following message to Ewald: "At this very moment the most definite information has been received that in the morning the French will advance into Holstein. We shall retreat to Regensburg."⁴⁸

The Danes were so confident about the French objective that they immediately prepared for a general retreat. The early hours of November 25 witnessed the hurried northward march of several detachments. At five o'clock in the morning Ewald sent a dispatch to the Prince Regent reporting that he had taken the measures necessary for the withdrawal of the royal forces, and that he hoped the whole army was on the march toward Schleswig.⁴⁹ Toward evening definite information arrived indicating that the reports about the French advance were unfounded, and that the retreat had been unnecessary. Some detachments under other commanders were ordered that evening to return to their cantonments, but Ewald declared that it was then too late for him to send back his own troops, who had been on the march the whole day.⁵⁰ In humiliation he dispatched news of his error to the Prince Regent. The Prince was astonished at the rapidity of the retreat and issued orders that it be countermanded and not resumed until the army should be actually pressed by the invaders. If there should be a French advance, the Danish commander was to protest against it, and to yield only if his protestations were in vain. Mere rumors, however, should not impel his men to give up their posts.⁵¹

⁴⁶ Garlike to Howick, Nov. 24, 1806, *Parl. Debates*, Vol. X.

⁴⁷ The Prince Regent to Berger, Nov. 19, 1806, *Krigsarchiv.*, Vol. II.

⁴⁸ *Ibid.*, Berger to Ewald, Nov. 24, 1806. See also the letter of Leschly to Major Flindt, of the same date, *loc. cit.*

⁴⁹ *Ibid.*, Ewald to the Prince Regent, 5:00 a. m., Nov. 25.

⁵⁰ *Ibid.* Ewald wrote: "At precisely a quarter after six I received the enclosed letter from Major General Berger. May it please Your Royal Highness to be merciful to me. At this moment I feel that the first report of Berger and now his last have made me appear a fool. I cannot now undo what has been done and recall the march of the soldiers. The dark night is before me. With those who are with me I shall remain at Segeberg."

⁵¹ The Prince Regent to Ewald, Nov. 25, *loc. cit.* To Captain Haffner he wrote: "Dersom

To mitigate the possibly grave consequences of this retreat the Prince sought to give it the aspect of an ordinary Danish maneuver. To Ewald he wrote:

I have received your report dated November 25. We must endeavor as far as possible to conceal the disorders which occurred yesterday. To the troops it must be represented as constituting their exercise, but the staff officers and other influential men must be allowed to see the incident in its true light.⁵²

Not only the Prince Regent of Denmark, but also the governments of the other states of northern Europe were deeply concerned about Franco-Danish relations.⁵³ These governments might decide to intervene in Danish affairs. Herein lies the significance of the events which had occurred along the frontier of Holstein. At St. Petersburg Tsartorisky discussed the matter with the Danish representative. It was considered at the various Courts, abstractly debated in the salons of Paris, and anxiously weighed by merchants even in places as far away as Riga. *Le Moniteur* referred to it, and English newspapers likewise.⁵⁴ The King of Sweden earnestly sought to adopt measures calculated to meet the dangers that would follow the approach of the French armies to the Sound.⁵⁵

At this threat of a French advance England was as much alarmed as was Sweden. John George Rist, the Danish Minister to England, observed that from the day the French occupied northern Germany the English Government became suspicious of the policy followed by the Prince Regent, who, they feared, would probably yield to the pressure of Napoleon to obtain control of Denmark.⁵⁶ Benjamin Garlike, the English Minister to Denmark, declared that the sudden retreat to the Eyder would give rise to the supposition that an arrangement of some kind had been made between the Danish and the French Governments.⁵⁷

The belief in the existence of such collusion persisted. Although the Danish Foreign Minister, Count Christian Bernstorff, endeavored to remove this suspicion by stating that there was no understanding between France and Denmark, and that the retreat had not occurred at the suggestion of France, Garlike felt compelled to report to his government on November 29 that the

de (the French) med magt vil indtraenge og ingen Protest vil imodtage, maa Magt imodsaettes med Magt: N. B., dog vig for Overmagten." *Krigsarkiv.*, Vol. II.

⁵² The Prince Regent to Ewald, Nov. 26, *loc. cit.* Cf. his letter to Berger of the same date.

⁵³ Cf. Holm, *Danmark-Norges Udenriske Historie*, Vol. II, p. 106 ff.

⁵⁴ *Ibid.*

⁵⁵ On Nov. 29, 1806, Garlike wrote to Lord Howick (Parl. Debates, Vol. X): "Mr. Pierrepont (Swedish Minister in London) will have informed your lordships of the very unfavorable impression (which the retreat made) upon the King of Sweden and of the strong measures of precaution which that monarch has judged it proper to adopt against the new danger that would result to his own interests and to those of his allies." Cf. *ibid.*, for the letters of Howick to Garlike of Dec. 3, 1806, and Jan. 22, 1807.

⁵⁶ Rist, J. G., *Lebenserinnerungen* (1880-1888), Pt. I, pp. 413-416.

⁵⁷ Garlike to Howick, Nov. 29, 1806, *loc. cit.*

danger to Holstein was "not less than it had been."⁵⁸ The British Foreign Secretary, Lord Howick, replied:

The accounts which have reached this country of the retreat of the Danish army from Holstein, and the advance of the French to the Eyder, from which river there is reason to apprehend that His Majesty's flag has been excluded, render it necessary that I should instruct you immediately to require of the Danish government a frank explanation of the motives which have produced measures apparently so injurious to the interest of His Majesty; and also the system of policy which that government means in the future to pursue in its relations with this country and with France.⁵⁹

Even the peace-loving Charles James Fox, while Foreign Secretary in the Ministry of All the Talents, declared that if Denmark should yield to the wishes of France, "the Court of London, although it thoroughly regretted such a development, could only regard it as an act of hostility towards Great Britain."⁶⁰

Denmark's position was thus one of international rather than national significance. As a sovereign state she was bound to compel both belligerents to respect her neutrality, but it was obvious to contemporaries that for this task she did not possess sufficient resources, and that she would be disinclined to resist the advance of the French armies, if these should be directed to occupy Holstein and the adjoining territory. It was equally obvious that if she persisted in her policy of yielding to the French, she would be committing an injustice to the cause of the Allies, and expose her territory to measures of reprisal. Of this fact Denmark had received definite indications, especially from England. But Denmark was patently unable to prevent the violation of her territory, and there were at that time no other neutral states capable of coöperating with her. Why did she not invite the help of England and the Allies, against whom the hostile measures of the French would presumably be taken? Such action on the part of a neutral would perhaps be approved by some modern jurists,⁶¹ and perhaps even by Article Ten of the Covenant of the League of Nations; but it would also be a direct participation in war. Denmark was not prepared to take that step, although England and Sweden felt that she might well do so.

With this view in mind the English Government did not confine itself to fruitless remonstrances; it rather sought means by which to protect Denmark

⁵⁸ Garlike to Howick, Nov. 29, 1806, *loc. cit.*: "Every account transmitted within these few days to Copenhagen, except those received by the government, increases our apprehension that the attack is not far off." Garlike added that the Danish Government believed an attack might occur, and that precautions were being taken to defend the Islands, but the government acted with the greatest secrecy and did not acknowledge the need of help from foreign nations.

⁵⁹ Letter of Dec. 9, 1806, *Parl. Debates*, Vol. X.

⁶⁰ Quoted in Holm, *op. cit.*, Vol. II, p. 108.

⁶¹ Westlake, John, *International Law* (1910), Vol. I, p. 315.

against French aggression, or to enter upon intervention for the purpose of preserving "as against external aggression the territorial integrity and existing political independence" of a friendly nation. To Wedel-Jarlsberg, Rist's predecessor in London, Erskine, the Lord Chancellor, had proposed that Denmark and England should take joint action against France,⁶² and in April, 1806, Fox had made a formal offer of British assistance. Sweden, being deeply interested, would contribute an army of 25,000 men.⁶³

Another plan, calling for the abandonment of the Peninsula of Jutland and the concentration of the combined forces for the defense of the Islands and the Sound, was also considered.⁶⁴ This plan was favored by all those Danes who believed that the chief strength of the monarchy was derived from its great maritime enterprises, supported by the fleet, since these enterprises, concentrated in the Islands and in a few towns in Norway, could be carried on even if the French should occupy the Peninsula.

If one of these proposals had been adopted, all apprehension as to the exposed position of Denmark would have been removed. A French attack on Zealand would under those circumstances encounter many great difficulties, such as might, indeed, with the proper exercise on the part of the (Danish) Court prove insurmountable. England would coöperate if Denmark should really stand in need of such aid,⁶⁵ but the Danish fleet might alone be sufficient for this defense.⁶⁶ To ascertain whether it would be so employed the British officials were carefully observing its movements and its state of preparedness.⁶⁷

To these various precautionary projects Danish statesmen remained singularly indifferent.⁶⁸ Their disinclination to turn Denmark from her position of lucrative neutrality and their fear of antagonizing Napoleon made them declare that no danger threatened. They adopted no measures of defense whatever, thus exposing their country to the intervention of either belligerent.

Garlike doubted the sincerity of the Danish policy and warned his government about the consequences that might follow. He believed that if the Peninsula should fall, the Danish Government would still continue to declare its determination to persevere in the firmest resolution to resist the enemy and its readiness to arm the fleet immediately for the protection of the

⁶² Holm, *op. cit.*, Vol. II, p. 108.

⁶³ Howick to Garlike, Dec. 3, 1806, Parl. Debates, Vol. X.

⁶⁴ Bobé, *Efterladte Papirer fra den Reventlowske Familiekreds*, entries for August and September, 1807; Parl. Debates, Vol. X, letters of Garlike to Howick of Nov. 14, 24, 29, 1806, and Jan. 12, 1807.

⁶⁵ Howick to Garlike, Dec. 3, 1806, *loc. cit.*

⁶⁶ Garlike wrote to Howick on Jan. 7 that if the Danish fleet were in as high a state of efficiency as was being represented, "It may still be hoped that every effort of France will fail against the Danish Islands."

⁶⁷ Canning believed that Denmark did not intend to use the fleet in self-defense. Parl. Debates, Vol. X, pp. 274, 280. During the siege of Copenhagen the fleet took no active part in the defense of the city.

⁶⁸ Cf. Raeder, *op. cit.*, Vol. I, p. 6.

Islands. "But having said this it is my duty not to conceal from your Lordship," he wrote to Lord Howick, "how much my apprehensions increase with respect to the persons in high though not in the first offices, to whom great confidence will be shown in the hours of danger, and who must have considerable influence in the direction of the public opinion and of the means of repelling the enemy. . . . They will present the danger to be actually less than it is, in order to prevent the activity of others, and will exaggerate it with the chance of securing and extending their own authority. These persons will then be capable of imputing as a crime, that more effectual means were not concerted for the defense of the country; and will recommend an accommodation with France through the voice of the populace, not as an avowal of their choice, but as a measure of the necessity to which they have been reduced."⁶⁹ A few days later Garlike stated that in consequence of this inadequate preparation the enemy might be able rather to seize the Danish fleet than to treat for it.⁷⁰

The Danish fleet presented a problem on which the English Government insisted there should be a complete understanding between Denmark and England. In his letter to Garlike of December 3, 1806, Lord Howick wrote:

Though His Majesty must experience the deepest regret from any interruption in the relations now so happily subsisting between the two Powers, it would be impossible for the King to acquiesce in any arrangement whereby the whole, or any part, of the Danish navy might be placed at the disposal of France. If therefore it should happen that, in order to secure the German dominions of the Crown of Denmark, that Power should be induced to comply with a demand of this nature, His Majesty could not avoid taking such measures as in that case would become indispensable for the honor of his crown and the interest of his people. Should any question of this sort arise, you will at once state distinctly and unequivocally the feelings of this government upon it.⁷¹

Garlike in his reply put the question of the Danish fleet still more bluntly. On December 28, 1806, he inquired of Lord Howick whether it would be advisable to declare to the Danish Government that any arrangement with the French upon this matter would "infallibly lead to open and active war on the part of Great Britain." Unfortunately, he never found the opportunity to discuss this entire matter candidly with Joachim Bernstorff, the Director of the Danish Foreign Office.⁷²

Here then was Denmark occupying one of the most strategic positions in Europe, and possessing a fleet second only to that of England.⁷³ In the war then raging between Napoleon and England these two assets might be the decisive factors of victory for either belligerent that could obtain control of them. European statesmen believed that Napoleon was only awaiting a favor-

⁶⁹ Garlike to Howick, Nov. 24, 1806, *Parl. Debates*, Vol. X.

⁷⁰ *Ibid.*, Dec. 28.

⁷¹ See also Howick's dispatch of Dec. 9, *loc. cit.*

⁷² Garlike's dispatch of Dec. 28, 1806, *loc. cit.*

⁷³ That was especially true after Trafalgar.

able opportunity to seize them both. They felt, likewise, that Danish resources were insufficient for effective defense, that Denmark was partial to the cause of France, and that her rulers would remonstrate against the violation of their neutrality but would not resist the French advance. Russia, Sweden, and Prussia had threatened to compel Denmark to join them in the war against Napoleon. Months before Canning became the British Foreign Secretary the English Government had sought an understanding whereby Sweden, England, and Denmark would form an alliance to defend Danish territory. Three months before he took office the government suggested that it would be compelled to take drastic action to forestall the possible seizure of the Danish fleet by Napoleon.

Anglo-Danish relations were also embittered by frequent controversies over the increasing activities of neutral merchants. The trade of the neutral states expanded with every war and shrank with every return of peace.⁷⁴ During the War for American Independence the city of Copenhagen experienced one of its great periods of flourishing trade,⁷⁵ and in the wars of the French Revolution and the Napoleonic Wars it enjoyed a few years of still greater prosperity.⁷⁶ The history of other Scandinavian centers of trade was similar to that of Copenhagen. While the total trade of the neutral states prospered, that of some individual merchants suffered at the hands of privateers and over-ambitious naval commanders. In the disputes which ensued, the neutral government was concerned mainly over the economic losses suffered by these individuals when their ships were captured, while the belligerent government found it necessary to weigh the effect which the total neutral trade would have upon the issue of the war.⁷⁷

Fundamentally, the controversy between neutral Denmark and belligerent England did not arise from an urgent necessity of protecting the trade of the neutral country, for as long as the war endured, this trade would flourish and when the war ended it would languish. The dispute was rather concerned with the extent to which a non-combatant nation might increase its commercial activities at the expense of a belligerent, and through its interposition prolong the war by nullifying the efforts of that belligerent's fleet.⁷⁸ The

⁷⁴ Cf. Nathanson, *Danmarks Handel, Skibsfart, Penge-og Finantsvaesen fra 1730 til 1830* (1832), Vol. I, p. 102; Bugge et al., *Den Norske Sjøfarts Historie* (1931), p. 528 ff; Amneus, *La Ville de Kristiania, son Commerce et son Industrie* (1900), p. 50.

⁷⁵ Odhner, *Sveriges Politiska Historia under Konung Gustaf III's Regering* (1885), Vol. II, pp. 121-122; Reumert, *The Commercial Geographic Importance of the Situation of Copenhagen* (1926), pp. 29-30.

⁷⁶ Raeder, *op. cit.*, Vol. I, pp. 7, 25.

⁷⁷ Cf. the interpretation given by Heckscher, *op. cit.*, p. 25 ff.

⁷⁸ In his note to Lord Howick, March 9, 1807, Rist, the Danish Minister, contended that Danish vessels had the unquestionable right to engage in the coastal trade of France and her allies. To this contention Howick replied, March 17: "The coastal trade of the enemy in time of peace is carried on by his own navigation. Even the other branches of the trade referred to, viz., from Holland to France, to Spain, and the hostile ports in the Mediter-

controversy arose from the measures adopted by the belligerent to protect its rights from the encroachment of the neutral.

Anglo-Danish maritime difficulties had been slow in developing. For two years or more after the war reopened in 1803, neutral trade and shipping remained practically undisturbed;⁷⁹ and through her treaty with England of 1803 Denmark had obtained favorable terms for her navigation.⁸⁰ Thus the seizure of her ships diminished steadily until in 1805 only thirty-five vessels were apprehended, and of these but three were adjudged good prize to the captor. In 1806, however, came the defeat of Prussia, the Continental System and its ramifications, the more frequent seizure of neutral ships by British privateers and men-of-war, and the more rigid application of the prize law by British judges.⁸¹ Sharp protests to England were made by the Danish Government, and these were answered by the equally pointed replies of Lord Howick.

The Berlin Decree, issued by Napoleon in November, 1806, and the Orders in Council from London in January, 1807, cast an atmosphere of unusual bitterness about the controversies between neutrals and belligerents.⁸² These regulations mark a complete departure from the principle which, according to the statement of Canning, prescribed that the rights of all states were secured by the sanctity of public law, and by which even the weaker were preserved from aggression, the principle applying at least through the conflict of interests, if not by means of immediate protection.⁸³ Into the policy of the belligerents, if not into that of the neutrals, they injected a spirit of retaliation. The Berlin Decree declared that "it is a natural right to oppose such arms against an enemy as he makes use of and to fight in the same way as he fights." Lord Howick interpreted this to mean that "if third parties suffer from these measures, their demand of reparation must be made to that country which first violates the established usages of war and the rights of neutral states."⁸⁴

anean, in time of peace, chiefly pass by the navigation of those countries respectively." When neutral navigation was enlisted to carry on this trade, it served "to rescue the commerce of the enemy from the distress to which it is reduced by the superiority of the British navy, to assist his resources, and to prevent Great Britain from bringing him to reasonable terms of peace." Both notes are found in *Parl. Debates*, Vol. X.

⁷⁹ Lindvald, A., "Danmark-Norges Handel-og Skibsfart, 1800-1807," in *Dansk Historisk Tidsskrift* (1815-1817); Heckseher, *op. cit.*, pp. 309-311.

⁸⁰ *Danske Traktater efter 1800* (Copenhagen, 1871).

⁸¹ Lindvald, *loc. cit.*, pp. 403-408. "Fra 1806 kom selv den største Samvittighedsfuld til kort. Søkrigen antog stedse voldsommere Former og Overgrebet mod den neutrale Handel blev stadigere flere." From June 14 to Nov. 3, 1806, sixty-eight Danish ships were seized. In 1807 the number was greater. *Ibid.*, p. 408.

⁸² Presently there were to be no neutral carriers in Europe. Thenceforth the controversy was between England and America.

⁸³ *Parl. Debates*, Vol. X, p. 282.

⁸⁴ Anderson, F. M., *The Constitutions and Documents Illustrative of the History of France* (1904), p. 386. Howick's interpretation was made in a note to Rist, March 17, 1807, *Parl. Debates*, Vol. X. Cf. Vattel, *The Law of Nations*, p. 40.

That the spirit of retaliation had now in large measure superseded legal principles as the guide in international transactions the Danish Government sought to ignore, passively in its relations with France, and positively in its negotiations with England in 1807, at the time when it stood forth as the champion of neutral rights. It dispatched a note to Rist in London, instructing him to declare that "the palpable inconsistencies and falsehoods" of the Orders in Council of January, 1807, could "not be equalled but by their fatal consequences with respect to society." From the regulations of the Orders the commerce of Denmark, including her participation in the coastal trade of France and her allies, should be exempted, for it was guaranteed by the public law of nations and by the sacred faith of treaties. The principle of belligerent retaliation should not affect Denmark, for she had never swerved from the strict execution of her treaties, or from her duties toward England. Rist was to point out that the English Government was following a policy which rendered the stipulations of treaties, and the pacific relations between states

subordinate to a right of war, indefinite in its principles, unlimited in its extent, incalculable in its consequences, but completely foreign to, and by no means binding on, a neutral power, independent, and protected by solemn and recent treaties. . . . This is the spirit of a measure which inflicts upon the commerce of Danish subjects the most severe wounds of which neutrality offers an example.⁸⁵

The Danish note compared the effect of the Orders in Council with that of the Berlin Decree establishing the Continental System. Here it departed from its discussion of the principles involved and frankly indicated that Denmark protested to England chiefly because Danish trade would be less severely disturbed by the French regulations than by the English. In his reply to Rist, Lord Howick challenged the contentions of the Danish Government. He held that neutral rights of Denmark were not curtailed, and explained that the Order in Council, unlike the Berlin Decree, might be a boon to Danish commerce.⁸⁶

The exchange of notes did not ease the tension between the two governments. It served to convince England that Denmark was subservient to Napoleon and unfriendly to the Allies. English officials observed that Denmark did not protest against the Berlin Decree,⁸⁷ and Canning said in the House of Commons that the manner in which the Danish Government had remonstrated with England on the subject of the Orders in Council, which was a partial retaliation for the French decree, revealed "anything but a

⁸⁵ Rist to Howick, March 9, 1807, *Parl. Debates*, Vol. X.

⁸⁶ Howick to Rist, March 17, 1807, *loc. cit.* See note 78 *supra*.

⁸⁷ *Ibid.* Howick stated: "No intention of resistance (to the French decree) has appeared in any public document, or any steps taken by the Danish government; whilst, on the other hand, it has observed a conduct not apparently calculated to enforce the respect due to the rights of a neutral nation."

disposition to cultivate impartiality," and that this Danish remonstrance had appeared in the same light to the last administration.⁸⁸ There was also complaint in England about "the shameful misconduct of neutral merchants, who lend their names for a small percentage, not only to cover the goods, but in numberless instances to mark the ship of the enemy."⁸⁹

As the first months of summer came and passed, Anglo-Danish relations became still more embittered. The Danish Government continued to protest against the Orders in Council and to demand unconditional recognition of its contentions, regardless of the conduct of its merchants or of the fact that a large number of foreign traders were operating under the protection of the Danish flag. After the delivery of the last of these notes, on June 6, the situation in London became so critical that the Danish chargé d'affaires expected to be recalled. A crisis was approaching, of which fact the Danish Government was keenly aware.⁹⁰

The Government had received a number of other warnings that decisive measures might be taken by England. Reports of traders, and stories appearing in the press in June and the early days of July pointed to an approaching English expedition to the Sound,⁹¹ and the Danish Consul in London, Jens Wolff, sent frequent warnings to the College of Commerce in Copenhagen. On June 2, 1807, he received a letter from an Englishman named Howard, who wrote:

Sirs: It is the opinion of some well informed persons that the expedition now fitting out in this country is intended for the purpose of taking possession of Copenhagen and the whole Island of Zealand, of which your government should certainly be informed in time to prepare accommodations for the said troops. . . . Wishing for peace among all mankind, I am, Sirs, Yours sincerely, Howard.⁹²

An English official, to whom Wolff showed this letter, remarked that it was "a very extraordinary singular letter."

For the purpose either of forming an alliance with Denmark, or of rendering the Danish fleet innocuous, the English Government had for months been weighing the question of an expedition to Copenhagen. The time at which this armada would sail was determined by the events which took place in the east, where the armies of Napoleon and Alexander I were engaged in deadly

⁸⁸ Parl. Debates, Vol. X, Canning's speech of Feb. 8, 1808.

⁸⁹ See *ibid.*, the note of Howick to Rist, March 17, 1807, and cf. Raeder, *op. cit.*, Vol. I, p. 26: "There was now hardly a vessel of which the cargo, ship's papers, crew, or destination did not reveal some irregularity."

⁹⁰ Raeder, *op. cit.*, Vol. I, p. 27.

⁹¹ The master of a Danish corvette, *The Fylla*, on his return to Copenhagen on July 19 said that while he was at anchor off Portsmouth he was told by Admiral Gambier to hurry home unless he wished to be detained there by order of the English Government. (*Ibid.*, p. 39.) Raeder also refers to a report in the *Berling Avis* for July 10, suggesting that an expedition to the Sound was being prepared.

⁹² Raeder, *op. cit.*, I, p. 37, quotes this letter both in Danish and in its original English.

combat, but it was the Battle of Friedland, rather than the Peace of Tilsit, which was the decisive factor.⁹³

Long before the Battle of Friedland the English Government recognized that Russia would come to terms with Napoleon if defeated by him, and it was aware of the general stipulations of any forthcoming treaty of peace.⁹⁴ England had failed to provide Russia with adequate subsidies, and, thanks to a disorganized transport system, her troops had arrived in the Baltic region too late to ease the French pressure on the Russian army.⁹⁵ In the House of Commons Canning summarized the contents of letters written to the Foreign Office by English representatives at St. Petersburg in the period from November, 1806, to May, 1807. "All accounts agree," he said, "in representing that the Court of Russia was alienated from this country."⁹⁶ The expectation of assistance from this country, no matter whether well or ill founded, was the cause, not of the Peace of Tilsit, but of the temper in which it was concluded, when military disasters had rendered that peace necessary.⁹⁷ Out of twenty dispatches received from our own ambassador with the Emperor, there was not one in which he did not say, 'Send assistance or Russia will fail you; make a diversion, which will take part of the weight of the war off Russia, or she will withdraw from it.'"⁹⁸ Months before the Peace of Tilsit the English

⁹³ The Treaty of Tilsit was signed on July 8; the orders for the sailing of the expedition were issued not later than July 19, and the first English vessels appeared before Kronborg August 1. The intervening time was too short for the government to have been guided by the information it had received from Tilsit. On the question of how the information about the negotiations at Tilsit reached England see Rose, J. H., "Canning and Denmark" in *Napoleonic Studies* (1904).

Of the Tilsit treaty Kirchheim, in his *Napoleon, Ein Lebensbild* (1927), p. 78, asserts: "Die Hauptbestimmung dieses Friedensvertrages, von dessen Inhalt später durch Verrat gegen Zahlung von 20 Millionen Marken von den russischen Diensten stehenden Grafen d'Antraignes Kenntnis erhielt, konnten für England sehr verhängnisvoll werden."

⁹⁴ Cf. Heckscher, *op. cit.*, p. 304.

⁹⁵ See Canning's statement in the House of Commons, July 31, 1807, *Parl. Debates*, Vol. X.

⁹⁶ See extracts from the dispatches of Charles Stuart, the English Ambassador at St. Petersburg, to Lord Howick, Nov. 19, 28, Dec. 1, 18, 1806, and Jan. 2, 14, 1807 (*Parl. Debates*, Vol. X), wherein he states: "I must not conceal from your lordship that the apparent silence of His Majesty's government, respecting a military diversion on the coast of France, has not produced a favorable effect upon the opinion either of the ministry or the public of this country." See also Lord Howick's dispatch to Stuart, Jan. 13, explaining why assistance was not sent, and the messages of Marquis Douglas to Howick of Jan. 26, Feb. 8, 14, 15, 20, March 9, 26, 1807. All these dispatches point out that Russia felt that she was abandoned by her allies.

⁹⁷ *Parl. Debates*, Vol. X, General Budberg's answer to the remonstrance of Lord Gower on the conclusion of the Peace of Tilsit.

⁹⁸ *Ibid.*, the debates on the expedition to Copenhagen of Feb. 3, 1808. That Russia would abandon her allies is indicated especially in the dispatch which Douglas sent to Howick, April 27, 1807. At other times Canning reverted to the significance of the Battle of Friedland. On one occasion he declared that since the victory of Friedland had laid all Continental states prostrate at his feet all the efforts of Bonaparte would be turned against the

Government recognized that if Napoleon should win a signal victory over Russia, he would be able to obtain control of the maritime strength of the whole Continent, provided he also accomplished the inviting object of adding the Danish navy, lying in a manner within his grasp, to his resources.

By midsummer of 1807 England was ready for drastic action against Denmark, but so were the French also. In a letter of August 2 Napoleon wrote to Bernadotte that if the English did not accept Russia's mediation as contemplated at Tilsit, Denmark should be asked to declare war against them, and if Denmark refused, he was to occupy the entire Peninsula of Jutland.⁹⁹ The French diplomatic service was also called upon to aid in inveigling Denmark into war with England. On August 2 Talleyrand was directed to inform Dreyer, the Danish Minister in Paris, that if England refused the mediation of the Tsar, Denmark must make war either on England or France; and that the friendship which the Prince Regent had manifested for Napoleon indicated that Denmark would not hesitate in its choice.¹⁰⁰ Four days later Talleyrand informed Dreyer that all the steps taken by Napoleon conjointly with the other Powers to exclude British commerce from the Continent were nullified by the fact that Denmark kept her harbors open to it. Denmark should therefore close her ports.¹⁰¹

Between peace and war there was for Denmark no alternative. She must voluntarily join one belligerent or the other, or be compelled to do so, for her military strength was insufficient to keep her neutrality inviolate in the face of the pressure being exerted upon her. Of this fact the Danish Government had received ample intimation. Yet it sought to escape the consequences of a deliberate choice, and allowed the country to drift into war with England because it was felt that the ultimate result of such a war would be less dangerous to the monarchy than a war with France.

This interpretation of Danish foreign policy is at variance with the view held by Danish historians,¹⁰² but it seems justified by the fact that to placate France Denmark did not hesitate to offend England,¹⁰³ and by the history of

power and resources of the British Empire. He developed this idea in detail. *Parl. Debates*, Vol. X, pp. 254, 267, 355, 358, 1186, 1205.

⁹⁹ *Correspondance de Napoleon*, Vol. XV.

¹⁰⁰ *Ibid.*

¹⁰¹ Holm, *Danmark-Norges Udenriske Historie*, Vol. II, p. 78.

¹⁰² Raeder, *op. cit.*, Vol. I, p. 6 ff. See also Sörenson, *Den Politiske Krise i 1807*, p. 4: "For of that both the Crown Prince and Foreign Secretary Bernstorff, who was directing the Department of Foreign Affairs under the King in Copenhagen, together with the country's whole enlightened population, were certain, that a war with England would be the greatest misfortune that could befall the United Kingdoms."

¹⁰³ One such act was the termination of the convention which gave the English postal connections over Husum and Tönning. Christian Bernstorff wrote to his brother Joachim, Aug. 12: "A war with England must be a war of destruction for us, but every concession to the demands of England will inevitably result in a rupture with France." Sörenson, *op. cit.*, p. 38.

the Anglo-Danish negotiations immediately preceding the military operations. The statement of the Privy Councillor, Carl Wendt, August 8, 1807, seems further to support such an interpretation:

Denn sie (the English) fordern nicht weniger als allianz oder Krieg, das heisst unsern Ruin, was wir auch wahlen. . . . Von beyden ist doch das letzte in der jetzigen Lage der Dinge das mindre Übel, denn Flotte, Schiffe, Colonien, und Handel kann man noch erwarten wieder zu bekommen, aber wenn einmal unsere Provinzen jenseits des Belts verschlingen sind, so kann England sie uns nicht wieder schaffen.¹⁰⁴

Other factors served to make an understanding between Denmark and England impossible. The English military policy of small expeditions had not inspired confidence,¹⁰⁵ and Danish statesmen, who did not foresee the new energy and changed strategy that came with the Portland Ministry, could have no faith in the ability of England to protect Denmark against French aggression.¹⁰⁶ When the general terms of the Treaty of Tilsit became known it seemed that a way of escape presented itself, for the Danish Government could then resort to a policy of procrastination, hoping that England would accept Russia's forthcoming offer of mediation and prevent a rupture between the Courts of London and Copenhagen.¹⁰⁷ Having adopted this policy of delay, the Danish Government found it necessary during the crisis of August to avoid any official dealings with the English representatives sent to treat with it.

The Danish foreign policy was at this moment directed from two separate points. At Kiel were the Prince Regent and the Foreign Secretary, Christian Bernstorff; at Copenhagen Joachim Bernstorff was directing the Department of Foreign Affairs. This arrangement was made necessary by the fact that the Prince, as commander-in-chief of the army, had established himself at its headquarters at Kiel. In the conduct of foreign affairs he needed Christian Bernstorff at his side.

On July 16, 1807, Canning sent Brooke Taylor to Copenhagen, and on July 28, Francis Jackson to Kiel, to present demands for an Anglo-Danish alliance of mutual defense, or the surrender of the Danish fleet for the duration of the war.¹⁰⁸ The extraordinary evasiveness with which both emissaries were met was designed to prevent them from explaining in diplomatic terms

¹⁰⁴ Bobé, *op. cit.*, Vol. VI, Wendt to C. D. F. Reventlow, Aug. 8, 1807.

¹⁰⁵ Such as those to South America, Constantinople, and Egypt.

¹⁰⁶ Cf. Joachim Bernstorff's letter to his brother, Aug. 13, 1807, in Sörensen, *op. cit.*, p. 35.

¹⁰⁷ Describing his meeting with Jackson, Christian Bernstorff wrote to his brother, Aug. 7: "I shall especially endeavor to gain time, and, if possible, to conduct the negotiations in such a manner that the actual consummation of the act of violence with which we are threatened may be delayed, at least until it is known whether the English Government will accept the Russian mediation and thereby prepare the way for a general peace." Sörensen, *op. cit.*, p. 33.

¹⁰⁸ For these and other details see Rose, J. H., "Canning and Denmark," in *Napoleonic Studies*.

the aim of their mission, and seemed intended to throw upon England alone the onus of the ensuing events, thus removing the danger that France might suspect Denmark of a collusive understanding with England.

Taylor arrived at Copenhagen, was introduced to Bernstorff on August 2, and at once entered upon a discussion of the Treaty of Tilsit. He explained the rôle Denmark was expected to play, and stated that England must have a declaration from the Danish Government upon the policy it aimed to follow. He was here met by Bernstorff's reminder that no one knew what had occurred at Tilsit, that England was agitated by mere rumors, and that Taylor's mission could not begin until he had presented his credentials to the King. Until that presentation had been made there could be no official negotiation between him and the Director of the Foreign Office.¹⁰⁹ Whatever information Taylor might give him must be regarded as a personal matter only. Other circumstances indicate that Bernstorff sought to deprive Taylor of the occasion to present the English demands. His audience with the King, set for August 7, was postponed on the ground that the Sovereign was indisposed, although Bernstorff made no secret of the fact that the Court functions were taking place as usual.¹¹⁰ There were no further interviews at this time, although Taylor found the opportunity to outline informally the terms of the English proposal. As the fleet continued to mass before Copenhagen, Bernstorff carefully refrained from discussing that matter, apparently fearing that such a discussion might give an official character to his pourparlers with Taylor.¹¹¹ The latter, finding that he could accomplish nothing, withdrew from Copenhagen.

Jackson, at Kiel, was no more successful. He arrived on August 6, and immediately asked Christian Bernstorff for an interview. The Foreign Secretary replied that he could not receive him in an official capacity, for the seat of government was at Copenhagen, but as a private citizen he would be glad to discuss confidentially anything that might affect the relationship between Denmark and England. Despite its unofficial nature the interview which followed was long and heated, not over Jackson's proposal for an alliance, but rather over his assertion that Denmark would yield to the wishes of France and Russia.¹¹² Of results the interview was barren, and Jackson asked that he might have an audience with the Prince Regent.

¹⁰⁹ Joachim Bernstorff to Chr. Bernstorff, Aug. 3, in Sörenson, *op. cit.*, p. 24.

¹¹⁰ *Ibid.* "This was a pretense that he was not displeased to have Taylor see through; for the meeting of the Council of State, and the dinner . . . were not postponed."

¹¹¹ *Ibid.*, pp. 20-27, *passim*.

¹¹² *Ibid.*, p. 31, Chr. Bernstorff to J. Bernstorff, Aug. 7. J. H. Rose, in "Canning and Denmark," writes: "Due to Canning's memorandum of July 29, in which he emphasized the fact that the possession of the Danish fleet was the main object of Jackson's mission to Denmark, and that without the fleet no concessions on the part of Denmark could be considered of any value, Jackson put the question of the fleet in the forefront of his negotiations and relegated the Anglo-Danish alliance to the background." This statement rests on evidence directly contrary to the reports given of the interview by Bernstorff, who analyzed the posi-

The audience was obtained through the efforts of Bernstorff, with the condition that the Prince should not enter upon negotiations of a formally diplomatic nature.¹¹³ Before he met the Prince, however, Jackson went again to the Foreign Secretary for a second interview, in which he gave Denmark the choice of war or an alliance to which England would contribute twenty-five ships of the line and 40,000 men, and suggested that Denmark might hope for a compensation in the form of colonies.¹¹⁴ On August 8 he had his audience with the Prince, to whom he repeated the statement he had made to Bernstorff. The Prince replied that he, as head of the government and commander of the army, could not listen to such proposals, and advised Jackson to see Bernstorff again.¹¹⁵ Believing a crisis was at hand, the Prince set out for Copenhagen late that evening. Jackson returned to Bernstorff for a third interview, but their meeting was fruitless. The Secretary had received authority to listen to Jackson's proposals but not to enter into an agreement with him.¹¹⁶ Upon learning that the pledge England demanded was the Danish fleet, Bernstorff urged Jackson to follow the Prince to Copenhagen that he might discuss this important matter with him there.

Jackson forthwith boarded a ship for the capital, August 9, but unfavorable winds brought his ship back to Kiel the following day. He experienced much difficulty in obtaining horses for the overland journey thus become necessary,¹¹⁷ and once on the road he was detained two hours at every station for exchanging horses, thanks to the instructions given by the Prince as he passed that way.¹¹⁸ On the thirteenth Jackson reached the capital, only to find that the Prince had left the night before to return to Kiel. Angry at having missed the Prince, he immediately sought an interview with Joachim Bernstorff, who, he learned, had received no authority to negotiate but instead had been directed to request him to return to Kiel for another audience. Bernstorff

tion of the English Government with amazing correctness, and added that England desired an alliance with Denmark and some security, perhaps some islands. He wrote to his brother (*loc. cit.*): "Thus the English Government sees itself forced into the necessity of asking Denmark either to join England in a close alliance and enter upon negotiations for the adoption of measures necessary for the safety and welfare of [our] country, or to give England some tangible pledge [*Pant*] toward her security." Jackson, he said, had not had opportunity to declare what "Panten" was to be. It might be one of the Islands, even Zealand.

¹¹³ Sörenson, *op. cit.*, p. 32, Chr. Bernstorff to Joachim, Aug. 7: "I shall in the meantime indicate to him [Jackson] that it is not the intention of the Crown Prince to enter upon political negotiations with him."

¹¹⁴ *Ibid.*, p. 32. See note 112, *supra*.

¹¹⁵ Sörenson, *op. cit.*, p. 34, the Prince Regent to Chr. Bernstorff, Aug. 8: "Er (Jackson) sagte ziemlich deutlich dass wir entweder uns allierten mussten oder auch Krieg haben konnten. Ich erwiderte, dass ich als Prinz und General nicht anhören konnte, und erwies ihn an Ihnen, damit er näher müsste sich expliciren."

¹¹⁶ See Bernstorff's summary of his interview with Jackson on Aug. 9, Sörenson, *op. cit.*, p. 40.

¹¹⁷ Bülow, Joh., *Memoirer og Breve udg. af Julius Clauson og P. Fr. Rist. Vol. III i Breve til Joh. Bülow til Sanderumsgaard* (1906), p. 98.

¹¹⁸ Raeder, *op. cit.*, Vol. I, p. 55.

discoursed freely upon the ethics of Denmark's position as a neutral, and pointed out that all responsibility for the ensuing struggle would rest on England. Jackson, seeing that no terms of an Anglo-Danish understanding could be broached, felt justified in retiring to the English fleet that same day.¹¹⁹ Late in the evening of August 15 the whole English fleet was set in motion, and at six-thirty in the morning of August 16 Joachim Bernstorff was informed that the English had begun their landing operations at Vedbaek.¹²⁰

What of the Prince Regent and his policy? If his aim had been to nullify all attempts of England to open negotiations for a treaty with Denmark, he had accomplished his purpose. He had evaded Jackson at Kiel and at Copenhagen. Taylor had likewise been frustrated in his mission. All avenues of approach had been closed. The Prince had closely observed the French activities near the Danish frontier, the Continental System and its implications, the general terms of the Treaty of Tilsit, and the attitude of suspicion entertained by some Continental states toward Denmark. Within his purview had fallen the diplomatic negotiations with England arising from the retreat of the Danish army at the approach of the French, and from the Danish protests against the Orders in Council. He had heard Jackson state that Denmark must surrender her fleet or join England in an alliance of mutual defense. He was aware that a crisis was at hand; but, like Christian Bernstorff, he knew that a war with England would be less dangerous than one with France, and, like him, feared that any concession to the demands of England would lead to the immediate advance of the French armies into Holstein.¹²¹

With these things in mind he planned a hasty trip to Copenhagen.¹²² When he arrived at the capital on August 11, he was greeted with enthusiasm and a sentiment that in the evening found expression in celebration and illumination. The enthusiasm of the evening gave way to depression on the following morning, when the capital awoke to learn that its hero, together with the King and the government officials, except Joachim Bernstorff, had departed for the Peninsula. The people found little encouragement as they read the proclamation which during the early morning had been posted on the streets: "Countrymen: After having organized everything which time and circum-

¹¹⁹ Sörenson, *op. cit.*, p. 56.

¹²⁰ *Ibid.*, p. 56. Raeder, *op. cit.*, p. 111, says that the operations began between four and five o'clock in the morning.

¹²¹ Chr. Bernstorff to Joachim (Sörenson, *op. cit.*, p. 41): "Our condition would become most deplorable if the French Government should make use of the English attack as a pretext to occupy Holstein arbitrarily."

¹²² This interpretation seems justified by the events and by contemporary accounts of them. See Bülow, *op. cit.*, Vol. III, p. 97: "In attendance upon the Prince there is only Adjutant General Bülow. They carry nothing with them except what they wear and a little linen, which a hussar could have carried under his arm."

stances permit, I hasten to the army for the purpose of acting with it in behalf of my beloved people, in case all matters are not terminated honorably and after my wish."¹²³ While Copenhagen was faced by an overwhelming English armament in its harbor, the Prince retired to the peaceful village of Kiel.

During his sojourn of twelve hours in Copenhagen he had taken all measures which he deemed necessary for the defense of the city.¹²⁴ He divided the military command, placing the forces operating in the southern part of Zealand under Major Castenschjold, who lacked initiative and was much too dependent upon specific instructions from Kiel.¹²⁵ At Copenhagen the elderly General Peymann, who had always served with the engineers and had never commanded a body of troops, was appointed commander-in-chief.¹²⁶ The other arrangements seem to have been commensurate with these appointments.¹²⁷ No plans were made for the disposal of the fleet, either by destruction or otherwise,¹²⁸ nor were any special efforts made to bring substantial reinforcements from Holstein to Zealand, though military experts believed in the feasibility of doing so.¹²⁹ Although there was a shortage of trained subordinate officers, which severely crippled the effectiveness of Castenschjold's army corps, no additions were made to his staff.¹³⁰

¹²³ *Krigsarkiv.*, Vol. III, p. 10. The Prince Regent arrived at Copenhagen at noon, Aug. 11, and departed at midnight. Practically the whole machinery of government was moved to Kolding.

¹²⁴ "It is indeed remarkable how much the Crown Prince accomplished in this short time. He had clearly in mind everything that needed to be done, even to the minutest details." *Krigsarkiv.*, Vol. III, p. 11. Cf. the letter of the Prince Regent to Chr. Bernstorff, Aug. 13, 1807, Sörensen, *op. cit.*

¹²⁵ Castenschjold to the Prince Regent, dispatches of Aug. 26 and 27, 1807, *Krigsarkiv.*, Vol. III.

¹²⁶ Raeder, *op. cit.*, Vol. I, p. 73 ff., characterizes Peymann and the other Danish officers.

¹²⁷ The Prince Regent's instructions to Peymann were vague: "You will therefore take over the defenses upon land and sea, taking such precautions as you may deem necessary. . . . As soon as hostilities begin, condemn all British property. On the other hand, refrain from being the aggressor. Begin at once to provision the fortresses of Copenhagen and Kronborg. Major General Biellefeldt and Commander Bielle will serve under you, and one of them will take command when you are not present. FREDERICK, K. P." *Krigsarkiv.*, Vol. III, p. 44. Not a word was said about the fleet.

¹²⁸ For papers and discussions bearing upon the fleet, see Raeder, *op. cit.*, Vol. I, pp. 220-222, 225, 227, 243, 246, 251, 262; for an explanation of why the fleet could not be destroyed see *ibid.*, pp. 256-257. On Aug. 18 the Prince Regent sent Lieut. Steffens to Peymann with instructions to burn the fleet. Steffens was captured, and his message was destroyed by Amptmann Treschow. Of this fact the Prince was informed at once, but he made no further attempts to communicate with Peymann about the fleet. See *Krigsarkiv.*, Vol. III, for the instructions to Steffens and Steffens' letter of Aug. 20, the Prince's acknowledgment of two messages from Copenhagen, Aug. 26, and his letter to Peymann, Aug. 28.

¹²⁹ On the feasibility of sending reinforcements to Zealand see *Krigsarkiv.*, Vol. III, p. 20, and also the letter of the Prince Regent to Wegner, Aug. 28, and Liliencrone's letter of Sept. 5. Further discussion is found in Raeder, *op. cit.*, Vol. I, pp. 378-384, and in Parl. Debates, Vol. X, p. 279 ff.

¹³⁰ Castenschjold to the Prince Regent, Aug. 23, *Krigsarkiv.*, Vol. III, p. 96.

To the defense of Kiel, on the other hand, the Prince Regent gave much attention. After he had returned to army headquarters from his trip to Copenhagen, he issued on August 16 the following declaration:

Since the English minister, Jackson, on the afternoon of August 13 declared that hostilities against Denmark would begin forthwith, and at the same time demanded passports for the withdrawal of himself and his suite, it is hereby announced that from now on war shall be regarded as having broken out between the two countries, and every man is required to take up arms against these men of violence.¹³¹

He then proceeded to fortify Kiel with ships, troops, and heavy artillery, so that an attack on that position would have been a serious matter.¹³²

These were extraordinary measures of defense, calculated, perhaps, to beguile the French rather than to resist the English, who had clearly indicated that they were not interested in Danish territory. Bernadotte questioned the sincerity of the Danish preparations. On August 10 he wrote to Napoleon: "Bernstorff has reported that it is the will of the Crown Prince to resist the English with all his power, but it is certain that no troops have been dispatched from Holstein to Fünen, to say nothing of Zealand. Up to the present it seems as though the Danes have had a military frontier only against us."¹³³

If the Prince Regent hesitated to send his own troops to reinforce the defenders of Copenhagen, or if he had no troops to spare for that purpose, he might have called upon the French, who would gladly have taken part in this defense. On August 17 Napoleon told the Danish Minister at Paris that he had given Bernadotte orders to go to the aid of Denmark,¹³⁴ and wrote to Berthier that he had directed Bernadotte to march into Denmark, if necessary against her will.¹³⁵ Ten days later Bernadotte sent his chief of staff, General Gerard, to the Danish headquarters at Kiel with the offer of French help, although he did not believe such help would be acceptable to Denmark.¹³⁶

Nor did the Danish Government wish to save its fleet and capital at the cost of French assistance.¹³⁷ Bernadotte's offer was politely rejected on the ground that it was inopportune. The reason for this rejection is given in Christian Bernstorff's letter to the Danish Minister at St. Petersburg, wherein he explained the nature of Napoleon's solicitude, and continued: "We could

¹³¹ *Krigsarkiv.*, Vol. III, p. 15, note. It is perhaps worth noting that the Danish Minister remained in London, where on Sept. 24 he held a conference with Canning. *Ibid.*, p. 34.

¹³² *Ibid.*, p. 16.

¹³³ *Krigsarkiv.*, Vol. III, p. 20.

¹³⁴ *Ibid.*, p. 57.

¹³⁵ *Ibid.*, p. 24.

¹³⁶ *Ibid.*, p. 30: "In a word, I think I have discovered that at the very time when they were talking about French assistance they were apprehensive of the moment when this assistance should appear in Danish territory."

¹³⁷ Bernstorff instructed Dreyer, the Danish Minister in Paris, to prevail upon the French to mass troops at the English Channel as a threat of invasion, to send flat-bottomed boats from Holland to Denmark, and to hold an army corps near Holstein until the season would permit them to be used. *Krigsarkiv.*, Vol. III, p. 24.

not refuse the help, but it was necessary that we should be masters of the conditions involved. The help would have been necessary only in case we wished to send troops to Zealand."¹³⁸ The problem confronting Denmark was not how to procure French aid, but how to avoid French intervention.

To do this it was necessary to create the impression that Danish arms were prevailing over the English in Zealand. That task was assumed by Christian Bernstorff. Early in the campaign he informed Napoleon that the English forces were in a dangerous position, hemmed in between the fortresses of Kronborg and Copenhagen on the one side and Castenschjold's corps on the other.¹³⁹ On August 31 he wrote to Dreyer: "Castenschjold has defeated the British advance guard, has established himself at Kjøge, and will within a few days take the offensive."¹⁴⁰ All available documents, however, indicate that Castenschjold's first contact with the enemy had resulted in his defeat on August 29. When that disaster could no longer be concealed, Bernstorff announced it in connection with another dubious report that the Danes had stormed and taken Fredericksborg Castle after a glorious battle.¹⁴¹ Presently there reached Kiel reports of more fateful events than the defeat of Castenschjold: the investment of Copenhagen by the English, the bombardment and capitulation of the city, together with the surrender of the whole Danish fleet on September 7. The news was received in a studied silence,¹⁴² for the problem of avoiding the effects of French resentment was acute.

The defenders of Copenhagen had yielded to the inevitable. According to contemporary accounts and the appraisal of careful historians, General Peymann and his associates had done everything in their power to escape defeat, and had obtained favorable terms from an enemy that could bide its time and impose its own conditions.¹⁴³ Even the surrender of the fleet was regarded as unavoidable.¹⁴⁴

¹³⁸ *Krigsarkiv.*, Vol. III, p. 92.

¹³⁹ Fortescue, Sir John W., *A History of the British Army (1899-1930)*, Vol. VI, p. 72.

¹⁴⁰ *Krigsarkiv.*, Vol. III, p. 11.

¹⁴¹ Through Dreyer the French Government was informed, Sept. 11, that the defeat of Castenschjold did not discourage the Danish Government, which now would send several battalions to Zealand. *Ibid.*, pp. 26-27.

¹⁴² Cf. Raeder, *op. cit.*, I, pp. 275-278. The silence of the Prince was the cause of much anxiety in Copenhagen, particularly among the men who had carried the burden of defending the capital.

¹⁴³ For a detailed account of the campaign at Copenhagen and the court-martial of Peymann and others, see Raeder, *op. cit.*, Vol. I, pp. 73-483; for the correspondence and military instructions see *Krigsarkiv.*, Vol. III, *passim*; for the articles of capitulation see *The Annual Register*, 1807, p. 695. *The Journal of the Army under Lord Cathcart (ibid.*, p. 698 ff.), is a formal daily record of the incident. Much contemporary material is found in Bobé, *Efterladte Papirer fra den Reventlowske Familiekreds*, and in Bülow, *op. cit.*, III, *passim*.

¹⁴⁴ See a letter of the Countess Stolberg to Count C. D. F. Reventlow, Sept. 21, 1807, in Bobé, *op. cit.*, Vol. III.

The English had conducted an efficient military campaign. It had been short, decisive, and almost devoid of untoward incidents; it had not seriously affected the Danish people outside the environs of the capital, and apparently had caused little bitterness.¹⁴⁵ The army had maintained excellent discipline; ¹⁴⁶ the soldiers' ready cash and liberality had been a welcome boon to the community and were regrettably missed when the expedition departed.¹⁴⁷

Within a comparatively short time some Danish leaders began to regret the action against the English and to feel, particularly after the war in Spain assumed significant proportions, that their country should have joined England in her struggle against France.¹⁴⁸ The Prince Regent, who alone was responsible for the fateful decision of 1807, lost favor with many because of his failure to avoid the conflict.¹⁴⁹ It was felt that the English had achieved their object with the capture of the fleet, and there was a desire for an accommodation with them. The city of Copenhagen regarded the war as at an end,¹⁵⁰ and so did high officials in Norway.¹⁵¹

In the policy of the Prince Regent there was no thought of peace with England; his main efforts were to placate the French, to whom the capitulation came as a surprise and a signal defeat. Fouché expressed its significance: "The success of the attack on Copenhagen was the first derangement of the secret articles of the Treaty of Tilsit, in virtue of which the navy at Denmark was to have been put at the disposal of France. Since the catastrophe of Emperor Paul, I have never seen Napoleon in such a transport of rage. That which struck him most in this vigorous *coup de main* was the promptitude and resolution of the English ministers."¹⁵²

To appease Napoleon, whom Bernstorff had so successfully deceived, various measures were taken. Agents were sent to Paris to explain what had happened, and Bernstorff and Major von Bülow went to the headquarters of Bernadotte. Communication between Zealand and the other parts of the kingdom was interdicted, presumably to prove that Denmark had no intention of seeking an accommodation with her enemy. All travelers between the Islands and Jutland were ordered arrested, and every attempt on the part of the English to open negotiations for peace was made in vain.¹⁵³

The reason which prompted the Prince Regent to send messengers to Na-

¹⁴⁵ The reference here is to the campaign as such and not to the policy that prompted it.

¹⁴⁶ Raeder, *op. cit.*, Vol. I, pp. 278-279, and elsewhere, comments favorably upon this phase of the campaign.

¹⁴⁷ The Countess Schimmelmann to the Countess Stolberg, Sept. 27, 1808, in Bobé, *op. cit.*, Vol. V. Cf. note 144 *supra*.

¹⁴⁸ The Countess Stolberg to C. D. F. Reventlow, July 20, 1809, in Bobé, *op. cit.*, Vol. V.

¹⁴⁹ Bülow, *op. cit.*, Vol. III, p. 177.

¹⁵⁰ Prince Christian August to the Prince Regent, Sept. 22, 1807, *Krigsarkiv.*, Vol. III.

¹⁵¹ The Prince Regent to Prince Chr. August, Oct. 6, 1807, *loc. cit.*

¹⁵² Fouché, J., *Mémoires* (1825), Vol. I, p. 220, and see p. 146.

¹⁵³ Raeder, *op. cit.*, Vol. I, p. 278; *Krigsarkiv.*, Vol. III, p. 34 ff.

poleon and Bernadotte forbade that he should condone the capitulation of Copenhagen and the surrender of the fleet. Peymann and his fellow officers were accordingly arrested on the charge of having neglected their duties in the defense of the capital. This punitive measure was taken despite the fact that they had faithfully carried out their instructions, and had done everything possible with their meager resources against an overwhelming English armament. The court martial began in November, 1807, and continued intermittently throughout the following year. Peymann was at first condemned to the loss of his life, honor, and property. The sentence was commuted to dismissal from the army without pension. At the end of January, 1809, when the situation was less dangerous and the memory of 1807 was dimmed, the aged general was exonerated, his property given back to him, and he was restored to the good graces of the Sovereign. Similar treatment was meted out to the other officers.¹⁵⁴

Such were the simple facts of the Anglo-Danish incident of 1807, as evidenced by contemporary sources. In the interpretation by historians of the opinion held by contemporary observers regarding the English expedition, however, more weight has been given to the view of what ought to be the proper relationship between sovereign states than to the actual facts which obtained in 1807. It has been sometimes forgotten that not only Canning, but also the Danish Countess Charlotte Schimmelmann and her friends, and Jacobi, the Prussian Minister to the Court of St. James, as well as others, expressed the view that Napoleon had erased every vestige of public law in Europe and had made the English expedition inevitable.¹⁵⁵

This incident has been characterized by Continental historians as an outrage on a friendly nation, an "unprovoked attack on Denmark," and an infringement of her independence and neutrality.¹⁵⁶ If that were true, it was not an isolated case, however, for the intervention by Continental sovereigns during the preceding decade in the affairs of Lübeck, Venice, and other small states of Europe afforded definite precedents, if such were sought. Moreover, the signatories to the Treaty of Tilsit pledged themselves to in-

¹⁵⁴ Raeder, *op. cit.*, Vol. I, p. 278; *Krigsarkiv.*, Vol. III, p. 34 ff.

¹⁵⁵ The Countess Schimmelmann believed that Denmark was fighting in the wrong camp, and many of her countrymen agreed with her that the country should be on the side of England. See especially her letter of July 20, 1809, to the Countess F. S. Reventlow, in Bobé, *op. cit.*, Vol. V. Of the attitude of King George III and his government toward the expedition Jacobi wrote from London, Oct. 20, 1807: "Rien n'a pu y faire consentir ce monarque que la réflexion fondée, ce me semble, que dans le cours de cette guerre révolutionnaire toutes les lois des nations ayant été foulées aux pieds par l'ennemi commun, il foudrait se résoudre à des actes de vigueur extraordinaire ou s'exposer au reproche d'avoir négligé les moyens usités de défense de soi-mêmes." Hassel, J. Paul, *Geschichte der Preussischen Politik* (1881), p. 105.

¹⁵⁶ Gjerset, Knut, *History of the Norwegian People* (1915), Vol. II, p. 387. Cf. Sörenson, *op. cit.*, p. 3 ff.; Raeder, *op. cit.*, Vol. I, p. 6 ff. Kirchseisen, Vandal and others hold a similar view. See Azuni, M. D. A., *Maritime Law of Europe* (English tr., 1806), Vol. II, pp. 21-63, for his discussion of the undefined state of the laws of neutrality.

tervene in the affairs of the neutral states, even to the extent of forcing them to join in the war against England. Nor was the subsequent action of Denmark greatly different, for as soon as the English had departed from Zealand her government engaged in negotiations with Russia for an agreement whereby these two would compel the Court of Stockholm either to declare war on England, or submit to their joint occupation of southern Sweden.¹⁵⁷ Such was the *Zeitgeist* of that period.

These facts were noted by observers of the incident. Yet it is the view of many present-day writers that the English treatment of Denmark roused a great outcry throughout Europe and alienated the sympathy of many from England.¹⁵⁸ Many contemporary documents fail to support this interpretation, but rather justify the seizure on the ground of self-defense.¹⁵⁹ They substantiate the observation made in the House of Commons by Lord Gower, the English Ambassador at St. Petersburg in 1807, that the expedition was not generally execrated on the Continent. As to Russia, he said, "a great majority of the persons of consequence there rejoiced in the event which took place at Copenhagen, and these consisted not merely of what was called the English party, but rather others, who thought that Russia ought not to have entered into a war with France, and seemed to wish to insulate their country from the rest of Europe. They saw with alarm a French army in Poland, and another on the frontier of Turkey, and were happy at the check which the expedition to the Baltic gave to Bonaparte, for they dreaded his hostility through Denmark."¹⁶⁰

Generally accepted also, at least among Continental historians, is another statement that does not seem to be well founded. Vandal, Kirchheim, and others have recorded that Russia, resentful at the seizure of the Danish fleet, severed her relations with England one month earlier than the date agreed upon at Tilsit.¹⁶¹ That statement implies that the Russian foreign policy was conditioned chiefly by events that took place between two distant foreign countries rather than by the consideration of Russian problems, and that, even at the time when they were making secret preparations for the invasion of Swedish territory for the purpose of acquiring Finland, Russian statesmen

¹⁵⁷ This point is developed by Anders Grade in his *Sverige och Tilsit Alliansen* (1807-1810), p. 136.

¹⁵⁸ Kirchheim, Napoleon I, Vol. II, p. 79 (Eng. tr., p. 412).

¹⁵⁹ Jacobi's letter to the Prussian King, Oct. 26, 1807, *loc. cit.*, contains the observation: "Le expédition contre le Danémark, ou plutôt contre la flotte danoise, ne me paraît justifiable, je l'avoue, que sur le princip de la défense de soi-même." On the same day the Swedish Minister at St. Petersburg, Marshal Stedingk, wrote to his sovereign: "Il faut avouer que l'entreprise Anglois sur Copenhague est contre tout droit des gens, et que elle ne peut se justifier que par la nécessité; mais cette nécessité n'est que trop réelle . . ." Stedingk, *Mémoires*, Vol. II. See also *ibid.*, his letters of Sept. 5, 18, 24, and Hassel, *op. cit.*, the letter of Von Scholer, the Prussian Minister at St. Petersburg, to his King, Oct. 13, 1807.

¹⁶⁰ Parl. Debates, Vol. X, debates of Feb. 3, 1808.

¹⁶¹ Vandal, Albert, *Napoleon et Alexandre I^{er}, L'alliance russe sous le premier empire* (1891-1896), Vol. I, p. 167; Kirchheim, *op. cit.*, p. 79.

were guided by the moral question involved in an international problem. It assumes also that Russia was irrevocably hostile toward England.¹⁶²

With the statement that Russia broke with England one month earlier than the time agreed upon, the Swedish historian, Anders Grade, takes issue in his carefully reasoned study, *Sverige och Tilsit Alliansen*. He bases his argument upon the secret articles of the Treaty of Tilsit, which provided that the severance of diplomatic relations between Russia and England should take place in London on December 1, 1807, but which made no reference to the matter of the dismissal of the English ambassador at St. Petersburg. Napoleon, through his instructions to Savary, September 27, sought to effect a modification of these terms, so that the Anglo-Russian break would come November 1. Grade shows that, despite the machinations of Napoleon and the equivocal letters of Alexander I¹⁶³ and other Russians, it was the fifth of December before the Russian Ambassador in London asked for his passport—definitely a tardy rather than a premature fulfillment of the agreement at Tilsit.¹⁶⁴

Upon still another point the interpretation of Kirchhausen would seem to be in error. He holds the view that nothing but resentment over the English conduct toward Denmark kept Sweden aloof from England until January, 1808.¹⁶⁵ This view is clearly refuted by the correspondence between the northern Courts and the records of Scandinavian authorities, which indicate that Swedish foreign policy was conditioned mainly by a fear of Russia in connection with her negotiations with Denmark and also with her suspected designs on Finland.¹⁶⁶

Denmark in the course of the Napoleonic Wars lay athwart the path of the belligerents. Her situation and her fleet would be invaluable to either party that could obtain control of them. For the defense of her neutrality she had made no preparation, and her resources were inadequate. She accordingly followed a line of action that would prove the less dangerous to her existence

¹⁶² But see a letter of Count Kotchoubey to the Duke of Richelieu, Sept. 2, 1807 (O. S.), in *Abhandlungen der Russ. Hist. Gesellschaft*, 1887. Alexander I, in a letter to Gustavus IV, Sept. 27 (Grade, *op. cit.*, p. 108), expressed sympathy for Denmark without showing hostility toward England, and as an indication of Russia's good intentions toward England pointed to the fact that Russian harbors were not closed to English shipping. As late as Oct. 30 he referred to the advantage of an understanding with England (*ibid.*).

¹⁶³ In contrast to his letters to Gustavus IV, cf. Alexander I's letter to Napoleon, Nov. 15, 1807, in Tatischeff, Serge, *Alexandre I et Napoleon*, p. 232.

¹⁶⁴ Grade, *op. cit.*, pp. 125-126: "But the main consideration was not the time when Lord Gower and his suite were dismissed from the Russian capital, but rather the time when the Russian decision was announced to the Government in London, and in that respect the Russian cabinet cannot impute to itself the merit of having anticipated the terms [of the Treaty of Tilsit]."

¹⁶⁵ Kirchhausen, *op. cit.*, Vol. II, p. 79.

¹⁶⁶ Clason, Sam, "Vårt Hundradsårsminne: Krisen 1808-1809," in *Svensk Hist. Tidsskrift* (1909), pp. 9-17; Grade, *op. cit.*, Chaps. V-VI; Clason, "Gustaf IV och General Moore," *Svensk Hist. Tidsskrift* (1912), pp. 2-12.

as a nation. At the time there were rumors of a secret understanding between Denmark and England. Raeder, writing some thirty years after the event, felt it necessary to explain that these rumors were ill founded and out of harmony with the honorable foreign policy of Denmark.¹⁶⁷ Although the facts, as related in these pages, do not point to more than a tacit acceptance on the part of both countries of the inevitability of the English intervention, they strongly suggest that the Prince Regent of Denmark helped to direct the course of the events of the summer and autumn of 1807.

Although the key to this particular phase of Danish foreign policy may be hidden in the European archives, the significance of Denmark's geographic position and her equivocal diplomacy in the early years of the nineteenth century remain clear. From 1803 Napoleon had given definite indications that he would at an opportune time seek to obtain control of Denmark's fleet and her strategic position. Denmark, on her part, had indicated not only that she would be unable to resist the advance of the French armies, but also that she would take a conciliatory attitude toward French aggression. England, carefully watching the events that occurred along the Baltic littoral, believed that her safety would be jeopardized through the approaching intervention by France. At the crucial moment she moved to anticipate the action of her enemy by presenting Denmark with the choice of an alliance or the surrender of the fleet. The Danish Government declined to entertain these proposals, and the English intervention, based on the ground of "self-preservation or imminent danger," became inevitable.

¹⁶⁷ Raeder, *Danmarks Krigs og Politiska Historie*, Vol. I, pp. 485-486.

EDITORIAL COMMENT

FUIT AUSTRIA

It has been said that statesmanship is the ability to see today the effects which a particular policy will have ten years hence. Judged by any such test the Governments of Great Britain and France were singularly lacking in statesmanship when they set their hands not only against a political union of Austria and Germany, but even against a restricted customs union which might have brought economic relief to Austria without the necessity of closer political ties. Excuse may doubtless be found for the failure of the British and French Governments to foresee as early as 1919 the ultimate advantages that would come from leaving Austria free to decide her own destiny. For the chaotic conditions in central Europe immediately following the World War obscured the view of probable future developments. But by 1926 the smoke and dust of the war had largely cleared away. Germany was now being admitted to membership in the League of Nations; the Weimar Republican Constitution appeared to be a stable document; democratic institutions were in full operation; and treaties were still regarded as creating legal obligations. A mere customs union might not have relieved the economic situation for Austria; but the withdrawal of prohibitions against it would have eased the political situation and would have greatly strengthened the democratic forces both in Austria and in Germany.

Today we witness not a customs treaty between two independent states, not even a confederation of Austria and Germany leaving the national integrity of Austria unimpaired, but the complete assimilation of Austria into Germany. Austria is henceforth to be a mere province of Germany, and the name of a country, whose origins go back to the tenth century or earlier, is now erased from the annals of international law. Diplomatic relations of Austria with third states will be merged with those of Germany. Treaties made with Austria come to an end; and there is only the question of the extent to which Germany may be expected by law to succeed to obligations once binding upon Austria.

What is to be the attitude of other members of the international community towards the forcible extinction of one of their associates? By no process of legal legerdemain can the coercion exercised by Germany upon the *de jure* Government of Austria be resolved into an act of voluntary consent on the part of Austria to the union. Whatever be the results of the plebiscite to be held as a means of obtaining formal confirmation of the accomplished fact, the initial use of force by Germany must taint all subsequent proceedings with illegality. In the case of the members of the League of Nations the legal obligation is explicit enough, whatever difficulties may be in the way of giving

practical effect to the obligation. For the experience of recent years has shown that collective security can not be counted upon unless the vast majority of the community is on the side of law and order, so that their combined strength greatly exceeds that of the lawbreaker and his accomplices. Collective security must inevitably fail when those who challenge the law are so powerful that they can only be suppressed at a cost to the community which appears to outweigh the suffering of the victim. Under such circumstances each member of the international community will be tempted to take a narrower view of its national interests and to seek its present safety at whatever cost to the general principle of coöperative defense.

For the states parties to the Pact of Paris there are no treaty obligations calling upon them to take action in consequence of the violation of the Pact. But apart from treaty obligations they have a right under international common law to protest against the violation of a treaty and to support their protest by such methods as they may see fit to adopt. The doctrine of non-recognition should logically be applied to the annexation of Austria as to a territorial conquest, since otherwise the protest against the violation of treaty provisions would be nullified by acceptance of the results. Further methods of protest might go so far as the prohibition of the shipment to the treaty-violating state of the raw materials of war industries and even the temporary recall of diplomatic representatives.

Once more the international community is presented with evidence of the fact that acquiescence in the commission of acts of lawlessness almost inevitably leads to a general breakdown of law and order. Steadily, for the past seven years, the community has witnessed treaties broken, territories invaded and annexations proclaimed. The situation has been reached where economic sanctions that might in the beginning have proved effective are no longer adequate. Concessions by way of alleviation of economic distress, which might ten years ago have stayed the tendency to resort to violence, can now be made only at the price of strengthening the hand of the violator of the law and making it less likely that he will listen to the voice of reason. Such is the vicious circle in which the world has been caught. It is a tight circle and it can only be broken by the boldest of moves—an offer on the part of the one powerful country that stands outside the present balance of power in Europe to lend its aid to the rebuilding of the foundations of international law that have been so seriously undermined.

How might this be done, conceding the slim chance of its success? It might be done by the prompt reassertion of the fundamental principles of international law and the pledge of the United States to give its moral support and the full measure of its economic aid to the maintenance of those principles. Foremost among those principles is the repudiation of violence as a means of enforcing claims: that no state may take the law into its own hands. Second only to this principle is the one that has been discussed so much during the past ten years but is still largely a matter of promise rather than of perform-

ance—that the raw materials and the markets of the world be made more readily accessible to all nations.

It may be that it is now too late to bring about that combination of military, economic, and moral disarmament which has been all along the one means of stemming the tide of international anarchy, but which has not been put into effect simply because of the lack of a determined will to do so. But the greater the danger that faces the nations, the more imperative it is that they make that last bold effort which, if it should succeed, would save our civilization from a calamity greater than any that has yet come upon it.

C. G. FENWICK

PEACEFUL WAR IN CHINA

Japan began her present military operations in China following an outbreak between Chinese soldiers and Japanese troops near Peiping on July 7, 1937. The Japanese thereupon attacked Shanghai, and since then hostilities in China have been increasing in extent and violence until it is said about a million troops are engaged on both sides with all the mechanical accessories of modern warfare and until all of the maritime provinces from Shanghai to Manchukuo are involved.¹

During the course of hostilities the Japanese forces have admittedly committed certain outrages against third Powers which it is difficult to reconcile with Japanese pronouncements. They include the military bombing and sinking of the *U. S. S. Panay* and three American steamers and the machine-gunning of the refugees, the assault on the diplomatic representative of the United States engaged in his official duties, the entry of American property and institutions and the removal of goods and employees therefrom, and the tearing down, burning or otherwise mutilating the American flag. Similar attempts have been made against the rights and interests of other Powers.

The rights of foreigners in China are governed by a series of treaties dating from about the middle of the last century when the Hermit Kingdom began to open its doors to Western intruders. The right of Americans or American institutions to establish themselves and to own property and to carry on business in China dates from the Treaties of 1844 and 1858.² This privilege was expanded by subsequent treaties and the most-favored-nation clause so that citizens may frequent, reside and carry on trade, industry and manufactures in the Open Ports and may rent, purchase houses, places of business

¹Meanwhile the Japanese Government was writing to the American Government, "The Japanese Government wishes to express its concurrence with the principles contained in the statement made by Secretary of State Hull on the 16th of July, 1937 concerning the maintenance of world peace."

²In addition, special "foreign residential areas," "settlements" and "concessions" were set aside by treaty in certain Open Ports for residence and use of foreigners under leaseholds. These areas are under their own local administration and not subject to Chinese laws.

and other buildings and rent or lease land and build thereon. They were also permitted to travel or trade in parts of the interior under passports of consuls countersigned by local authorities. Missionary societies have practically the same property rights in all parts of the former Empire.

Although the navigation of inland waters is generally reserved to domestic craft in other countries, China has by treaty dating from 1895 opened the inland waters of the Empire to all steam vessels, native or foreign, for the carriage of passengers and merchandise, which are especially registered for this purpose. This grant did not cover public vessels, but by virtue of the most-favored-nation clause the United States and other Powers claimed the advantages of Article 52 of the Sino-British Treaty of 1858 which states that "British ships of war coming for no hostile purpose or engaged in the pursuit of pirates shall be at liberty to visit all ports in the dominion of the Empire of China and shall receive every facility for the purchase of provisions, procuring water, and if occasion require, for the making of repairs."

By treaty provision, American consuls are permitted to reside in the Open Ports, now numbering some seventy-five, and enjoy the consular privileges of the most favored nation, and diplomatic representatives may reside at the capital and enjoy all the privileges and immunities of international law and of representatives of the most favored nation.

Besides the foregoing privileges, there grew up in China the system of extraterritoriality, whereby Americans and nationals of other treaty Powers are tried in criminal and civil cases by consular officers who apply the laws of the nationality of the defendant.³ American merchant vessels are also subject to the authorities of their Government, and citizens and their property shall not be subject to seizure and forcible detention on any "pretense of the public service."⁴

It is therefore evident that American citizens, institutions and property and American vessels are rightfully within Chinese territory, including Chinese rivers, by virtue of special treaty stipulations.

The first question to consider is by what right is Japan now carrying on hostilities in China with several hundred thousand men.

In communications to the Conference at Brussels called pursuant to the Nine Power Treaty to which she is a party, Japan, in declining to participate in the conference, stated in November, 1937, that her relations with China were a "measure of self-defense," that she desired the "material and moral development of the Chinese nation," that she wished to "promote cultural

³ Subsequently the United States by Act of Congress established the United States Court for China, similar to the British Supreme Court of China, without disturbing the original jurisdiction of the consular courts.

⁴ By mandate of May 4, 1931, China promulgated regulations for the abolition of extraterritorial jurisdiction, but they never became effective. (Millard, *End of Extraterritoriality in China* (1931), p. 3.)

For an excellent discussion of treaty rights in China, see W. W. Willoughby, *Foreign Interests in China* (1920), and *China at the Conference* (1922).

and economic coöperation" with foreign Powers in China and to "respect foreign rights and interests in that country."⁵

The encroachments of Japan on China began with the seizure of Korea at the beginning of this century. Later came the so-called Twenty-One Demands of 1915 which, if acceded to, would have made China a protectorate of Japan. Under the pressure of the Nine Power Conference in Washington, Japan signed the Nine Power Convention of 1922 whereby she with other Powers solemnly agreed to respect "the sovereignty, the independence and the territorial and administrative integrity of China."⁶ Japan was also a party to the Pact of Paris of 1928, thereby agreeing not to use armed force as an instrument of national policy. She is also a party to the Hague Convention for the Pacific Settlement of International Disputes. Her treaty engagements would make a war of conquest or tutelage impossible except to a nation whose plighted word is but a veneer of feudal propensities. The protestations of Japan as to her purposes in China are an affront to the intelligence of mankind and to a decent regard for her treaty obligations to the world. The common judgment of mankind is that her great armies are in China in violation of her solemn promises, and the hostile acts committed against the Chinese Government, against the defenseless noncombatants and against foreigners at large come under the ban of present-day covenants of right and canons of humanity.⁷ Under the classic standards of international law, a war of conquest was not prohibited and did not involve the legal or moral stigma of an international crime. Today, however, the conscience of the world has been awakened to the fact that wars, at least wars of conquest, are fundamentally at variance with the moral law and the desire of mankind to live in peace with the neighborhood.

If Japanese troops are wrongfully in China under the world treaties, are they there under some special arrangement with China or by virtue of international law?

I believe it may be properly said that there is no treaty authorizing the presence of Japanese troops in China, except the Boxer Protocol of 1901 providing for the stationing of garrisons at Peking to protect the legations and at points between Peking and the sea to keep open communications, and the temporary stationing of guards along the South Manchurian and the

⁵ On Sept. 4, 1937, the Imperial Message to the Diet stated that Japan had no other purpose than "securing swiftly the peace of East Asia." On the next day the Prime Minister before the Diet referred to "our great mission of establishing peace in the Orient."

⁶ Japan was also an original member of the League of Nations but gave notice of her withdrawal in 1932. While a member of the League, however, and contrary to its tenets, Japan took from China the province of Manchuria containing roughly 500,000 square miles of territory.

⁷ The report to the Assembly of the Far East Advisory Subcommittee, Oct. 5, 1937, showed that "the action taken by Japan is a breach of Japan's treaty obligations and cannot be justified." The conclusions of this report were adopted by the Assembly of the League and approved by the United States Government.

Chinese Eastern Railways in Manchuria. Nevertheless, through Japanese pressure, military and police control in Chinese districts has been greatly expanded from very small beginnings and based largely upon the excuse of the protection of Japanese subjects on account of local disorders. The Japanese forces have frequently remained after the alleged necessity ceased to exist even after protest and offer of full protection by the Chinese Government. It is true that several countries, including Japan, sent troops to Han-kow in the revolution of 1911, but all withdrew their troops when the emergency was over, except Japan. International law allows the introduction of troops in a foreign country only in case of an emergency and to protect the lives and property of nationals when this cannot be done by local authorities, but international law insists that such troops be withdrawn as soon as the emergency is passed. It is believed that the excuses of the Japanese for continuing to maintain troops in China in the past have been without basis in international law and have not followed the practice of other countries in withdrawing troops from China. Moreover, the present Japanese armies in China are so disproportionate to the alleged purpose in view and to the requirements of international law that another objective must be attributed to the Japanese Government.

May the present extensive military operations of Japanese forces on Chinese soil be explained on the ground of war?

No declaration of war has been made by either side in the conflict, although the Hague Convention of 1907, to which China and Japan are parties, provides that hostilities should not commence without previous and explicit warning to the other party and notice to neutral Powers. The exercise of belligerent rights of blockade, visit, search and capture have not been resorted to by either side. Diplomatic relations have not been broken off although the heads of missions retired after the fall of Nanking. Consuls generally remain at their posts and commercial intercourse has continued, although naturally on a much reduced scale. On the other hand, extensive military operations have been in progress between the Japanese and Chinese armies since early July, 1937. Something like a million troops are said to be engaged on both sides, and something over thirty-five warships have taken part in the operations. Bombardments by warships, heavy artillery and war planes have been extensive and destructive to life and property. As early as August 25 Admiral Hasegawa declared a blockade of certain Chinese coasts against Chinese vessels, and Chinese vessels running the blockade have been captured and sunk. Provisional governments in the nature of military governments supported by armed forces have been set up by Japan in the conquered territory. Neutrals have been warned to withdraw from areas of hostilities, and encroachments have been made by Japanese forces upon the foreign settlement areas.

Can it be said that this situation does not represent war?

The authorities are clear that up to the time of the Hague Convention,

above mentioned, hostilities usually began without a declaration of war and that a subsequent declaration, if made, was essentially for the purpose of warning the nationals of the belligerent. To disregard the Hague requirement as to a declaration of war and the stipulations of the anti-war pacts not to resort to armed force would not make hostilities any the less a war. It might be an illegal war in origin but it might be carried on according to the international laws of warfare and be recognized by belligerents and neutrals alike as a public war. Bootleg liquor is liquor nevertheless. As hostile acts by one nation may be considered as war-like or not by the recipient, it would seem that the attitude of the latter might determine the result. Here China is opposing force with force and is contesting by military measures the right of Japan to invade her territory and to enforce her demands. It would seem these acts indicate the intention of China not to submit and the intention of Japan to insist on submission. Indeed, Japan now claims the fruits of conquest.⁸ Says the United States Supreme Court with reference to the hostilities between the United States and France, "Every contention by force between two nations in external matters under the authority of their respective governments is not only war but public war."⁹ And again the same court says, "War has been defined to be 'that state in which a nation prosecutes its right by force'."¹⁰ The courts and the writers pretty well agree that the fact of actual hostilities is the essential element necessary to constitute a state of war. Pitt Cobbett writes, "War is a question of fact and once it exists in fact then all its legal incidents will attach irrespective of the legality of its commencement."¹¹

If war exists, is Japan's position in China that of a military occupant, entitled to the rights and privileges thereof in the territory within her positive control?

The Hague Convention of 1899, in force between China, Japan and the other Treaty Powers, provides that "Territory is considered occupied when it is actually placed under the authority of the hostile army." Occupation then is a question of fact and follows the army. The convention goes on to state that "the authority of the legitimate power having actually passed into the hands of the occupant," he shall have certain rights and obligations. In general these obligations include, among other things, respect for personal and property rights, the preservation of order and safety, the prevention of pillage, the protection of the property of institutions dedicated to religion, charity, education, art and science, subject of course to the necessities of war.

⁸ According to an Associated Press despatch from Tokio, March 22, 1938, Premier Konoye told the Diet, "I can tell you we will never give up an inch of the areas already occupied. We must do our utmost to develop industry and the economic condition of the occupied areas, paralleling this work with cultural efforts."

⁹ *Bas v. Tingy* (1800), 4 Dallas 34, 40.

¹⁰ *The Prize Cases* (1862), 2 Black 635.

¹¹ Cobbett, *Leading Cases on International Law*, Vol. II, p. 10.

According to certain precedents, it seems that a military occupant has a right to exercise the fullest measure of control in the territory under his hand and that the inhabitants who remain owe a temporary allegiance and are bound to submit to his will.¹² In the case of Castine it was held that the sovereignty of the United States was temporarily suspended and substituted by that of Great Britain and that the laws of the United States could not be enforced there and were not obligatory on the inhabitants. While private rights of individuals with respect to each other are generally allowed to continue unmolested by the invader subject to military necessities, the relations of individuals to the government, which is now the military occupant, are modified where necessary. Foreign consuls are subject to the regulations of the invader, but, as the occupant is governed by international law, he must treat diplomatic agents of third Powers accordingly.

In this view, what becomes of the treaty rights of third Powers in the territory of occupation—for example, the rights of Americans, American institutions and American vessels in China? Can alien residents claim from the occupant the same rights and privileges that they claim from the legitimate government? Can consular courts of the United States continue to function? Do treaty tariffs and trade privileges continue? Do treaty rights of navigation subsist? It would seem in principle, on the theory that the military occupant is supreme, that they do not, without his consent and approval, particularly the rights as to residence, travel, trade, tariffs, and the like. It is true that certain other treaty rights, such as extraterritoriality, may be claimed on the ground that they are derived from a special grant of a portion of the sovereignty of China and that therefore the military occupant takes subject to them. But it is doubtful whether he can be thus circumscribed by prior contracts. The precedents on this point are few and not very clear. In the case of the military occupation of Madagascar by the French in 1883 it appears that consular jurisdiction was superseded, but in the case of the military occupation of Samoa in 1889 by Germany, consular jurisdiction was permitted to continue perhaps as a matter of grace. In a later case in Madagascar in 1895 the jurisdiction of the French authorities under martial law was apparently admitted.¹³ In the case of the German deserters from the French Army in Morocco, the Hague Arbitration Court appeared to hold that the jurisdiction of the military occupant had the preference over that of the consul clothed with extraterritorial jurisdiction.¹⁴

This situation may be assimilated to that of the so-called leased areas in China where the lessee exercises jurisdiction but the titular sovereignty remains in China. In such cases the precedents indicate uniformly that consular courts cannot function and that even the ordinary consular

¹² Moore, *Digest of International Law*, Secs. 21-22, 1143-55; Spaight, *War Rights on Land*, p. 320 ff.

¹³ Moore, *op. cit.*, II, pp. 204, 644.

¹⁴ Scott's *Hague Court Reports*, p. 110.

privileges cannot be exercised without an exequatur from the lessee government.

On the other hand, if the rights of navigation on the inland rivers are rights *in rem*, like servitudes or easements, derived from grants of the legitimate sovereign, then such rights may perhaps follow the territory and become a limitation on the fee in the hands of the military occupant.¹⁵

If the present adventure in China is not a war, the responsibilities of Japan will be quite different and they may well be sufficient to impel her ultimately to admit (if she has not already done so) that this affair with China is and has been from the beginning a public war, albeit by Japanese logic a "peaceful" war.

L. H. WOOLSEY

THE ROBINSON CASE

Mr. Adolph Arnold Rubens, not known to be an American citizen, obtained an American passport for himself and one for his wife, Mrs. Ruth Marie Rubens. He also obtained in New York two other fraudulent passports issued in the names of two deceased children, Donald Louis Robinson and Ruth Norma Robinson.¹ By using the Rubens passports the couple proceeded to France and later entered Russia early in November by means of the fraudulent Robinson passports for which an authentic Soviet visa had been obtained. At Moscow they established themselves at a hotel two doors from the American Embassy, but did not visit the Embassy. When Mr. Rubens disappeared and the matter was brought to the attention of the Embassy officials, they made a call on Mrs. Rubens, known as Mrs. Robinson, late in the afternoon, to see if they could assist her in her distress. When they returned the following day to complete the investigation they found that Mrs. Rubens, alias Robinson, had also disappeared. Whereupon a request for information was made to the Soviet authorities. While the Embassy awaited a reply to its request, the Department of State, as a result of its investigation, learned that the Robinson passports were fraudulent and so informed the Soviet authorities. On January 21, the American Chargé d'Affaires at Moscow, Mr. Loy W. Henderson, was informed over the telephone by a member of the Foreign Office that he had been instructed to inform Mr. Henderson as follows:

(a) The woman in question entered the country in possession of a passport in the name of Ruth Norma Robinson; (b) her Soviet visa was valid; (c) the internal authorities state that it would be inconvenient for the Embassy to visit her in prison until after their investigation of her had been completed. He added that the internal authorities permit the representatives of no foreign country to visit their nationals in prison

¹⁵ Magoon's Reports, pp. 328-331.

¹ Press Releases, U. S. Dept. of State, Dec. 18, 1937, p. 472; Jan. 22, 1938, p. 133; Jan. 29, 1938, p. 173; Feb. 12, 1938, p. 260; New York Times, Dec. 30, 1937; Dec. 31, 1937; Jan. 23, 1938; Jan. 26, 1938; Feb. 11, 1938.

during the course of investigations and could make no exception to the United States.²

Whereupon Secretary of State Hull by cable instructed Chargé d'Affaires Henderson to address a formal communication to the Minister of Foreign Affairs at Moscow. In this second and more emphatic demand that an American representative be permitted to visit Mrs. Rubens in the Soviet jail, where she was "held on the suspicion of spying",³ Mr. Henderson was instructed

to call attention to the letter of the Minister for Foreign Affairs of November 16, 1933, to the President of the United States⁴ in which Mr. Litvinoff stated that nationals of the United States would be granted rights with reference to legal protection which would not be less favorable than those enjoyed in the Soviet Union by nationals of the nation the most favored in this respect. In this connection Mr. Litvinoff called the President's attention to the text of certain articles of the agreement concerning conditions of residence and business and legal protection in general which was concluded on October 12, 1925, between the Union of Soviet Socialist Republics and Germany. Paragraph 2 of the final protocol to Article 11 of this agreement reads in part as follows:

"In places of detention of all kinds, requests made by consular representatives to visit nationals of their country under arrest, or to have them visited by their representatives, shall be granted without delay."⁵

Mr. Henderson was also instructed to say that the Government of the United States is unable to accept any interpretation of this paragraph which would operate to restrict in any way whatsoever the granting without delay of requests made by its representatives to visit American nationals under arrest, or to have such American nationals visited by representatives of American consular or diplomatic officers.

Mr. Henderson was instructed to add that the Government of the United States continues to expect that an officer of our Embassy at Moscow will be permitted without delay to interview the person whom the Soviet authorities refer to as Mrs. Robinson.⁶

On February 10, Chargé d'Affaires Henderson, accompanied by the Second Secretary of the Embassy, Mr. Angus I. Ward, were permitted to interview Mrs. Rubens in the Butyrskaya Prison at Moscow, where she was detained. The Department gave out the following account of the interview:

Others present were an investigating magistrate, a Russian official who acted as interpreter, and a representative of the Foreign Office. The purpose of the visit was definitely to identify Mrs. Rubens and to endeavor to establish whether she is an American citizen. Inasmuch as the

² Press Releases, U. S. Dept. of State, Jan. 22, 1938, p. 133.

³ Associated Press, New York Times, Jan. 26, 1938.

⁴ Dept. of State, Eastern European Series, No. 1, Establishment of Diplomatic Relations with the Union of Soviet Socialist Republics, U. S. Govt. Printing Office, Washington, 1933, p. 11; also this JOURNAL, Supp., Vol. 28 (1934), p. 8.

⁵ *Ibid.*

⁶ Press Releases, U. S. Dept. of State, Jan. 29, 1938, p. 173.

investigation by the Russian authorities has not been completed, questions dealing with matters connected with the official investigation could not be asked, but the interview did elicit definite identification by Messrs. Henderson and Ward of Mrs. Rubens.

Mrs. Rubens stated that she is Ruth Marie Rubens and that she left New York and was in transit under the name Rubens and entered the Soviet Union in the early part of November on a passport under the name of Ruth Norma Robinson. She said that she does not know how the Robinson passport was obtained. Her husband procured it for her and did not tell her how it was obtained or explain why.

Mrs. Rubens stated that she does not have an attorney representing her at present and that she does not desire an attorney. She made no complaint of her treatment. When asked if there was anything which the Embassy could do to make her more comfortable or to assist her she said that she was grateful for the offer of assistance but that she wanted no assistance.

Mrs. Rubens was neatly dressed and fairly well groomed.⁷

The releases above referred to do not indicate that the Secretary of State instructed our representatives to protest at the failure of the Soviet authorities to notify the Embassy of the arrest of Mrs. Rubens, an American citizen, in accordance with the terms of the Roosevelt-Litvinoff exchange wherein the Soviet Commissar specifically prescribed that such notice would be given, and President Roosevelt, acknowledging the Soviet undertakings, said:

Let me add that American diplomatic and consular officers in the Soviet Union will be zealous in guarding the rights of American nationals, particularly the right to a fair, public and speedy trial and the right to be represented by counsel of their choice. We shall expect that the nearest American diplomatic or consular officer shall be notified immediately of any arrest or detention of an American national, and that he shall promptly be afforded the opportunity to communicate and converse with such national.⁸

The protocol to Article 11 of the German treaty referred to above required that the Soviet authorities should give notice of the arrest "in large towns, including capitals of districts, within a period not exceeding threetimes twenty-four hours."⁹ The failure of the Soviets to extend the benefit of this provision under the most-favored-nation clause and to apply it in the Robinson case may perhaps have had some justification, in view of the fact that through their reliance on the validity of an American passport they had been subjected to the danger of admitting a spy to their territory. For a similar reason our representatives may not have been in a very favorable position to insist upon the right to conduct a less strictly censured interview with the prisoner.

There is no more important obligation of the state than that of protecting its nationals from abuse and injustice when abroad. The United States has recently indicated the adoption of the viewpoint that Americans who reside or

⁷ Press Releases, U. S. Dept. of State, Feb. 12, 1938, p. 260.

⁸ Dept. of State, Eastern European Series, No. 1, p. 12; this JOURNAL, Supp., Vol. 28 (1934), p. 9.

⁹ *Ibid.*, p. 8.

travel abroad, as well as those who invest their capital beyond our frontiers, must assume the risks of the adventure and cannot expect the nation to incur the dangers of recourse to force in order to guarantee them the enjoyment of their rights under international law. This change of policy, for it cannot yet be considered a change of law, is merely a notification to American citizens that they cannot expect the government to use force for their protection, but it does not mean that the United States has assured other governments that it will so refrain from protecting them. It is not, however, to be expected that we shall have recourse to armed intervention against a great Power to obtain redress for the injurious treatment of a national in any particular instance. But violations of the rights of our nationals, especially when repeated, may lead to a dangerous state of tension and ultimately result in war. In any event it still remains true that any abusive treatment of an alien engages the responsibility of the state and justifies the alien's government in the exercise of its protective action and the employment of such appropriate means as may be adequate to secure redress. In order to fulfil its duty of protection of nationals abroad, it is essential that our representatives should be able freely to communicate with them at all times. If an alien can be seized and held in prison *incomunicado* without notification to the diplomatic or consular representatives of his state, the protection to which he is entitled under international law is rendered illusory.

Certain states claim the right to hold arrested persons *incomunicado* for a limited period while the investigation is in progress. According to our system of law, the dangers which the exercise of an arbitrary power of arrest may hold for the rights of the individual are met in part, at least, by the writ of *habeas corpus*. The failure of a state to provide any such remedy may be a matter within the sovereign discretion of the state, but its lack will not justify the application to an alien of regulations which may permit unjustifiable detention and prevent the representative of his government from aiding him to secure his release. It is obvious that an alien who is ignorant of the language and legal system will be at a disadvantage in establishing his innocence of any offense of which he may be accused or suspected.

The United States has consistently contended that notice of the imprisonment of a national should be given and that its representative should be permitted to visit the prisoner in order to ascertain that he was not subjected to any unreasonable restriction of his liberty or abuse of his rights. This right of access to nationals in prison is so clearly a necessary adjunct or adjective provision of the right to protect nationals when abroad from injustice or abusive treatment that it must inescapably be recognized as a rule of international law. This is true notwithstanding the divergent views expressed by certain states and their failure in some instances to acquiesce in its application.

It is to be regretted that the texts pay so little attention to this important rule. This is doubtless due to the fact that international law has generally

been studied more from the angle of natural law principles than from the practical point of view of the procedure appropriate to secure international legal rights. There is no right without a remedy, and if the remedy be defective the right will suffer accordingly.

The Harvard Research in International Law does not fall into this error, for its draft convention on the Legal Position and Functions of Consuls contains in its Article 11 (d) the provision that the receiving state shall permit a consul, "To communicate with, to advise and to adjust differences between nationals of the sending state within the consular district; to visit such nationals especially when they are imprisoned or detained by authorities of the receiving state; to assist such nationals in proceedings before or relations with such authorities; and to inquire into any incidents which have occurred within the consular district affecting the interests of such nationals."¹⁰

This right to visit imprisoned nationals would *a fortiori* include the right of a member of the diplomatic mission to exercise a similar right of visit in appropriate cases, and this application or interpretation is made in President Roosevelt's letter quoted above. It will be noted that the permission to visit nationals in the Harvard Research draft convention is given "especially when they are imprisoned." Following the same course of reasoning, the comment on the draft text points out that this right of visit is especially important when the alien is held *incomunicado*.¹¹ Then, if ever, he is in need of the aid and protection of his diplomatic or consular representatives to prevent any disregard of his rights, whether intentional or not.

ELLERY C. STOWELL

THE VILLA CASE

The *New York Times*, in a dispatch dated November 20, 1937, reported that a military court in Palma de Majorca had sentenced Antonio Fernandez Villa to twenty years imprisonment on charges of sympathizing with the enemy. His wife was sentenced to twelve years in prison. The dispatch added that both are naturalized American citizens, but that the court had refused to admit this plea; and that the American Vice-Consul at Leghorn had been sent to Majorca to protect the interests of the Villas.

As a matter of fact, the two had been held in jail since the end of 1936. The first notice of this was a home-made Christmas card received by his brother, Professor Pedro Villa Fernandez, of New York University, containing an acrostic with one word in English, "jail." Professor Fernandez at once took the matter up with the Department of State, which has been working assiduously on the matter since that time. The case presents some peculiarities and difficulties which make it worthy of discussion.

In April, 1937, it was reported by unofficial workers that Villa would be released if he had an American passport—his own was hidden away, and he

¹⁰ Harvard Research in International Law, *The Legal Position and Functions of Consuls*, this JOURNAL, Supp., Vol. 26 (1932), pp. 267-268.

¹¹ *Ibid.*, p. 270.

was unable to produce it. Since the records of the State Department confirmed the fact that he was entitled to an American passport, the Consul General at Marseilles was instructed to issue one for him provided he had not meanwhile expatriated himself; and money was sent for his return. He was not, however, released; and the Department of State reported that it was unable to accomplish much because of the necessarily unofficial character of its efforts. Meanwhile, a number of agencies had become interested and were bringing pressure to bear upon the Department; and 400 college professors had sent in a petition on behalf of Villa. To such requests the Department replied, and justifiably, that it needed no spur. It had, indeed, gone to unusual lengths in dealing with an insurgent group. Vice-Consul Fisher was away from his family for several months on the case; the Consul at Seville saw General Quiapo de Llano and obtained from him a promise to take up the matter with the authorities at Salamanca; and even the Ambassador had interceded indirectly. In October, all concerned were confident of his release; the *Times* correspondent wrote Professor Fernandez that the authorities at Majorca were uncomfortable, but did not wish to release Villa for fear he would talk of conditions in Majorca. The Department, in a letter to Dr. Evelyn Seufert, reported that the trouble lay with the subordinate officials at Majorca, who would not obey, and that every step short of force had been taken to secure the release of the Villas.

The accusations made at the trial in November (before a court of eight military officers) were that an incriminating note had been found in Villa's desk; that he had been in a "Red" parade in May, 1936; that he belonged to a labor union and had promoted a strike; and that therefore he was an extreme Leftist. It was brought out during the trial that the man who found the note had left the country, and that the man who wrote the note denied having sent it to Villa. Both Villa and his wife admitted having been in the parade because of the pressure of local politics upon a business man; the parade, however, was perfectly legitimate at the time, and no effort had ever been made to prevent it, or to punish for participation in it. Mr. Villa said that he had been in a workingman's organization, but that he had resigned from it before hostilities started. Their property was confiscated, as well as property belonging to Professor Fernandez, his brother. There could be no doubt that Mr. and Mrs. Villa were convicted for actions which were not illegal at the time they were done—if they are now. Certainly, it would be the duty of aliens to respect the legitimate government of the state in which they were located, and they should not be penalized for so doing.

One phase of the problem which the Department of State faces in dealing with such a case is the pressure and criticism of uninformed groups. While Professor Fernandez himself willingly says that the Department has done everything in its power in behalf of his brother, the New York College Teachers' Union on January 14, 1938, adopted a resolution asserting that the "State Department has been shockingly inactive in behalf of these innocent Ameri-

cans, in striking contrast to its energetic defense of more questionable personages abroad"; and demanding "that the State Department order the diplomatic officers of the American people in Spain to secure the immediate release of Mr. and Mrs. Antonio Fernandez Villa and their safe conduct out of Spain to a destination of their own choice." If the resolution had contained some information as to how this could be done, doubtless it would have been welcomed at the Department of State. The Government of the United States has rarely resorted to force to protect a citizen abroad; and at the present time, when there is a popular clamor for American citizens to return home and cease constituting risks of war, the Department could have little hope that the American people would back it up if it wished to recommend the employment of force in this case.

It is the fact that American citizens are held by an insurgent group, and one which does not have sufficient control over its own local authorities, which makes this an especially difficult problem of diplomatic protection. Should the insurgent movement fail, it would of course be impossible to demand reparation from it; on the other hand, the parent government can usually disclaim responsibility on the ground that it has employed all the means at its disposal to restrain the insurgents—which would seem to be beyond doubt in this case. In such a situation, there is a certain amount of exigency; if one waits until the strife is ended, it may be too late.

But the ordinary means of pressing such an issue are not available. The United States has not recognized the Franco régime as belligerents, much less as a *de jure* and independent government. If the denial of recognition implies a denial of legal relationships, upon what grounds can demands for release or reparation be based? Aside from this, the ordinary channels for diplomatic action do not exist; if a diplomatic agent were sent to deal with General Franco, there is no doubt that he would attempt to seize upon it as an evidence of recognition. The Spanish imbroglio has kept Europe at the point of war for many months; the United States must step carefully. Nevertheless, and aside from such political considerations, which undeniably justify caution, too much attention may be given to formalities. Recognition is clearly an individual decision; the state which deals with an unrecognized group is able to make it clear that it does not thereby intend recognition. The signature of a treaty has usually been regarded as indicative of recognition; yet the United States was able to sign more than one treaty with Soviet Russia without thereby conferring recognition upon that government. Even if recognition were claimed by the pretending state, as a result of some formality, it could have no method of compelling the protecting state to deal with it on a footing of equality. The situation is one of fact and should be so treated. There is no good reason—aside from the involved political situation in this particular case—why American diplomats should not deal directly with insurgent authorities where necessary in caring for American interests; nor why the Department of State should not deal openly with the agents of

such a government in this country. It is unnecessary and undignified to act clandestinely through unofficial representatives.

It could be argued that the belligerency of the Franco régime should be recognized.¹ If this were considered, the possibility of recognition could be used for bargaining purposes; perhaps also other methods of approach or pressure might be opened through the new status. This course seems impracticable in the present situation, because of the extremely tangled and dangerous international problem of which Spain is the center.

The easiest solution would probably be a threat or use of force. Franco could not afford to take the risk of such losses as might befall him; a mere naval demonstration might be sufficient to secure the release of the Villas. There could be little risk of war, for interested nations would know that the United States would have no intention of doing more than securing the release of her citizens. It would be more than ordinarily justifiable, for here the injury is being committed by a group which cannot otherwise be held to responsibility; still more is this true where the authorities at the head of the insurgent movement are unable to secure obedience from subordinates. For all practical purposes, it is the local authorities at Majorca with whom we must deal; it should not require a great expenditure of our naval resources to coerce them. If the precedents of the United States are against such action, it is also true that this is an exceptional situation, involving unusually irresponsible elements. It is nevertheless probably true that the temper of the American people today would not permit such action to be taken.

Are there any other measures which could be undertaken to secure respect for the rights of American citizens in insurgent control? The Neutrality Act, as adopted on April 29, 1937, extends its provisions to cover civil strife, and they must be applied equally to both parties to the strife. If the Neutrality Act contained the clause often advocated, permitting revocation of its provisions in favor of one of the parties, it might be possible to take measures so injurious to the insurgent effort as to compel the release of these Americans. Again, it is the temper of the American people—doubtless including some of those who now criticize the Department of State for its failure to secure the release of the Villas—which restrict the efforts which can be made in their behalf.

Possibly the Executive Department could find some act of reprisal or penalty to employ against those who hold Mr. and Mrs. Villa. There is an agent of the Franco régime in New York who could be imprisoned with no more injustice than are the Villas. It is understood that the Franco régime has money deposited in New York banks; it might be possible to impound a sufficient amount of these moneys to cover a proper reparation for what Mr. and Mrs. Villa have lost and suffered. If existing legal authority is not sufficient to permit of such action, Congress should be able to provide the

¹ See editorial comment by James W. Garner, this JOURNAL, Vol. 32 (1938), pp. 106-113.

authority. The contemplation of such measures should be attended by careful study, for they might result in retaliation. It has been suggested by friends of the Villas that the United States might request the Government of Spain to exchange for the Villas some of its insurgent prisoners. If such a request were based upon the argument that the Villas deserved the support of the Loyalist Government, this would constitute an admission of guilt which would nullify any demand for reparation from the Franco régime, now, or if it should succeed; if it were requested as a favor from the Spanish Government, the United States might be embarrassed by a request for return of the favor. Perhaps some such reciprocal favor could be found; on the whole, it does not seem to offer a promising solution.

De facto régimes have always furnished difficulties for international lawyers and diplomats; the matter of diplomatic protection affords a particularly delicate illustration. The risk of conferring an unintentional recognition, which seems to have embarrassed statesmen in the past, can and should be disregarded. The absence of a responsible entity with whom one can deal on a basis of legal rights is the real difficulty. The tendency of the present day seems to be to put the parties to a civil war upon the same footing as belligerents at war. This tendency was discussed by Professor Garner in the last issue of this JOURNAL; it appears also, as has been remarked, in our neutrality legislation. Such an attitude has the advantage of common sense recognition of a state of fact—granted a sufficient degree of warfare—by outside states; it would provide some little basis of legal responsibility, and make somewhat more easy intercourse with the insurgents. A factual situation should be dealt with as a fact; if the recognition of the fact of belligerency is not sufficient, more direct action should be taken. We have in the past dealt directly and in drastic fashion with pirates and bandits, even though unrecognized. The Franco régime must be placed in a higher ranking; but if it, or other insurgent groups, behaves in reckless and irresponsible fashion toward other states, it should not be allowed to escape responsibility for the protection of aliens because of its uncertain legal status and transitory character.

It is bad enough that war should be permitted to change the legal rights of, and do injury to, third states; it is even more objectionable that a civil war, which is supposed to be a domestic affair, should give license to an unrecognized group to do harm to the citizens of another state.² Some rules exist concerning the responsibility of belligerents in case of formal war, and efforts are now being made to hold to greater responsibility states which impose war upon an unwitting world; perhaps an effort should be made also to build some international regulations for insurgent groups in civil war. The difficulties, but also the need, of such regulation is shown by the Spanish Civil War. An

² "The right to treat unlawful and unauthorized warfare as piratical, seems to me, therefore, clearly imbedded in the very roots of international law." *The Ambrose Light*, 25 F. 408 (1885). The court is here dealing with an unrecognized insurgent group.

international control has been suggested. Failing that, the only possibility seems to be "direct action," for there is no law to cover the case.

In the law and procedure of diplomatic protection today, as in other fields, foreign offices are being confronted with strange and incredible situations. If conventional and accepted methods of procedure and settlement are disregarded to our injury, it is not necessary to cling to established etiquette. It would seem reasonable to employ new and impressive measures in defense of rights when such measures are used to attack rights. CLYDE EAGLETON

THE CLOSE OF A CHAPTER IN THE HISTORY OF TRANSISTHMIAN TRANSIT

The termination of Article VIII of the Boundary Treaty between the United States and Mexico, concluded December 30, 1853 [Gadsden Treaty], is significant of the changes in international relations following changes in methods of transportation. This Article VIII stated that

The Mexican Government having on the 5th of February 1853 authorized the early construction of a plank and railroad across the Isthmus of Tehuantepec, and to secure the stable benefits of said transit way to the persons and merchandise of the citizens of Mexico and the United States, it is stipulated that neither government will interpose any obstacle to the transit of persons and merchandise of both nations; and at no time shall higher charges be made on the transit of persons and property of citizens of the United States than may be made on the persons and property of other foreign nations, nor shall any interest in said transit way, nor in the proceeds thereof, be transferred to any foreign government.

The United States by its agents shall have the right to transport across the Isthmus, in closed bags, the mails of the United States not intended for distribution along the line of communication; also the effects of the United States Government and its citizens, which may be intended for transit, and not for distribution on the Isthmus, free of customhouse or other charges by the Mexican Government. Neither passports nor letters of security will be required of persons crossing the Isthmus and not remaining in the country.

When the construction of the railroad shall be completed, the Mexican Government agrees to open a port of entry in addition to the port of Vera Cruz, at or near the terminus of said road on the Gulf of Mexico.

The two governments will enter into arrangements for the prompt transit of troops and munitions of the United States, which that government may have occasion to send from one part of its territory to another, lying on opposite sides of the continent.

The Mexican Government having agreed to protect with its whole power the prosecution, preservation and security of the work, the United States may extend its protection as it shall judge wise to it when it may feel sanctioned and warranted by the public or international law.

That some means of convenient transisthmian transit should be devised had been advocated for more than three hundred years. During the nineteenth century three routes were under particular consideration, the Tehuantepec, Nicaragua, and Panama routes. The support for each route enlisted able engineers and varied arguments. For the Tehuantepec as regards the

East and West Coast of the United States, such arguments as reduction of distance from New York to California by 1,250 miles as compared with the Panama route, the generally favorable winds at the termini of the interoceanic ship railway, the economy of construction of the railway both in money and time as compared with water routes, were advanced. Even in the message of President Cleveland of December 8, 1885, it was said "The Tehuantepec route is declared, by engineers of the highest repute and by competent scientists, to afford an entirely practicable transit for vessels and cargoes, by means of a ship railway, from the Atlantic to the Pacific."

When the treaty was negotiated, the United States was to enter into an arrangement with Mexico for the transit of troops and munitions from one side to the other side of the continent via Tehuantepec and the "construction of a plank and railroad" was to be "early." After more than eighty years it seems just that the rights of the United States, which have not been exercised, in the Tehuantepec area should be terminated. One chapter of the history of the transisthmian projects and controversies has been brought to an end on December 21, 1937, by the exchange of ratifications of the treaty signed at Washington on April 13, 1937.*

GEORGE GRAFTON WILSON

RESERVATIONS TO MULTIPARTITE INTERNATIONAL INSTRUMENTS

It is only in recent years that formal articles in multipartite international instruments, upon which the effectiveness of international legislation frequently depends, have begun to receive the attention which they deserve. The drafting of the conventions which were opened for signature at the Peace Conferences at The Hague in 1899 and 1907 has been widely praised; yet if those texts are compared with the texts of some recent conventions, it will at once be seen that great progress has been made in this field. A marked tendency towards standardization of formal articles in current international instruments is noticeable, and on the whole the prevailing forms are giving little difficulty.

In spite of the progress made, however, solutions have not yet been provided for all of the problems which occasionally arise. One of these problems is connected with the necessity of consent to reservations which a state may wish to make in signing or ratifying or acceding to a multipartite international instrument. Attention was attracted to this problem some years ago, in connection with the Austrian reservations to the Convention on Traffic in Opium and Drugs, of February 19, 1925.¹ That convention was open to signature by any member of the League of Nations until September 30, 1925; on the latter date, it was signed on behalf of Austria with certain reservations, without any notice to or assent by other signatories. Austria had not been represented at the conference which drafted the convention. Great Britain

* United States Treaty Series, No. 932.

¹ 81 League of Nations Treaty Series, p. 317; 3 Hudson, International Legislation, p. 1589.

had previously become a signatory to the convention, and exception to Austria's action was taken by the British Government, with a request that the question be placed on the agenda of the Council of the League of Nations.² A reference to the Committee of Experts for the Progressive Codification of International Law led, in 1927, to an inconclusive report on the matter.³ The question presented was the subject of an illuminating study by Sir William Malkin who, finding that "the question of principle . . . does not seem to have been the subject of much study by writers on international law," proceeded to give a useful list of the precedents.⁴

Since the appearance of Sir William Malkin's study, a number of interesting cases have occurred, of which reference may be made to the following:

(1) On September 10, 1919, a Convention revising the General Act of Berlin of February 26, 1885, and the General Act and Declaration of Brussels of July 2, 1890, was signed at St. Germain on behalf of the United States of America, Belgium, British Empire, France, Italy, Japan, and Portugal.⁵ It was brought into force between Belgium and the British Empire on July 31, 1920; subsequently and prior to the end of 1922, ratifications were deposited by all other signatories except the United States and Italy. The convention was ratified by the President of the United States on April 11, 1930, subject to an understanding which modified the effect, as to the United States, of a provision in Article 12 concerning the arbitration of disputes arising under the convention. This ratification was promptly sent to Paris for deposit in the archives of the French Government; the consent to the reservation by other signatories was sought as a condition precedent to the deposit, and for this reason the deposit was not effected until October 29, 1934. Meanwhile, on April 14, 1931, the Italian ratification had been deposited.⁶

(2) On January 5, 1931, the Cuban ratification of the Protocol of September 14, 1929, for the Revision of the Statute of the Permanent Court of International Justice, was offered for deposit at Geneva. The ratification contained reservations as to paragraph 4 of the Protocol (relating to the coming into force of the instrument), and as to the amendment to Article 23 of the Statute of the Court, annexed to the Protocol; the covering letter with which the ratification was transmitted contained a further reservation. In this case, the Secretary-General seems to have consulted all the signatories to the Revision Protocol and all members of the League of Nations as to whether they would consent to the reservations; in their replies, a number of states

² League of Nations Official Journal, 1926, pp. 521, 612.

³ *Idem*, 1927, p. 880. See also the Council's resolution of June 17, 1927, *ibid.*, p. 800.

⁴ 7 British Year Book of International Law (1926), p. 141. See also 1 Hudson, *International Legislation*, p. xlix; Marjorie Owen, "Reservations to Multipartite Treaties," 38 *Yale Law Journal* (1929), p. 1086.

⁵ 1 Hudson, *International Legislation*, p. 343; United States Treaty Series, No. 877; this *JOURNAL*, Supp., Vol. 15 (1921), p. 314.

⁶ United States Treaty Information Bulletin, No. 7 (April, 1930), p. 5; No. 24 (September, 1931), p. 12; No. 60 (September, 1934), p. 4.

objected to the reservation relating to the amendment to Article 23 of the Statute. Thereafter, the reservations were withdrawn, and a new ratification without reservations was deposited on March 14, 1932.⁷

(3) Prior to April 23, 1932, ratifications of the Convention on Consular Agents adopted by the Sixth International Conference of American States at Havana, February 20, 1928,⁸ had been deposited with the Pan American Union by the United States of America, Brazil, Mexico, Nicaragua, and Panama, and the convention had been brought into force for those five states. On April 23, 1932, a ratification of this convention by the Dominican Republic was offered for deposit, containing reservations as to Articles 12, 15, 16, 18, 20 and 21 of the convention and interpretations of words in Articles 14 and 17.⁹ These reservations had not been consented to by other states, but the ratification was nevertheless received for deposit by the Pan American Union. The Government of the United States later notified the Pan American Union that the reservations were unacceptable to the United States, and that it "does not regard the convention as ratified by the Dominican Republic to be in effect between the United States of America and that Republic."¹⁰

(4) The Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs, of July 13, 1931,¹¹ entered into force as to some thirty states on July 9, 1933. Japan was a signatory to the convention. On March 27, 1933, Japan gave notice of an intention to withdraw from membership in the League of Nations, and the withdrawal became effective two years later. In June, 1934, the Japanese Government informed the Secretary-General of the League of Nations that the Japanese ratification of the convention would be subject to a reservation as to the maintenance of Japan's position in the matter of the composition of the organs mentioned in the convention, and the appointment of the members thereof, "regardless of whether she be a member of the League of Nations or not." The Japanese Government requested that this information be communicated "to all the other contracting parties," with a "request that they will, as soon as possible, and at latest by the end of December, 1934, notify to the Secretariat any objections which they may make with regard to this reservation." The Secretary-General's communication of June 19, 1934, was addressed only to "the parties" to the convention, but the term "parties" may have included all signatories. No objection having been expressed, on January 23, 1935, the Japanese Government informed the Secretary-General that it was prepared to act "on the assumption that those governments which have not replied by the contemplated date of December 31, 1934, have no objection to the said

⁷ See the writer's account in this JOURNAL, Vol. 26 (1932), p. 590.

⁸ 4 Hudson, International Legislation, p. 2394; this JOURNAL, Supp., Vol. 22 (1928), p. 147.

⁹ United States Treaty Information Bulletin, No. 32 (May, 1932), p. 18.

¹⁰ *Idem*, No. 38 (November, 1932), p. 22.

¹¹ 139 League of Nations Treaty Series, p. 301; 5 Hudson, International Legislation, p. 1048; this JOURNAL, Supp., Vol. 28 (1934), p. 21.

reservation." This information was circulated "to the governments concerned." On March 25, 1935, the Japanese Government made a declaration in the sense of its proposed reservation, and this too was circulated at its request to "the other high contracting parties." A Japanese ratification, containing the reservation, was deposited on June 3, 1935.¹²

(5) The Convention for Facilitating the International Circulation of Films of an Educational Character, of October 11, 1933,¹³ was opened to accession by certain non-signatory states; the convention entered into force on January 15, 1935, as a result of the deposit of ratifications or accessions by five states, among which was Switzerland. On March 28, 1935, in a communication addressed to the Secretary-General of the League of Nations, the Union of Soviet Socialist Republics expressed a desire to accede to the convention, subject to a reservation as to Article 11 which provides for the settlement of disputes as to the interpretation or application of the convention; on May 11, 1935, the Secretary-General so informed the "parties" to the convention by a circular letter.¹⁴ On November 21, 1935, the Chilean Government, whose ratification had been deposited on March 20, 1935, replied that it "does not know, and cannot *prima facie* see, what reasons justify the [proposed] reservation," and was "unable for the moment to decide as to the acceptance of the said reservation before knowing its exact text and the reasons which have led the U.S.S.R. Government to make it"; on May 5, 1936, the U.S.S.R. Government replied that in view of the Chilean difficulties, it had "no objection to that convention's being considered by the Government of Chile if the latter so desires, as not binding between that State and the Union of Soviet Socialist Republics," and this course was agreed to by the Chilean Government.¹⁵ Other governments which formulated replies having accepted the reservation, on February 16, 1937, the Government of the U.S.S.R. wrote to the Secretary-General expressing the opinion that "if no other state signatory to the convention declares itself opposed to the reservation in question by March 28, 1937, the reservation should be deemed to have been accepted by all the signatories except Chile," adding that a declaration of formal accession would then follow.¹⁶ On March 12, 1937, the Swiss Government informed the Secretary-General that "the Federal Council has very serious doubts as to the propriety of supporting an accession which would, in fact, be tantamount to the suppression of a clause of essential importance"; and that the Federal Council "cannot accept the reservation which has been submitted to it."¹⁷ On March 20, 1937, the Iranian Government, whose accession had been deposited on April 12, 1935, reserved the right to express its views on the U.S.S.R. reserva-

¹² See League of Nations Official Journal, 1935, pp. 995-998.

¹³ 155 League of Nations Treaty Series, p. 331; 6 Hudson, International Legislation, p. 456.

¹⁴ League of Nations Document C.L.68.1935.XII; United States Treaty Information Bulletin, No. 68 (May, 1935), p. 5.

¹⁵ League of Nations Document C.L.169.1936.XII.

¹⁶ *Idem*, C.L.40.1937.XII.

¹⁷ *Idem*, C.L.53.1937.XII.

tion.¹⁸ Since that date, no further steps appear to have been taken with regard to the proposed accession by the U.S.S.R.

In each of these five cases, the instrument itself contained no provision for dealing with the situation which arose. Indeed, no provisions had been invented which would satisfactorily meet the actual difficulties. In a few instruments of recent date, limit has been placed upon the possible reservations which a state may make. Thus, a protocol to the Convention on the Simplification of Customs Formalities of November 3, 1923,¹⁹ provided that certain reservations made by states at the time of ratification or accession, were to be accepted only "if the Council of the League of Nations so decides after consulting the technical body mentioned in Article 22 of the convention." In the Convention providing a Uniform Law for Bills of Exchange and Promissory Notes of June 7, 1930,²⁰ it was stipulated in Article 1 that the parties might make reservations "chosen from among those mentioned in Annex II of the present convention"; Annex II formulates certain reservations as made by all the parties, and others as optional to each of the parties. A similar disposition was adopted for the Convention providing a Uniform Law for Checks of March 19, 1931.²¹ In the Convention concerning Economic Statistics of December 14, 1928,²² the possibility of reservations was envisaged in the following somewhat restrictive provision (Article 17):²³

The high contracting parties agree to accept the reservations to the application of the present convention which are set forth in the protocol to this convention and in respect of the countries therein named.

The governments of countries which are ready to accede to the convention under Article 13, but desire to be allowed to make any reservations with regard to the application of the convention, may inform the Secretary-General of the League of Nations to this effect, who shall forthwith communicate such reservations to the governments of all countries on whose behalf ratifications or accessions have been deposited and enquire whether they have any objection thereto. If within six months of the date of the communication of the Secretary-General no objections have been received, the reservation shall be deemed to have been accepted.

A new solution of the problem of reservations, invented by the Legal Section of the Secretariat of the League of Nations, has recently been embodied in the Convention for the Prevention and Punishment of Terrorism, opened for signature at Geneva on November 16, 1937.²⁴ Article 23 of this instrument provides:

¹⁸ League of Nations Document C.L.60.1937.XII.

¹⁹ 2 Hudson, *International Legislation*, pp. 1094, 1120; this JOURNAL, Supp., Vol. 19 (1925), pp. 146, 166.

²⁰ 5 Hudson, *International Legislation*, p. 516.

²¹ *Ibid.*, p. 889.

²² 4 *Idem*, p. 2575.

²³ A similar provision was contained in Art. 22 of the Convention on the Suppression of Counterfeiting Currency, of April 20, 1929. *Ibid.*, p. 2692.

²⁴ League of Nations Document C.546.M.383.1937.V. See the comment on a draft of this provision by Valentine Jobst III, in this JOURNAL, Vol. 31 (1937), p. 318.

1. Any member of the League of Nations or non-member state which is prepared to ratify the convention under the second paragraph of Article 21, or to accede to the convention under Article 22, but desires to be allowed to make reservations with regard to the application of the convention, may so inform the Secretary-General of the League of Nations, who shall forthwith communicate such reservations to all the members of the League and non-member states on whose behalf ratifications or accessions have been deposited and enquire whether they have any objection thereto. Should the reservation be formulated within three years from the entry into force of the convention, the same enquiry shall be addressed to members of the League and non-member states whose signature of the convention has not yet been followed by ratification. If, within six months from the date of the Secretary-General's communication, no objection to the reservation has been made, it shall be treated as accepted by the high contracting parties.

2. In the event of any objection being received, the Secretary-General of the League of Nations shall inform the government which desired to make the reservation and request it to inform him whether it is prepared to ratify or accede without the reservation or whether it prefers to abstain from ratification or accession.

This provision represents an innovation in setting two time limits: (1) a time limit of three years from the date of the instrument within which signatories which have not proceeded to ratification are nevertheless to be consulted as to proposed reservations; and (2) a time limit of six months within which a negative reply to any consultation may be made. Aside from this innovation, it recognizes the possible interest of signatories which have not proceeded to ratification in the reservations offered by other signatories, and thus clarifies a point on which there has been doubt. It also establishes that when reservations other than those agreed to at the time of signature are proposed, the alternatives are absence of objection from any state consulted, on the one hand, and abstention from proceeding to deposit of a ratification or accession on the other hand. It serves as a needed guide not only to international administrative officials, but also to governments themselves. Many difficulties may be avoided if this or some provision along similar lines should become a standard article for multipartite conventions.

MANLEY O. HUDSON

THE IMPERIAL CONFERENCE OF 1937

The Conference which met in London from May 14 to June 15, 1937, following the coronation, while not marked by any very spectacular achievement, dealt with certain matters which are of some general international significance. The composition of the body was somewhat different from that of previous Conferences. In the absence of representation from the Irish Free State, the group of autonomous units within the Commonwealth was not quite complete. In addition to the representatives of the other self-governing Dominions and India, there were observers from Burma and Southern Rhodesia. Newfoundland was represented by the Secretary of State for

Dominion Affairs, the Colonial Empire by the Secretary of State for the Colonies.

Of the matters discussed, those relating to defense and intra-Commonwealth coöperation, collective security and the preservation of peace, and certain constitutional questions concerning nationality and multilateral treaty-making, are perhaps of chief interest from the point of view of international law.

Defense and foreign policy, rather than the economic matters touched upon (such as shipping policy, civil air commerce, and Empire trade), received major emphasis. There were rather ominous references to "deterioration in the international situation,"¹ "disintegration" in the world,² and the "troubled and harassed world."³ There was, naturally, concern that the associated units should work together for their own safety and best interests. Technical coöperation for purposes of defense may have received even more attention than the official summary of proceedings reveals. To one critic the sections of the report on foreign affairs and defense seem to furnish a "handbook of imperial platitudes" for any future meeting.⁴ But the apparent earnestness with which faith was declared in the method of coöperation within the Commonwealth of Nations cannot be lightly put aside. While no action was taken—beyond a decision for further consultation—on the Australian suggestion of a non-aggression pact in the Pacific, and while the Conference recognized that it was the sole responsibility of the several Parliaments of the Commonwealth to decide the nature and scope of their own defense policy, the Australian Prime Minister could say at the conclusion of the conversations that there was no divergence on fundamental principles concerning international affairs and defense.⁵

In view of the great changes that had occurred in the international situation since the last Conference, and of the probably greater vulnerability of the Empire in its various parts, it was but natural that there should come into the discussions some references to the attitude of Commonwealth members, and particularly the central member, toward collective security. In what was perhaps the most pointed official statement, the Prime Minister of New Zealand, after expressing the belief that the "partner Governments" represented the greatest existent force for peace and justice in the world, hoped that the Conference would not be content with an "innocuous and unhelpful formula."⁶ The spokesman for Australia declared that the Dominions

¹ Imperial Conference, London, 1937, Summary of Proceedings (Cmd. 5482), p. 62 (remarks of Prime Minister Chamberlain).

² *Id.*, p. 65 (remarks of Prime Minister Mackenzie King).

³ *Id.*, p. 70 (remarks of Sir Muhammad Zafrullah Khan, on behalf of the Indian delegation).

⁴ F. H. Soward, "The Imperial Conference of 1937," *Pacific Affairs*, Vol. 10, pp. 441, 444 (Dec., 1937). Cf. John Coatman, "The Imperial Conference," *Political Quarterly*, Vol. 8, pp. 311-325 (July-Sept., 1937); Kingsley Martin, "Is the British Empire in Retreat?" *Yale Review*, Vol. 27, pp. 12-29 (Autumn, 1937).

⁵ Summary of Proceedings, p. 66.

⁶ *Id.*, p. 57.

must play their part in "ensuring the peace of the world," and that from the Conference should issue a statement which would make clear that the countries composing the British Commonwealth of Nations (referred to as a "lesser League within the League") were prepared to act together in support of the maintenance of law and order.⁷ Prime Minister Hertzog, of the Union of South Africa, predicted that the British Commonwealth would become a more potent instrument for peace than the League of Nations.⁸ The difficulties and reverses which had been experienced by makers of British foreign policy during the year just preceding may well be remembered in relation to Prime Minister Chamberlain's declaration, made in the course of the concluding statements, that "The key-note of our policy is . . . the maintenance of peace and the removal of the causes which have so long delayed the restoration of the confidence of the world."⁹

The Statute of Westminster, 1931, had left a number of constitutional questions unsettled. Of these, that relating to creation of an Imperial Court of Appeals as a substitute for the Judicial Committee of the Privy Council, and provision of some machinery for the settlement of inter-Dominion disputes,¹⁰ was not acted upon at this Conference.

Action was taken on certain questions concerning nationality. Before 1914, persons naturalized in a Dominion were considered British subjects while in that particular Dominion's territory, and were accorded British diplomatic protection in foreign countries (at least, in countries other than those of origin). But, when in other parts of the Empire, they might be treated as aliens. Thus a German-born person who had been naturalized in Australia in 1908 was later considered an alien in the United Kingdom.¹¹ The British Nationality and Status of Aliens Act, 1914, as subsequently amended,¹² defined British subjects so as to include anyone born in His Majesty's dominions and owing allegiance. It authorized the granting of naturalization certificates by the government of any "British Possession." Certificates from Dominions whose legislatures adopted the naturalization provisions of statutes passed by the Parliament at Westminster were to be recognized as conferring a status which would be recognized in other parts of

⁷ *Id.*, p. 53, 54. With this may be read the Prime Minister's earlier remarks (at p. 52 of the Summary of Proceedings) on the impracticability, under existing conditions, of fully achieving Covenant ideals, and the desirability of examining the position of the League.

⁸ *Id.*, p. 58.

⁹ *Id.*, p. 62. At the opening of the Conference, Prime Minister Baldwin had referred to British belief in "agreement as the mainspring" and "democratic institutions as the method" of government. He added that the British did not underestimate "the value of that idea to which other ways of government attach supreme importance—the idea of service to the State."

¹⁰ The general problem is summarized in Ch. XVII of *The British Empire* (1937), a volume issued under the auspices of the Royal Institute of International Affairs.

¹¹ *Rex v. Francis. Ex parte Markwald* (1918), 1 K. B. 617; *Markwald v. Attorney-General* (1920), 1 Ch. 348.

¹² 4 & 5 Geo. 5, c. 17; 8 & 9 Geo. 5, c. 38; 12 & 13 Geo. 5, c. 44; 23 & 24 Geo. 5, c. 49.

the Empire, except in those Dominions not adopting the specified part of the Act. At the time of the Imperial Conference of 1937, certificates issued by the self-governing units other than India and the Irish Free State could, under this plan, acquire validity in other parts of the Empire. There still remained considerable diversity. Legislation of the Irish Free State, passed in 1935, had contemplated the abolition of the status of "British subject," in so far as citizens within its territory were concerned.¹³ On the general question, the Conference, while affirming that each member of the Commonwealth could decide what persons should have its distinct nationality, declared that it was desirable to secure, in so far as possible, uniformity in principle and avoidance of the inconveniences which would result from dual or multiple nationality within the Commonwealth. The basis recommended was the following:

Each member of the Commonwealth would in the normal course include as members of its community:—

(a) persons who were born in, or became British subjects by naturalization in, or as a result of the annexation of, its territory and still reside there, and

(b) persons who, coming as British subjects from other parts of the Commonwealth, have identified themselves with the community to which they have come.¹⁴

It was recognized that one member might be interested in the status assigned to a migrant from it to another member's territory. Communication of information, and consultation with other member governments before passage of new legislation on the subject, were therefore recommended. It was thought that any member of the Commonwealth of Nations, when constructing new definitions of its nationals, might well include British subjects not born in, but residing in, the member's territory, and might give such persons the privilege of opting against this nationality. Flexibility was introduced in the suggestion that, even without defining membership of their respective communities, the members might, in their legislation, give effect to some of the "implications" of the principles approved by the Conference, or might consider giving effect to these principles administratively.

Another constitutional question before the Conference had to do with nationality of married women. The Hague Convention of 1930 on Certain Questions Relating to the Conflict of Nationality Laws,¹⁵ had never been formally ratified by those self-governing members of the Commonwealth

¹³ Ch. XX of the volume referred to in note 10, *supra*. The pertinent provisions of the Irish legislation are quoted, and reference is made to the possible bearing upon this of the decision in *Moore and Others v. Attorney-General for the Irish Free State and Others* (1935), A. C. 484. According to the Judicial Committee's decision, the Irish Free State Legislature could, after the Statute of Westminster went into effect, pass an act repugnant to an Imperial Act. See also *Irish Jurist*, Vol. 1 (1935), pp. 2, 10, 23.

¹⁴ Summary of Proceedings, p. 26.

¹⁵ This JOURNAL, Supp., Vol. 24 (1930), pp. 192-200.

which were signatories, but, since 1930, legislation in line with the principles of the Hague Convention, in so far as it related to the nationality of married women, had been passed in the United Kingdom, Canada, Australia, the Irish Free State and New Zealand. It was stated at London that the Union of South Africa contemplated similar legislation. Some Dominions had gone farther than others toward placing the nationality of women on a basis of equality with that of men. By laws of Australia and New Zealand, a woman who, prior to marriage to an alien, was a British subject, could retain within these two Dominions, respectively, political and other rights of a British subject.¹⁶ The Imperial Conference did not find it possible to agree upon any recommendations of change in the existing laws, and the matter was left for further consideration and consultation between the represented governments.

Of the various legal aspects of the evolution of the British Commonwealth of Nations, that concerning treaty-making has been much discussed. Freedom for the Dominions in this matter has usually been regarded as one criterion of autonomy. The Imperial Conference recognized

(1) That each member takes part in a multilateral treaty as an individual entity, and, in the absence of express provision in the treaty to the contrary, is in no way responsible for the obligations undertaken by any other member; and

(2) That the form agreed upon for such treaties at the Imperial Conference of 1926 accords with this position.¹⁷

In general, and without restriction to the specific matters selected for comment here, there appears in the work of the Imperial Conference of 1937 further evidence of the continuing process of emergence, out of a formerly unified Empire, of a group of substantially autonomous but closely associated states. There was no more evidence at this, than at previous Conferences, of a desire to restrict this development by rigid legal formulas.

ROBERT R. WILSON

THE USE OF THE RADIO AS AN INSTRUMENT OF FOREIGN PROPAGANDA

The development of radio broadcasting has obviously created new problems of international relations not covered by existing law. In the case of the development of aerial navigation old theories of jurisdiction were forced to give way to practical realities. Whether the air beyond a certain height was free, as the seas beyond the marginal strip were free, might be debated by scholars when the airplane was in its experimental stage. Ten years later, when planes were actually capable of sustained flights, the argument was over. Today we are in the presence of a similar need for the adaptation of customary

¹⁶ Summary of Proceedings, p. 28, and volume referred to in note 10, *supra*, pp. 312-313.

¹⁷ Summary of Proceedings, p. 27. For the 1926 form, see Cmd. 2768 of 1926, pertinent parts of the text of which are in this JOURNAL, Supp., Vol. 21 (1927), pp. 29-32, 37-38.

rules to meet unforeseen conditions; and it is probable that the changes in the traditional law may prove to be quite as far-reaching.

Thirty years or more ago the Institute of International Law told us that "the air is free. States have over it, in time of peace and in time of war, only the rights necessary for their preservation." Whether the principle thus broadly stated still holds, is no more than an academic question. For new conditions have given rise to an interpretation of "the rights necessary to their preservation," which makes them quite as inclusive as rights of dominion itself. Under the head of "self-preservation" may a state protect itself against broadcasts from other states which are believed to be hurtful to it? May it regard such broadcasts, made under governmental auspices, as an attack upon its territory which it is entitled to regard as in the class of military attacks, although less imminent in respect to the danger they present? May self-preservation be extended to justify the use of all possible ways and means to prevent the reception of unfriendly broadcasts? How will it be possible to distinguish between broadcasts intended for home consumption and others intended primarily for foreign propaganda? These are questions that would have had no meaning even in the days when jurisdiction over the air was being debated. Today they have become crucial issues, and the practices which have given rise to them are a source of acute controversy between certain of the leading nations of the international community. It would seem of little consequence which particular theory of jurisdiction over the ether be resorted to in proof of the unlawfulness of "hostile broadcasting." Whether the ether is to be assimilated to the air in relation to territorial jurisdiction and so made a part of the national domain, or whether it is like the sea, *terra nullius* or *terra communis*, but subject to appropriation for particular uses, we are confronted with a definite and concrete situation which calls for prompt regulation. Foreign hostile broadcasts present an immediate danger to the peace; and it is only a question of ways and means of controlling them.

There will be no dispute as to the right of a state under existing international common law to control foreign propaganda coming within its territorial boundaries by other means than radio broadcasts. Whatever might be the wisdom of the policy of a particular state in suppressing freedom of the press in respect to literature and other communications regarded as harmful to the citizen body, the state has had at its disposal means of control through the customs offices of the state and through the administration of the postal service. Obscene literature, for example, has been banned, and it did not take an international convention to justify the exercise of the police power of the state in prohibiting its entrance into the country. The problem of suppression, however, did not, under the rule of customary law, involve action against a foreign government, but merely against individuals acting upon their own responsibility; and as a rule the literature against which the policy of suppression was directed met with no different fate from that met by literature originating within the state itself. There were "isms" of all sorts abroad in

Europe during the nineteenth century; but so long as they were not identified with national governments the propaganda engaged in by their adherents raised no question of international law. Each state applied its restrictions according to its own policies, and with few exceptions it had only itself to blame if it failed to succeed as effectively as it desired.

The problem of hostile governmental propaganda first became an international issue with the establishment of the Soviet Government in Russia. As in the case of the French National Convention in 1792, the Soviet Republic became convinced that it was essential to the success of the revolution in Russia that similar revolutions should be carried out in all capitalist countries. With the Third International as an agency of propaganda the new Republic began its program of "world revolution," and the so-called "capitalist states" proceeded to defend themselves by such suppressive measures within their own territories as they found it feasible to take. When subsequently the Government of the U.S.S.R. sought recognition of its *de jure* character, it was to be expected that pledges would be exacted from it that it would discontinue hostile propaganda. In the exchange of notes which marked the recognition of the U.S.S.R. by the United States in 1933, the Soviet Government pledged itself in general terms to respect the right of the United States to "order its own life within its own jurisdiction in its own way" and to "refrain from interfering" in any manner in the internal affairs of the United States; more specifically, to restrain all persons in its service and all organizations under its direct or indirect control from overt or covert acts tending to disturb the tranquillity or security of the United States, and "in particular" to restrain them from "any agitation or propaganda" having as its aim "the bringing about by force of a change in the political or social order" of the whole or any part of the United States.

It will be remembered that the issue arose in 1935 whether the activities of the Communist International in the U.S.S.R. in "formulating policies to be carried out in the United States by the communist organization in the United States" constituted a violation of the "pledge of non-interference," the Soviet Government asserting that it could not take upon itself "obligations of any kind" with regard to the Communist International, and the United States Department of State insisting that there was no question of supremacy of the authority of the Soviet Government within its territorial limits and of its absolute "power to control" the acts and utterances of organizations and individuals within those limits.

Hostile government propaganda presents issues quite distinct from the familiar problems of abuse of freedom of speech and of the press. For here we have not a group of individuals eager to spread their doctrine to the people of other countries, but states themselves, acting through their public authorities, seeking to accomplish results antagonistic to the policy of the state in which the propaganda is being carried out. The "isms" which formerly had behind them only the personal convictions of their advocates are now identi-

fied with vital national interests. They are no longer theories of a better world put forth by irresponsible individuals, they are official objectives of national policy, to be pursued with the support of the state and to be imposed, if possible, as a means of extending the power of the state which engages in the propaganda.

Wide as is the range of freedom of speech and of the press in the United States, it has always been recognized that there are limitations in the interest of the moral standards of the community, apart from the law of slander and libel. To these limitations there have been added of recent years within a number of the individual States of the Union restrictions upon the advocacy, by word of mouth or in written or printed form, of "criminal anarchy," which in the New York law of 1902 is defined as "the doctrine that organized government should be overthrown by force or violence, or by the assassination of the executive head or of any of the executive officials of government, or by any unlawful means." The judicial interpretation of the statute confines it to words having a present effect of inciting to violence. Academic discussion, historical or philosophical essays, remain outside the law.

The controversy with Russia in 1935 clearly showed that the United States regards an indirect attack upon its political institutions by propaganda supported by a foreign government as controlled by the same principles that govern a direct attack. The only question that arises is of the ways and means by which subversive propaganda originating in a foreign state and supported by its government may be prevented. In the case of pamphlet literature it is, as has been said, merely a question of the length to which a state wishes to go in the suppression of freedom of speech and of the press. The means are at hand for such suppression if the state which is the victim of the propaganda wishes to use them.

Hostile government broadcasting, however, presents new problems. Here we have not only government initiative in the attempt to spread certain principles and policies to the people of other countries, but the use of a technique of dissemination which greatly adds to the difficulty of suppression. By means of powerful stations located within its own territory a state which engages in such propaganda is able to reach persons in far distant countries, and the only practical means of suppression available to the local government is to build a more powerful station which will blot out the hostile broadcast, although at the same time preventing the reception of other local or friendly foreign broadcasts.

There are, of course, degrees in the extent to which such hostile government broadcasting may be worthy of notice by a democracy which has developed its political traditions in an atmosphere of freedom of speech and of the press. The reported broadcasts from the Italian station at Bari, which appear to have been deliberately intended to rouse the native Arab population under British and French rule to rebellion, would seem to constitute a hostile "attack" of a character not to be condoned by any extension of the principle of

freedom of speech. In like manner official broadcasts directed towards a racial minority in a neighboring country with the object of stirring up discontent and intensifying the opposition of the minority towards the government under which they are living would seem to constitute a "hostile attack" upon the neighboring state. At the opposite extreme would be broadcasts which do no more than seek to glorify the accomplishments of the broadcasting government or to promote its trade with neighboring countries. These would normally give rise to no complaint on the part of the state of reception, unless it pursued a policy of far-reaching censorship. But between these extremes there are possibilities, daily becoming realities, of hostile broadcasting which call for regulation in the interest of international peace.

What form might such regulation take, assuming that the method of regulation should be by international convention? The International Radio Convention, signed at the close of the Washington Conference in 1927, dealt only with the transmission of wireless messages as "an international service of public correspondence." A Commission on Radio Commerce was, however, created, the object of which was to study technical questions pertaining to radio communication; and General Regulations were adopted classifying radio emissions and providing for the allocation and use of frequencies and types of emission. No regulations other than those relative to facilities for communication were provided by the Madrid Convention of 1932, which replaced the former International Telegraphic Union with the new International Telecommunication Union. The European Broadcasting Convention, signed at Lucerne in 1933, re-allocated wave-lengths and made provision for the elimination of interference as between the European states parties to the convention. But again no provision was made as to the substance of broadcasts intended primarily for reception in a foreign country.

Under present conditions there would seem to be little possibility of a general self-restraining agreement among the states which engage in hostile broadcasting. Bilateral radio non-aggression pacts may perhaps be worked out between states which can find a political basis for the mutual concessions called for. Failing these, there remains merely the question of what measures of defense a particular state may take to protect itself when the necessity arises. As a matter of domestic legislation it is possible to prohibit the use of selective sets and to require that all radios be built so as to receive only programs transmitted by government stations or by private stations under government license. This, however, would require a degree of supervision and control by the national government which would be out of the question in a democracy and very difficult of enforcement under any but the tightest dictatorship. The "war in the ether" seems destined, therefore, to continue and to lead to reprisals of a political and economic character until such time as a new and more comprehensive agreement of collective security may be developed, within which political, economic, and what has come to be called "moral" disarmament will all form parts of a single system.

C. G. FENWICK

THE JOINT RESOLUTION PROHIBITING THE PICKETING OF DIPLOMATIC AND CONSULAR PREMISES IN THE DISTRICT OF COLUMBIA

According to the well-recognized principle of international law, every state must within its jurisdiction insure a respectful treatment of foreign representatives and must take care that they encounter no interference in the discharge of their important duties. A like obligation rests upon the states to prevent any discourtesy to the head of a foreign state or to the flag or other emblems considered to personify it. In order to fulfil this obligation, the United States, early in its history, passed an act imposing heavy penalties on any one who should "offer violence to the person of a public minister."¹ This provision is good as far as it goes, but it does not cover all of the acts for the prevention of which this country must be held responsible.

In recognition of this legislative deficiency and in order the better to fulfil our obligation under this head, Congress passed a Joint Resolution, approved February 15, 1938, which seeks to prevent what is known as picketing.² The resolution prohibits the display of banners and the commission of certain specified offensive or intimidating acts "within five hundred feet of any building or premises within the District of Columbia used or occupied by any foreign government or its representative or representatives as an embassy, legation, consulate, or for other official purposes . . ."

It is to be regretted that the application of this remedial legislation is limited to the District of Columbia. The responsibility of the Federal Government is as broad as our national jurisdiction. No doubt the States and municipalities of our Union may ordinarily be expected to protect foreign diplomatic and consular premises and residences from insult and interference, but the Federal Government cannot always safely rely upon this concurrent jurisdiction and coöperative action. In an effort to escape responsibility it will not avail to plead the lack of a legislative sanction, since Congress might well have enlarged the scope of the anti-picketing resolution.³ However loath the Federal authorities might be to act outside the District of Columbia in the absence of specific legislative authorization, they have, even in the absence of such legislation, the undoubted right to use whatever force may be necessary to protect foreign representatives and foreign flags and emblems from insult. If this were not the case, the failure of municipal authorities to insure an adequate protection might entail the most serious consequence and even endanger the maintenance of peaceful relations with the other nations.

The practice of making demonstrations before the offices or premises of foreign representatives, both diplomatic and consular, seems to be on the

¹ Act of April 30, 1790. R. S. 4062 of U. S. Code, Title 22 § 255.

² Public Resolution No. 79, 75th Cong., 3d Sess. "To protect foreign diplomatic and consular officers and the buildings and premises occupied by them in the District of Columbia." Printed in this JOURNAL, Supp., p. 100.

³ See note by Lawrence Preuss in this JOURNAL, Vol. 31 (1937), p. 705, at p. 710.

increase. In the press of March 12 it is reported from Boston that, following the announcement of the German invasion of Austria, a group staged an anti-Nazi demonstration before the building housing the offices of the German consul. According to the report, this demonstration was quiet and orderly and the police dispersed the demonstrators without trouble.⁴ The next day the German consulate in New York was subjected to picketing by a crowd reported to number a thousand, and a resolution against the invasion of Austria was handed to the German Consul-General who, according to the dispatch, stated that he would ignore it.⁵ From London comes the report that a crowd of 25,000 demonstrators against Premier Chamberlain and the German action in Austria marched towards the German Embassy until they were stopped by the police, but they were permitted to send a delegation with a protest to the Embassy.⁶ On March 14, the German swastika, flying from the German consulate in St. Louis, was set afire by a man who reached the flag from the thirteenth floor with a blow torch while a crowd in the street below cheered. Police were unable to discover the offender.⁷ On the same day in Washington 39 persons who were parading with anti-Nazi placards before the German Embassy and Austrian Legation were arrested.⁸

A year ago the Italian Embassy in Washington was picketed by sympathizers with the Spanish Loyalists.⁹ More recently it was reported in the press that the veterans of the Abraham Lincoln Brigade, picketing the Italian Embassy, made use of an airplane, flying high above the Embassy and trailing a streamer bearing the legend "quarantine the aggressor." The veterans also handed to a member of the Embassy staff a letter demanding withdrawal from Spain.¹⁰ As early as December 3, 1936, when demonstrators against Nazi intervention in Spain made a demonstration before the German Embassy, five of the demonstrators were sentenced by Police Court Judge Isaac R. Hitt to \$100 fines or thirty days in jail, and others received suspended sentences on charges of parading without a permit.¹¹ Last October a demonstration was made by a group of Chinese business men and students, who attempted to parade in front of the Japanese Embassy. They were interrupted by the police, who refused to let them picket in front of the Embassy, but they were permitted to deliver a protest to the Embassy. Although the resolution to prevent picketing had not at that time been adopted by Congress, the police inspector did not allow the demonstration.¹² These are only a few of the instances which have occurred, and similar demonstrations are of frequent occurrence in other countries.

The freedom, not to say license, of the press, gives foreign sovereigns and

⁴ Washington Times (I. N. S.), Mar. 12, 1938.

⁵ New York Times, Mar. 13, 1938.

⁶ Washington Post, United Press dispatch, Mar. 15, 1938.

⁷ *Ibid.*

⁸ *Ibid.*, Mar. 24, 1937.

⁹ *Ibid.*

¹⁰ *Ibid.*, Feb. 15, 1938.

¹¹ Washington Daily News, Dec. 3, 1936.

¹² Washington Herald, Oct. 9, 1937.

their representatives some ground for complaint because of the discourteous treatment to which they are sometimes subjected in the columns of newspapers and magazines of other countries. How to prevent offense to foreign states without interfering with the freedom of the press in democratic states is a difficult problem and one which will not soon be solved. Even though it be a half loaf, the anti-picketing resolution will prove of practical value in preventing a particularly offensive form of discourtesy to foreign representatives at the capital.

ELLERY C. STOWELL

THE INFLUENCE OF DUMAS

It is an interesting fact for Americans that in the period of the Revolution and for some time thereafter, the influence of a foreign scholar was significant in sane American international development. Franklin while in Europe in the early days of the Revolution had become acquainted with Charles William Frederick Dumas, a Swiss, who had lived many years in The Netherlands and was received in the diplomatic circles at The Hague. Dumas had a warm sympathy for the aspirations of the American colonies and was active in enlisting the sympathies of others when the American colonies were of relatively little concern abroad. Franklin, as chairman of the Committee of Secret Correspondence, turned to Dumas as a suitable confidential agent in Europe, and seems to have sent to him the first letter from the Committee and to have kept up a continued confidential relation.

As a Swiss, Dumas was naturally an admirer of the comprehensive work of Vattel on international law and seems to have thought it would be a sound guide for the early American leaders. He accordingly sent three copies of an edition, which he had issued, to Franklin. Of these books Franklin wrote to Dumas on December 19, 1775,

I am much obliged by the kind present you have made us of your [1775] edition of Vattel. It came to us in good season, when the circumstances of a rising state make it necessary frequently to consult the law of nations. Accordingly, that copy which I kept (after depositing one in our own public library here, and sending the other to the College of Massachusetts Bay, as you directed) has been continually in the hands of the members of our Congress now sitting, who are much pleased with your notes and preface, and have entertained a high and just esteem for their author.

A recent investigation has disclosed that the copies deposited in "our own public library here," now the Library Company of Philadelphia, and "the College of Massachusetts Bay," now Harvard College, more than one hundred and sixty years later are still preserved in those libraries. The third copy, said to have been "pounced upon by studious members of Congress," has not been located, even after considerable search, and it would be a satisfaction to know whether it is still in existence and, if so, where.

Dumas helpfully initiated and carried forward many negotiations with

European states, both before and after the Revolution. He recognized the importance of official residences for diplomatic representatives and acted as agent in the purchase of such a residence for Mr. Adams, the Hotel d'Amérique, in The Hague in 1782. At this period only France and Spain were thus provided. As has been recognized in practice of later years, he even then reports "This purchase, besides the economy of it, has produced, politically, very good effects."

Dumas wisely recognized that a new state should come into being with a sound knowledge of and respect for international law, which he hoped the work of Vattel would supply. In his confidential service with the Committee of Secret Correspondence and later as Chargé, Dumas showed wide knowledge of current conditions and deep devotion to the principles of political liberty. The wisdom of his advocacy of state ownership of diplomatic residences is now recognized. His acquaintance with men and affairs often during the years 1774 to 1794 contributed much to the success of American negotiations in Europe.

GEORGE GRAFTON WILSON

CURRENT NOTES

ANNUAL MEETING OF THE SOCIETY

The 32nd Annual Meeting of the American Society of International Law will be held in Washington, April 28-30, 1938, at the Carlton Hotel. The advance program calls for the opening address by the President of the Society, Dr. James Brown Scott, on Thursday, April 28, at 8.15 p.m., to be followed by addresses on "The Nature, Place, and Function of International Law Today" by Professor Norman A. MacKenzie, of the University of Toronto, and "The Theory of International Law" by Professor Josef L. Kunz, of the University of Toledo. On the morning of Friday, April 29, Mr. Wallace M. McClure, of the Treaty Division of the Department of State, will read a paper on the "International Law of Copyright," and Mr. Irvin Stewart, former Vice Chairman of the Federal Communications Commission, will discuss "Some Administrative Aspects of International Broadcasting." Further discussion of air law will take place on the afternoon of Friday. "The International Law of the Air in Time of Peace" will be considered in a leading paper by Mr. Howard S. LeRoy, of the New York and District of Columbia Bars, and "Neutral Rights and Duties in respect of the International Law of the Air" will be the subject of an address by Professor Philip C. Jessup, of Columbia University. The evening session of Friday, April 29, will be opened with an address by Professor George Grafton Wilson, of Harvard University, on the subject of "War: Declared and Undeclared." He will be followed by Professor Clyde Eagleton, of New York University, who will consider "Responsibility for Damages to Persons and Property of Aliens in Undeclared War." The discussions will be concluded on Saturday morning, April 30, followed by the business meeting of the Society. The annual meeting will close as usual with a banquet at the Carlton Hotel on Saturday evening, April 30. The Honorable Francis B. Sayre, Assistant Secretary of State, has courteously consented to speak at the banquet, as has also Dr. Jan Hostie, of the Belgian Foreign Office. One or two other speakers will be added and their names announced later.

GEORGE A. FINCH, *Secretary*

CONFERENCE OF TEACHERS OF INTERNATIONAL LAW

In connection with the annual meeting of the Society this year, there will be held the 6th Conference of Teachers of International Law and Related Subjects. The last conference of teachers was held at the time of the annual meeting of the Society in 1933. The sessions of the Society on Thursday evening, April 28, and on Friday and Saturday, April 29 and 30, will be joint sessions with the teachers; but the Teachers' Conference itself will open a day earlier on Wednesday, April 27, at the Brookings Institution. The open-

ing session will take place at 2.30 o'clock p.m. under the presidency of Professor Jesse S. Reeves, Director of the Conference. At this session reports will be rendered by the Committee on Publications, under the chairmanship of Professor Robert R. Wilson, and by the Executive Committee, under the chairmanship of Professor Clyde Eagleton. At the same session Dr. Cyril Wynne, Chief of the Division of Research and Publication, will deliver an address on the "Publications of the Department of State," and Professor James T. Shotwell will speak on "The Conference on International Studies of the Committee on Intellectual Coöperation." On Wednesday evening, April 27, the Conference of Teachers of International Law will discuss contributions from allied fields. The subject of "Economics" will be covered by Professor Eugene Staley, of the Fletcher School of Law and Diplomacy, and the subject of "The Psychology of Propaganda" by Professor Harold Lasswell of the University of Chicago. On Thursday morning, April 28, the Teachers' Conference will consider the curricula in small colleges, and will hear from President Bessie C. Randolph, of Hollins College, Professor Harold Tobin, of Dartmouth College, Professor Ivan M. Stone, of Beloit College, and Professor Montell Ogdon, of Texas Technological College. The afternoon of Thursday will be devoted to visits to the Department of State and the National Archives. There will be a luncheon for the members of the Teachers' Conference at the Carlton Hotel on Friday, April 29, at which the speaker will be Mr. William V. Whittington of the Treaty Division of the Department of State. Should a further session of the Teachers' Conference be necessary, it will be held at the Brookings Institution on Saturday afternoon, April 30, at 2.15 o'clock.

GEORGE A. FINCH, *Secretary*

**NOTICE OF AMENDMENT OF THE CONSTITUTION OF THE AMERICAN SOCIETY OF
INTERNATIONAL LAW**

The Secretary hereby notifies to the members of the American Society of International Law the following resolution adopted by the Executive Council on April 29, 1937, proposing an amendment of the Constitution of the Society to be submitted for action at its 32nd annual meeting:

Resolved, That the Executive Council propose the following amendment to the Constitution to be submitted to the Society for action at its 32nd annual meeting:

Article III of the Constitution is amended by adding after the second paragraph thereof the following paragraph:

"The Council is authorized to establish a student membership upon payment of dues of not less than three dollars."

GEORGE A. FINCH, *Secretary*

THE JOINT RESOLUTION METHOD

The obstructive tactics of a minority of the Senate in preventing the approval of important treaties has given rise recently to increased consideration of the joint resolution method as an alternative device for conducting

the conventional phases of our foreign relations. That this may be an alternative device appears from the fact that the Constitution does not expressly provide that the treaty method shall be exclusive. Although it declares that all legislative powers are vested in Congress, it does not declare that all powers of international agreement are vested in the President and two-thirds of the Senate. Since Congress, however, does not, in general, have power to maintain direct relations with foreign governments, the phrase "joint resolution method" as here used denotes not only such a resolution as passed by Congress and approved by the President but also, and in combination with it, international action in the form of an executive agreement. The joint resolution cannot, by itself, effectuate a program of international action, but it may authorize the President, as the organ of international action, to do so.

The question as to the possibility of conducting the foreign relations of the United States through the alternative device of the joint resolution method is largely one of usage under the Constitution or, as it may be called, of customary constitutional law. Although the Constitution draws a distinction between treaties and agreements, there is admittedly no express authority in that document for the conduct of foreign relations by the joint resolution method. Consequently, we must look mainly to practice and usage as establishing the rule.

The historical precedents need not here be entered into in any fullness or detail. They have been sufficiently described elsewhere.¹ It may be pointed out, however, that the instances in which the purposes of international negotiation have been accomplished by means of executive agreements, indicate that it is not always easy to distinguish them from treaties in respect to the nature and importance of their subject-matter. From this fact also it is deducible that these two forms of international agreement may, on occasion, constitute alternative methods of arriving at the same object. To require that all international understandings to which the United States is a party should be submitted to the Senate for approval by a two-thirds vote would be burdensome and impracticable. It would not be feasible to conduct our foreign relations with any degree of efficiency under such a rule.

A few concrete illustrations may be cited. In 1850, by executive agreement, Horse-Shoe Reef in Lake Erie was ceded to the United States by Great Britain on the condition that the United States should erect and maintain a lighthouse thereon. Congress had in the previous year made an appropriation for this purpose, which was equivalent to Congressional sanction of the agreement. Again, under the Platt Amendment of 1901, providing for the sale or lease by Cuba to the United States of lands necessary for coaling or naval stations, the President made an agreement with Cuba, without submission to

¹ See, e.g., J. W. Garner, "Acts and Joint Resolutions of Congress as Substitutes for Treaties," this JOURNAL, Vol. 29 (1935), pp. 482-488.

the Senate, providing for an annual payment to Cuba for the use of the land so leased.

In this connection we may consider briefly the method of terminating war other than by treaty. In July, 1921, Congress passed and President Harding approved a joint resolution announcing that the state of war with Germany "is hereby declared at an end." It seems obvious, however, that Congress cannot by a mere joint resolution, even though approved by the President, make a negotiated peace, since Congress has no means of carrying on *pourparlers* directly with a foreign government, while the President, in approving the resolution, is acting in a domestic, and not in an international, capacity. It would hardly be contended that Congress could end a foreign war by a joint resolution declaring peace while the war is being actively waged on both sides. After hostilities on both sides have definitely closed, however, Congress may declare or recognize the existence of peace without terms. But the communication of terms of peace to the enemy and the notification by the enemy of its acceptance must be transmitted through the President, acting in his international capacity, and such offer and acceptance could be effected by executive agreement. This, however, would not preclude the subsequent embodiment of the terms of the peace in a definitive treaty, approved by the Senate.

The entrance of the United States into the International Labor Organization through a joint resolution authorizing the President to accept membership therein on behalf of our Government has given added support to the belief that this method is subject to further application with the view of securing American membership in other international organizations, such as the League of Nations and the Permanent Court of International Justice.

The constitutionality of this alternative method seems clearly based on usage and reason. Congress, in passing a joint resolution authorizing the President to accept membership in an international organization, is acting under authority granted to it in the "necessary and proper" clause. The President, in accepting membership, is acting both under his implied authority to conduct foreign relations and under his express authority and duty to see that the laws are faithfully executed. Moreover, the executive agreement, when made under the authority of a Congressional act or joint resolution, has the force of law to the same extent as has the act or resolution.

In conclusion, it may be pointed out that, when a need arises in governmental affairs to accomplish certain desirable ends without the interference of unnecessary constitutional restrictions, a tendency naturally develops to devise means of accomplishing these purposes by more direct and less difficult processes. Moreover, long continued usages, not clearly contrary to the Constitution, acquire in time constitutional validity, and may thus be considered a part of the unwritten Constitution. On the other hand, it should be borne in mind that ends do not always justify the means. Consequently, although the joint resolution method of becoming a member of an interna-

tional organization may be constitutionally feasible, political expediency may render it impracticable in cases involving intense partisan controversy. Popular unfamiliarity with this method may render it politically inexpedient to resort to it in the near future for the accomplishment of such important steps as the entrance of the United States into the League of Nations or the World Court. Even in regard to such really important projects, however, further development of the joint resolution method may eventually be required by the increasing need for modifying the governmental machinery so as to make it a more efficient instrument of international action.

JOHN M. MATHEWS

University of Illinois

MARITIME TREATIES SUBMITTED TO THE SENATE

By submitting the six maritime draft conventions and two recommendations of the Twenty-first and Twenty-second Sessions of the International Labor Conference¹ direct to the Senate of the United States, the President has determined that, in so far as these particular questions are concerned, the competent authority, within the meaning of Article 19 (405) of the Constitution of the International Labor Organization, is the Senate.

It will be recalled² that on two previous occasions the President sent draft international labor conventions and recommendations to the Congress of the United States. The more recent action of submission to the Senate only may have been due to a change in policy on the part of the Administration, but more likely to the fact that the maritime draft treaties and recommendations pertain to the employment of seamen—a matter over which the Federal Government has exclusive jurisdiction.

A comparison of the Presidential messages accompanying the draft treaties and recommendations of the International Labor Conference reveals that the decisions of the Nineteenth and Twentieth Conferences were submitted to the Congress on June 18, 1936, and June 28, 1937,³ respectively by the President in messages identical in form and to which he invited the attention of Congress. An exception was made in the case of the draft convention (No. 51) concerning the reduction of hours of work on public works which was accompanied by the President's recommendation for action by Congress at its earliest convenience.

The President's message to the Senate of August 19, 1937, accompanying the maritime conventions and recommendations specifically asks for consent to ratification:

¹ Held at Geneva, October 6-24, 1936. See *Treaties Submitted to the Senate, 1937*, Dept. of State Publication No. 1126 (1938), pp. 11 and 12.

² See Valentine Jobst, III, "The United States and International Labor Conventions," *this JOURNAL*, Vol. 32 (1938), p. 135 ff.

³ Subsequent to the article by Mr. Jobst, the President's message of June 28, 1937, was printed in Sen. Doc. No. 89, 75th Cong., 1st Sess.

I am of the opinion that, subject to the considerations advanced in the accompanying reports, the approval of the conventions and recommendations would be in the interest of American seamen and American shipping in general. I therefore request, subject to the suggestions contained in the accompanying reports, the advice and consent of the Senate to the ratification of the conventions and that appropriate action be taken by the Senate, in conjunction with the House of Representatives, to give effect to the two recommendations.⁴

The accompanying reports referred to by the President are those submitted to the Secretary of State from the Secretaries of Commerce and Labor and the Chairman of the United States Maritime Commission. These reports reveal a large measure of agreement between the above officials in regard to the desirability of ratification. Mr. Hull, in his letter to the President, summarized the reports as follows:

Ratification of the draft convention (No. 53) concerning the minimum requirements of professional capacity for masters and officers on board merchant ships is recommended by the Secretaries of Commerce and Labor. The Chairman of the Maritime Commission does not consider that this draft convention falls within his competence and makes no recommendation either for or against ratification.

Ratification of the draft convention (No. 54) concerning annual holidays with pay for seamen is recommended by the Secretary of Labor and Chairman of the Maritime Commission. The Secretary of Commerce perceives no objection to ratification.

Ratification of the draft convention (No. 55) concerning the liability of the shipowner in case of sickness, injury, or death of seamen is recommended by the Secretary of Labor. The Secretary of Commerce does not oppose ratification. The Chairman of the Maritime Commission sees no advantage in ratification, as American law at present provides substantially equal or greater rights than those provided in the draft convention.

Ratification of the draft convention (No. 56) concerning sickness insurance for seamen is recommended by the Secretary of Labor and the Chairman of the Maritime Commission only if a thorough survey and study of the situation indicates that the creation of such a system would be desirable. The Secretary of Commerce does not desire to express an opinion until such a study has been made.

Ratification of the draft convention (No. 57) concerning hours of work on board ship and manning is recommended by the Secretaries of Commerce and Labor and the Chairman of the Maritime Commission.

Ratification of the draft convention (No. 58) fixing the minimum age for the admission of children to employment at sea (revised 1936) is recommended by the Secretaries of Commerce and Labor and the Chairman of the Maritime Commission.

Favorable action upon the recommendation (No. 48) concerning the protection of seamen's welfare in ports and the recommendation (No. 49) concerning hours of work and manning is recommended by the Sec-

⁴ Sen. Ex. Docs. V to CC, incl., 75th Cong., 1st Sess., 1937, p. 2. Made public Nov. 30, 1937.

retaries of Commerce and Labor and the Chairman of the Maritime Commission.⁵

Regardless of any general view on the constitutionality of certain types of treaties, it would seem clear from the very nature of the maritime treaties that little question could be raised regarding the competence of the Senate to deal with them in the exercise of its constitutional functions as part of the treaty-making authority. Even though the United States wished in connection with certain labor treaties to avail itself of paragraph 9, Article 19 (405), of the Constitution of the International Labor Organization,⁶ it could hardly invoke in the instance under consideration the special rights reserved for federal states.

The Secretary of Labor, having in mind the maritime conventions, made the following statement in her report to the Secretary of State:

I am advised by the Solicitor's office that all of these conventions clearly come within the treaty-making power of the Federal Constitution (Art. II, Sec. 2, clause 2; Art. VI, clause 2). Of these conventions only that concerning annual holidays with pay for seamen might be regarded as raising questions involving the due-process clause of the fifth amendment. In the enclosed memorandum prepared by the Solicitor's office, however, it is shown that any apprehension on this score is unfounded. Hence, with no limitation contained in the Federal Constitution prohibiting the Senate from ratifying⁷ these conventions as treaties, submission for ratification is the only procedure which would satisfy the provisions of the International Labor Organization constitution.⁸

The Secretary of State avoided taking a position in regard to the memorandum prepared by the Solicitor's office on the question of constitutionality.

WILLIAM LONSDALE TAYLER

Queens College, New York

⁵ *Op. cit.*, p. 5.

⁶ "In the case of a federal state, the power of which to enter into conventions on labor matters is subject to limitations, it shall be in the discretion of that government to treat a draft convention to which such limitations apply as a recommendation only, and the provisions of this article with respect to recommendations shall apply in such case."

⁷ The Senate does not ratify, but constitutionally gives its advice and consent to ratification. This is what the President requested in his message of Aug. 19, 1937.

⁸ *Op. cit.*, pp. 30-31, Sen. Ex. Docs. V to CC. The memorandum prepared by the Solicitor's office is found on pp. 32-34.

CHRONICLE OF INTERNATIONAL EVENTS

FOR THE PERIOD NOVEMBER 16, 1937—FEBRUARY 15, 1938

(Including earlier events not previously noted)

WITH REFERENCES

Abbreviations: *B. I. N.*, Bulletin of International News; *C. S. Monitor*, Christian Science Monitor; *Clunet*, Journal du droit international; *Cmd.*, Great Britain, Parliamentary papers; *Cong. Rec.*, Congressional Record; *Europe*, L'Europe Nouvelle; *Ex. Agr. Ser.*, U. S. Executive Agreement Series; *G. B. Treaty Series*, Great Britain Treaty Series; *I. L. O. B.*, International Labor Office Bulletin; *L. N. M. S.*, League of Nations Monthly Summary; *L. N. O. J.*, League of Nations Official Journal; *L. N. T. S.*, League of Nations Treaty Series; *P. A. U.*, Pan American Union Bulletin; *Press Releases*, U. S. State Department; *R. A. I.*, Revue aéronautique internationale; *T. I. B.*, Treaty Information Bulletin, U. S. State Department; *U. S. T. S.*, U. S. Treaty Series.

July, 1936

- 4 HUNGARY—ITALY. Signed agreement at Rome for the valorization of Hungarian wheat. *L. N. Information Sec.*, Nov. 1, 1937 (unnumbered).

August, 1936

- 12 EGYPT—GREAT BRITAIN. Notes exchanged at Alexandria and Cairo regarding telecommunications. Texts: *G. B. Treaty Series*, No. 4 (1938), *Cmd.* 5640.

- 12/31 and September 9 EGYPT—GREAT BRITAIN. Notes exchanged at Cairo, Alexandria, and London, regarding taxation, etc., of pensions of retired foreign officials. Texts: *G. B. Treaty Series*, No. 3 (1938), *Cmd.* 5639.

November, 1936

- 9 GERMANY—GREECE. Air navigation convention signed at Rome. *L. N. Information Sec.*, Nov. 1, 1937 (unnumbered).

December, 1936

- 24 FRANCE—SWEDEN. Convention signed at Paris, for the avoidance of double taxation and the establishment of rules of administrative assistance in the matter of succession duties. *L. N. Information Sec.*, Nov. 1, 1937 (unnumbered).

February, 1937

- 18 FRANCE—UNITED STATES. Effected an agreement by exchange of notes regarding customs privileges for educational, religious and philanthropic institutions in Syria and the Lebanon. Text, together with decree of the French High Commissioner, dated Mar. 27, 1937: *Ex. Agr. Ser.*, No. 107.

March, 1937

- 2 to October 9 CANADA—UNITED STATES. Agreement reached by exchanges of notes, dated Mar. 2, 10, Aug. 17, Sept. 8, 20, and Oct. 9, 1937, regarding exchange of information concerning issuance of radio licenses. Texts: *Ex. Agr. Ser.*, No. 109.
- 22 GREAT BRITAIN—POLAND. Notes exchanged at Warsaw regarding the customs classification of certain pneumatic tires. *G. B. Treaty Series*, No. 6 (1938), *Cmd.* 5644.

May, 1937

- 26 ARGENTINA—PERU. Ratifications exchanged at Lima of the conventions on exchange of publications, intellectual interchange, and motion picture censorship, signed July 2, 1935. *P. A. U.*, Feb., 1938, p. 116.

28 to June 3 AÉRIAL LEGAL EXPERTS. Four Commissions of the International Technical Committee of Aerial Legal Experts convened at Paris. Extracts from report of the American delegation. *Journal of Air Law*, Oct., 1937, pp. 657-662. Drafted two preliminary texts of conventions: (1) Collaboration of the C. E. I. T. J. A. in the interpretation and application of convention on private air law, (2) Legal status of aeronautic navigating personnel. Texts: *T. I. B.*, Oct., 1937, pp. 23-27.

June, 1937

- 2 EGYPT—GREAT BRITAIN. Agreement signed at Cairo relative to British war memorial cemeteries and graves in Egypt. Text [with notes of June 2 and 5, 1937]: *G. B. Treaty Series*, No. 53 (1937), *Cmd.* 5618.
- 10 BRAZIL—COLOMBIA. Notes exchanged approving the marking of their common boundary, fulfilling the provisions of the treaties of Apr. 24, 1907, and Nov. 15, 1928. *P. A. U.*, Feb., 1938, p. 116.

September, 1937

- 1 to November 22 PERMANENT COURT OF ARBITRATION. Spain renewed appointment of Señor Román and named Señor Luis Jiménez de Asúa. Brazil reappointed on Nov. 22 Dr. Clovis Bevilacqua. *T. I. B.*, Sept., 1937, p. 1. Mr. Cosmus A. C. Meyer named on Oct. 29 by Denmark, replacing Mr. F. C. Schröder, deceased. *T. I. B.*, Nov., 1937, p. 1. Cuba appointed Señor Antonio S. de Bustamante, on Nov. 18, replacing Señor Ricardo Dolz y Arango. *T. I. B.*, Dec., 1937, p. 1.
- 4 ITALY—YEMEN. Treaty of friendship signed, for duration of twenty-five years. Summary: *Times* (London), Jan. 11, 1938, p. 11.
- 9/24 MEXICO—UNITED STATES. Agreement effected at Mexico City by exchange of notes for the reciprocal exchange of official journals and parliamentary documents. *T. I. B.*, Nov., 1937, p. 26. Text: *Ex. Agr. Ser.*, No. 108; *U. S. T. S.*, No. 932.
- 17 ARGENTINA—BOLIVIA. Signed two conventions at Buenos Aires: (1) frontier traffic, (2) preliminary convention on railroad matters. *P. A. U.*, Jan., 1938, p. 44.
- 24/27 BRAZIL—ECUADOR. Ratified the extradition treaty, signed March 4, 1937. *P. A. U.*, Jan., 1938, p. 45.

October, 1937

- 1 BOLIVIA—BRAZIL. Recommendations of the Mixed Commission on Economic Relations signed at La Paz, concerning oil deposits in Bolivia and the construction of a railroad to them. *P. A. U.*, Jan., 1938, p. 46.
- 1/November 3 TURKEY—UNITED STATES. Agreement effected by exchange of notes, modifying the claims agreements of Oct. 25, 1934 (*Ex. Agr. Ser.*, No. 73) and supplement of May 29 and June 15, 1936 (*Ex. Agr. Ser.*, No. 113). Texts: *Ex. Agr. Ser.*, No. 115.
- 8 ECUADOR—GREAT BRITAIN. Ratifications exchanged at Quito of the extradition convention, signed at Quito, June 4, 1934, supplementary to the treaty of Sept. 20, 1880. Text of 1934 convention: *G. B. Treaty Series*, No. 52 (1937), *Cmd.* 5614.
- 14 FRANCE—GREAT BRITAIN. Agreement reached by exchange of notes in Paris regarding commercial relations with Tunis. Texts: *G. B. Treaty Series*, No. 54 (1937), *Cmd.* 5622.
- 16 ESTONIA—FRANCE. Signed commercial payments agreement and a commercial convention at Paris. *L. N. M. S.*, Dec., 1937, p. 322.
- 27 JAPAN—TURKEY. Signed a trade agreement at Ankara. French and Japanese texts: *Journal of International Law and Diplomacy*, Jan., 1938.

November, 1937

- 1 LIBERIA—UNITED STATES. Extradition treaty signed. *T. I. B.*, Nov., 1937, p. 18.
- 11 SWITZERLAND—UNITED STATES. Signed a convention regarding military obligations in certain cases of double nationality. *T. I. B.*, Nov., 1937, p. 18.
- 12 GREAT BRITAIN—RUMANIA. Exchange of notes at London modified the payments (amendment) agreement of May 27, 1937. Texts of notes: *G. B. Treaty Series*, No. 51 (1937), *Cmd.* 5613.
- 16 CHILE—UNITED STATES. M. Edouard Herriot named joint commissioner of the International Commission provided for in the treaty for the advancement of peace, signed at Washington, July 24, 1914. Other members: *T. I. B.*, Nov., 1937, p. 1; *N. Y. Times*, Nov. 17, 1937, p. 5; *Press Releases*, Nov. 20, 1937, p. 383.
- 16 GREAT BRITAIN—GREECE. Ratifications exchanged in Athens of the convention, signed in London, Feb. 27, 1936, regarding legal proceedings in civil and commercial matters. Text of convention: *G. B. Treaty Series*, No. 5 (1938), *Cmd.* 5643.
- 16 to February 6, 1938 SPAIN. Russia modified its opposition to granting belligerent rights to Spanish factions, and accepted a general plan, approved by the other Non-Intervention Powers on Nov. 4, for removing foreign soldiers. Text of statement: *N. Y. Times*, Nov. 17, 1937, p. 1. Gen. Franco suggested Nov. 23 belligerent rights be accorded when 3,000 foreigners withdraw from each side. *N. Y. Times*, Nov. 24, 1937, p. 16. Franco's reply of Nov. 23 to Non-Intervention Committee's request for his concurrence in the resolution of Nov. 4 was circulated among all members of the Committee. *Times* (London), Nov. 26, 1937, p. 15. Blockade of all Spanish Government ports proclaimed Nov. 28 by Franco. *N. Y. Times*, Nov. 29, 1937, p. 1. On Dec. 2 the Loyalist Government published reply to the Committee's note of Nov. 6, agreeing to the withdrawal of foreign volunteers. *Times* (London), Dec. 3, 1937, p. 15. British Ambassador to Spain informed on Dec. 7 the Salamanca Government that, since belligerent rights had not been granted, it did not recognize any right to declare a blockade. The Spanish Government replied Dec. 9. *B. I. N.*, Dec. 25, 1937, p. 607. Non-Intervention Committee's subcommittee reached agreement Dec. 22 on all unsettled points in the mandate to be given two commissions which are to supervise in Spain the withdrawal of foreigners. *Times* (London), Dec. 23, 1937, p. 9; *B. I. N.*, Jan. 8, 1938, p. 37. On Jan. 11 the Secretary of the Non-Intervention Committee reported all governments had agreed to the proposed expenditure of £5000. *B. I. N.*, Jan. 22, 1938, p. 73. The Loyalist Government's offer, to transfer about 4000 political refugees from embassies and legations, was taken under advisement on Jan. 17 by diplomatic missions. *N. Y. Times*, Jan. 18, 1938, p. 16; *Times* (London), Jan. 19, 1938, p. 11. The British proposal for an extension of the patrol in the western Mediterranean was accepted by Italy on Feb. 6. *B. I. N.*, Feb. 19, 1938, p. 143.
- 17 CANADA—EL SALVADOR. Most-favored-nation treatment came into force. *Times* (London), Nov. 18, 1937, p. 13; *N. Y. Times*, Nov. 15, 1937, p. 31.
- 17 CZECHOSLOVAKIA—HUNGARY. Commercial treaty signed at Prague. *N. Y. Times*, Nov. 19, 1937, p. 12.
- 17 GREAT BRITAIN—SPAIN. Loyalist Government in Spain sent note protesting appointment of agents to General Franco's administration. *B. I. N.*, Nov. 27, 1937, p. 522.
- 19 ARGENTINA—BOLIVIA. Signed accord at Buenos Aires giving Bolivia outlet across Argentina for its oil deposits. *N. Y. Times*, Nov. 20, 1937, p. 3; *P. A. U.*, Jan., 1938, p. 47; *C. S. Monitor*, Nov. 22, 1937, p. 2.

- 21 HUNGARY—SPAIN. Recognition by Hungary of the Franco régime became known, although no formal announcement was made. *N. Y. Times*, Nov. 22, 1937, p. 8; *C. S. Monitor*, Nov. 22, 1937, p. 3.
- 22 GREAT BRITAIN—SIAM. Signed treaty of commerce and navigation in Bangkok, replacing the treaty of 1925. *B. I. N.*, Dec. 11, 1937, p. 571.
- 23 to February 3, 1938 CHINA—JAPAN. Japan took control of Shanghai's customs on Nov. 23. *N. Y. Times*, Nov. 24, 1937, p. 1. Parallel representations on the subject were made to Japan on Nov. 27 by the United States, Great Britain and France. *N. Y. Times*, Nov. 28, 1937, p. 1. A note from the United States to Japan, delivered Nov. 28, demanded it be consulted when questions pertaining to customs organization are considered by Japanese authorities. *N. Y. Times*, Nov. 30, 1937, p. 1. Japan seized control Nov. 27 of all communications facilities in the Shanghai area. *C. S. Monitor*, Nov. 26, 1937, p. 1; *N. Y. Times*, Nov. 27, 1937, p. 1. The Japanese commander-in-chief issued a warning on Dec. 29 against interference with military operations in the occupied area, promising due consideration to principles of international law and terms of existing treaties in the case of foreign nationals. *Times* (London), Dec. 30, 1937, p. 10. China sent note on Jan. 5, 1938, protesting the treatment of its consuls in Korea. *B. I. N.*, Jan. 22, 1938, p. 55; *N. Y. Times*, Jan. 6, 1938, p. 6. On Jan. 11 the first Japanese imperial conference since 1914 took place. *N. Y. Times*, Jan. 12, 1938, p. 1. Japan formally announced withdrawal of recognition of the Chinese Government on Jan. 15. Text of statement: *C. S. Monitor*, Jan. 17, 1938, p. 1; *N. Y. Times*, Jan. 16, 1938, p. 33; *Times* (London), Jan. 17, 1938, p. 12; *B. I. N.*, Jan. 22, 1938, p. 54. China and Japan recalled their ambassadors on Jan. 17 and 18. *N. Y. Times*, Jan. 18, 1938, p. 14; *C. S. Monitor*, Jan. 18, 1938, p. 1. Statement issued by the National Government of China at Hankow, on Jan. 18, made clear that terms for the restoration of peace must conform to its determination to maintain sovereign rights and territorial and administrative integrity. *N. Y. Times*, Jan. 20, 1938, p. 6. Extracts: *Times* (London), Jan. 21, 1938, p. 11. Japanese Foreign Minister issued a statement on Jan. 18 of policy in China and at home. Summary: *Times* (London), Jan. 20, 1938, p. 11; *N. Y. Times*, Jan. 19, 1938, p. 10. In an address to the Diet the Japanese Foreign Minister pledged continuance of the "open door" policy in China. Text: *N. Y. Times*, Jan. 23, 1938, p. 34; *Times* (London), Jan. 24, 1938, p. 11. "A state of war exists between the two countries," according to Foreign Minister Hirota. *C. S. Monitor*, Feb. 2, 1938, p. 7. On Feb. 3 Japan sent to all foreign diplomats at Shanghai a warning for aliens to leave a large area of China. *C. S. Monitor*, Feb. 3, 1938, p. 6.
- 26 HUNGARY—NORWAY. Reached agreement by exchange of notes at Stockholm for the reciprocal abolition of visa fees on passports. *L. N. M. S.*, Dec., 1937, p. 322.
- 27 DENMARK—GERMANY. Protocol signed, extending for one year the agreement of March 1, 1934, regarding reciprocal exchange of goods, and extending the final protocol of the agreement of Jan. 30, 1936. *L. N. M. S.*, Dec., 1937, p. 322.
- 28 ITALY—MANCHOUKUO. Italy announced recognition of Manchoukuo as a separate state. *Times* (London), Nov. 30, 1937, p. 13; *N. Y. Times*, Nov. 30, 1937, p. 5; *C. S. Monitor*, Nov. 29, 1937, p. 3; *International Gleanings from Japan*, Dec. 15, 1937, p. 4.
- 29 COLONIES. Following diplomatic conversations, France and Great Britain issued a joint *communiqué* saying the question cannot be considered "in isolation." Text: *N. Y. Times*, Dec. 1, 1937, pp. 1, 8.

December, 1937

- 1 JAPAN—MANCHOUKUO. Extraterritorial rights in Manchoukuo relinquished by Japan. *International Gleanings from Japan*, Dec. 15, 1937, p. 2; *Revue internationale française du droit des gens*, Dec., 1937, p. 308.
- 1 SPAIN. Japan recognized the Franco Government. *Times* (London), Dec. 2, 1937, p. 13; *International Gleanings from Japan*, Dec. 15, 1937, p. 3; *N. Y. Times*, Dec. 2, 1937, p. 23.
- 1-2 FRANCE—GREAT BRITAIN. Ratifications exchanged in London of the convention for the abolition of capitulations in Morocco and Zanzibar, signed in London, July 29, 1937. Text of convention: *G. B. Treaty Series*, No. 8 (1938), *Cmd.* 5646. Promulgated by France on Dec. 2. *Revue internationale française du droit des gens*, Dec., 1937, p. 303.
- 2 MANCHOUKUO—SPAIN. A mutual recognition of governments effected by an exchange of notes. *Times* (London), Dec. 3, 1937, p. 16; *International Gleanings from Japan*, Dec. 15, 1937, p. 5.
- 3 GREAT BRITAIN—JAPAN. Ratifications exchanged in London of the trade and commerce convention between Burma and Japan. Text of convention: *G. B. Treaty Series*, No. 1 (1938), *Cmd.* 5636.
- 4 POLAND—UNITED STATES. Reached an agreement by exchange of notes for the mutual recognition of ship measurement certificates and for the adherence of the Free City of Danzig to the agreement, effected by notes of Jan. 17, Mar. 14, Apr. 22, 1930, and Oct. 5, 1934. *T. I. B.*, Dec., 1937, p. 21. Text: *Ex. Agr. Ser.*, No. 111.
- 6 GREAT BRITAIN—RUMANIA. Notes exchanged in London regarding the acceptance of seamen's discharge books in lieu of passports. Texts: *G. B. Treaty Series*, No. 7 (1938), *Cmd.* 5645.
- 7 SYRIA—TURKEY. Turkey denounced the treaty of friendship and non-aggression, signed May 30, 1926. *C. S. Monitor*, Dec. 8, 1937, p. 7; *N. Y. Times*, Dec. 8, 1937, p. 7; *Times* (London), Dec. 8, 1937, p. 15.
- 9-11 BALTIC STATES. Ministers of Foreign Affairs held conference at Tallinn. A communiqué reaffirmed their faith in the League of Nations. *Revue internationale française du droit des gens* (Paris), Dec., 1937, pp. 313-314.
- 11 LEAGUE OF NATIONS—ITALY. Italy withdrew from the League. *L. N. M. S.*, Dec., 1937, p. 309; *Times* (London), Dec. 13, 1937, p. 12; *N. Y. Times*, Dec. 13, 1937, p. 19.
- 12/ January 12, 1938 RUSSIA. First elections of the Soviet régime took place for members of a Soviet of the Union and a Soviet of Nationalities. *C. S. Monitor*, Dec. 13, 1937, p. 4; *N. Y. Times*, Dec. 13, 1937, p. 1. First session of the new parliament opened in Moscow on Jan. 12. *N. Y. Times*, Jan. 13, 1938, p. 6.
- 13 GERMANY—STANDSTILL AGREEMENT. Agreement of September, 1931, prolonged for one year from Feb. 28, 1938. *N. Y. Times*, Dec. 14, 1937, p. 39.
- 14 CHINA. A provisional government, formed with the coöperation of the Japanese, was proclaimed for the Chinese at Peiping. *N. Y. Times*, Dec. 15, 1937, p. 1.
- 14 FRANCE—YUGOSLAVIA. Signed three agreements at Prague, supplementing their trade treaty. *B. I. N.*, Dec. 25, 1937, p. 586.
- 14 to January 31, 1938 DOMINICAN REPUBLIC—HAITI. The Dominican Republic invoked on Dec. 14 the Gondra Treaty (1923) and the General Convention of Inter-Ameri-

- can Conciliation (1929), and named representatives on a Commission of Investigation and Conciliation to be appointed in accordance with those pacts. *N. Y. Times*, Dec. 15, 1938, p. 19; *Press Releases*, Dec. 18, 1937, p. 477. On Dec. 17 President Trujillo of the Dominican Republic accepted the invitation of the Permanent Commission, set up under the Gondra Treaty, to settle the dispute by conciliation. *N. Y. Times*, Dec. 19, 1937, p. 28; *C. S. Monitor*, Dec. 21, 1937, p. 3. Texts of Dominican acceptance and President Roosevelt's reply: *Press Releases*, Dec. 25, 1937, p. 494. Dominican representatives appointed on Dec. 27. *P. A. U.*, Feb., 1938, pp. 121-122. Chief executives of the two countries exchanged pledges to avoid war as a means of settling recent border incidents. *N. Y. Times*, Dec. 27, 1937, p. 6. The Dominican Republic agreed Jan. 31 to pay \$750,000 indemnification to Haiti and to punish all guilty parties in the October events. Both countries promised to prevent illegal emigration of nationals. *C. S. Monitor*, Feb. 1, 1938 p. 3.
- 15-30 GREAT BRITAIN—JAPAN. In a note of protest to Japan on Dec. 15, citing instances of attacks on her ships on the Yangtze, Great Britain asked definite assurance against such repetition. Texts of British note and Japanese reply: *N. Y. Times*, Dec. 16, 1937, p. 17; *Times* (London), Dec. 16, 1937, p. 14. Japan replied on Dec. 28 regarding attacks on the gunboat *Ladybird*. *N. Y. Times*, Dec. 29, 1937, p. 2. Extracts: *C. S. Monitor*, Dec. 30, 1937, p. 5. Text: *Times* (London), Dec. 31, 1937, p. 11; *N. Y. Times*, Dec. 31, 1937, p. 2. Text of British note of Dec. 30 accepting Japanese apology: *Times* (London), Jan. 1, 1938, p. 12; *N. Y. Times*, Jan. 1, 1938, p. 4.
- 16 FRANCE—GERMANY. Signed a frontier agreement concerning the Saar region. *N. Y. Times*, Dec. 17, 1937, p. 4.
- 16 INTERNATIONAL LABOR ORGANIZATION—ITALY. Italy resigned from the I. L. O. *C. S. Monitor*, Dec. 16, 1937, p. 6; *N. Y. Times*, Dec. 17, 1937, p. 11; *I. L. O. Monthly Summary*, Nov.-Dec., 1937, p. 62.
- 16 ITALY—UNITED STATES. Signed a temporary commercial treaty at Rome. *Times* (London), Dec. 20, 1937, p. 11; *T. I. B.*, Dec., 1937, p. 18. Text: *N. Y. Times*, Dec. 18, 1937, p. 11; *Press Releases*, Dec. 18, 1937, p. 480; *T. I. B.*, Dec., 1937, pp. 26-29.
- 17 FRANCE—SYRIA. Agreement signed regarding application of the Franco-Syrian treaty, whereby France agrees to fulfill her engagements towards the minorities, but would not undertake commitments towards each group, and Syria confirms the rights and guarantees to be accorded the minorities. *B. I. N.*, Dec. 25, 1937, p. 608.
- 17 INTERNATIONAL SHIPPING CONFERENCE. Representatives of 12 nations, meeting in London, passed a resolution accepting the principle of continued international coöperation. *B. I. N.*, Dec. 25, 1937, p. 601.
- 18 GERMANY—ITALY. Several commercial accords signed at Rome. *N. Y. Times*, Dec. 19, 1937, p. 23; *Times* (London), Dec. 20, 1937, p. 11; *B. I. N.*, Dec. 25, 1937, p. 603.
- 21 JAPAN—RUSSIA. Prolonged for one year, from Dec. 31, the fishery convention, concluded in 1907 and twice re-affirmed. *C. S. Monitor*, Dec. 22, 1937, p. 2.
- 21 KELLOGG, FRANK B. Former World Court judge, Secretary of State, Nobel peace prize winner, and co-author of the Kellogg-Briand Pact, died at St. Paul. *N. Y. Times*, Dec. 22, 1937, p. 1.

- 21 MEXICO—UNITED STATES. Ratifications exchanged of the treaty of Apr. 13, 1937, providing for termination of Art. VIII of the Gadsden Treaty, signed at Mexico City, Dec. 30, 1853. *Press Releases*, Dec. 25, 1937, p. 510; *T. I. B.*, Dec., 1937, p. 12.
- 21 REFERENDUM ON WAR. Former Secretary of State Stimson vigorously opposed Congressional resolution. Text of letter: *N. Y. Times*, Dec. 22, 1937, p. 14; *Cong. Rec.* (daily), Jan. 4, 1938, pp. 33-35.
- 22 GREAT BRITAIN—JAPAN. Great Britain sent note protesting Japanese attack on a Chinese customs cruiser in Honkong territorial waters. *Times* (London), Dec. 23, 1937, p. 10; *N. Y. Times*, Dec. 23, 1937, p. 1.
- 22 to January 5, 1938 ETHIOPIAN CONQUEST. Dutch Government suggested on Dec. 22 that the Oslo Convention States recognize Italian sovereignty over Ethiopia. On Dec. 29 the King of Norway in a message to Emperor Haile Selassie refused Dutch invitation to approach Great Britain and France regarding recognition of Ethiopian conquest. *B. I. N.*, Jan. 8, 1938, p. 33. A semi-official Italian bulletin of Jan. 5 listed the following countries giving *de jure* recognition: Germany, Switzerland, Austria, Hungary, Yugoslavia, Albania, Spain, Japan, Manchoukuo and Yemen. Chile, Panama, Guatemala, Ecuador, Ireland and Nicaragua addressed credentials to the "King and Emperor." *De facto* recognition given by Great Britain, France, Belgium, Greece, Bulgaria, Rumania, Czechoslovakia, Turkey, Iran, Peru and Haiti. *N. Y. Times*, Jan. 6, 1938, p. 2; *B. I. N.*, Jan. 22, 1938, p. 67. Poland and Ireland have granted *de jure* recognition. *Times* (London), Jan. 6, 1938, p. 11.
- 25 BAKER, NEWTON D. The Secretary of War in President Wilson's cabinet from 1916 to 1921 died in Cleveland, aged 66 years. *N. Y. Times*, Dec. 26, 1937, p. 1.
- 27 CZECHOSLOVAKIA—HUNGARY. Commercial agreement signed in Budapest. *B. I. N.*, Jan. 8, 1938, p. 29; *Times* (London), Dec. 28, 1937, p. 11.
- 29 JAPAN—RUSSIA. Signed an agreement in Moscow, extending for one year the fisheries convention, signed in 1928. *B. I. N.*, Jan. 8, 1938, p. 41.
- 29/February 9, 1938 IRELAND. New constitution came into force, and the new name, Eire, became effective in 26 counties. *N. Y. Times*, Dec. 29, 1937, p. 6; *Times* (London), Dec. 29, 1937, p. 10. British Foreign Office issued a statement defining the attitude of the British and Dominion Governments. *Times* (London), Dec. 30, 1937, p. 10; *B. I. N.*, Jan. 8, 1938, p. 28. Election results in Ulster on Feb. 9 opposed union with Eire and advocated continued union with Great Britain. *C. S. Monitor*, Feb. 11, 1938, p. 1; *N. Y. Times*, Feb. 11, 1938, p. 12.
- 30 ITALY—JAPAN. Agreement signed at Rome, supplementing the existing treaty of commerce and navigation, and providing for trade between Japan and Italian East Africa. It recognizes the Italian conquest of Ethiopia. *Times* (London), Dec. 31, 1937, p. 11; *C. S. Monitor*, Dec. 30, 1937, p. 5; *B. I. N.*, Jan. 8, 1938, p. 30.
- 31 GERMANY—SIAM. Signed a treaty of friendship and trade at Bangkok. *B. I. N.*, Jan. 8, 1938, p. 35.

January, 1938

- 1 BRAZIL—UNITED STATES. Agreement, providing reciprocal waiver of passport visa fees for non-immigrants, came into force. *N. Y. Times*, Jan. 1, 1938, p. 4; *Press Releases*, Jan. 1, 1938, pp. 27-28. Summary: *T. I. B.*, Dec., 1937, p. 24.
- 1 EMBARGO. France ordered a virtual embargo on armament shipments to Rumania and Yugoslavia. *N. Y. Times*, Jan. 2, 1938, p. 1.

- 1 ESTONIA CONSTITUTION. New constitution came into force, by which all political parties are abolished and the Diet replaced by corporations. *B. I. N.*, Jan. 8, 1938, p. 20; *Revue internationale française du droit des gens*, Dec., 1937, p. 306.
- 1 MEXICO—UNITED STATES. President Cardenas of Mexico abrogated the so-called Morrow-Calles oil agreement of 1928 by announcing that United States petroleum companies can hold their concessions only if they agree to pay royalties. *N. Y. Times*, Jan. 3, 1938, p. 1.
- 2 HONDURAS—NICARAGUA. President Somoza of Nicaragua announced withdrawal of all troops from the Honduran border in accordance with the recent agreement. *N. Y. Times*, Jan. 3, 1938, p. 10.
- 3 CHINA. Premier Chiang Kai-shek resigned and was succeeded by Dr. H. H. Kung. *N. Y. Times*, Jan. 3, 1938, p. 12.
- 4 PALESTINE. White Paper published containing the terms of reference of a technical commission to visit Palestine (a fact-finding body to study the details and practicability of the plan of partition). Text: *N. Y. Times*, Jan. 5, 1938, p. 6; *Times* (London), Jan. 5, 1938, p. 10; *Cmd.* 5634.
- 6 CHILE—UNITED STATES. Provisional commercial agreement, effected by exchange of notes, to replace *modus vivendi* in force since 1931. *N. Y. Times*, Jan. 7, 1938, p. 13. Text: *Press Releases*, Jan. 8, 1938, p. 36.
- 7 to February 10 RUSSIA—UNITED STATES. Note from the United States, formally requesting information concerning Mrs. Ruth M. Rubens who disappeared Dec. 9, 1937, in Moscow, received by Soviet Foreign Office. *N. Y. Times*, Jan. 8, 1938, p. 1. Russia granted permission on Feb. 5 for United States agent to see Mrs. Rubens. *N. Y. Times*, Feb. 6, 1938, pp. 1, 28; *C. S. Monitor*, Feb. 5, 1938, p. 1. United States officials interviewed Mrs. Rubens in prison at Moscow on Feb. 10. *Press Releases*, Feb. 12, 1938, p. 260.
- 8 AMERICAN NATIONALS AND INVESTMENTS IN CHINA. In response to Senate Resolution 210 of Jan. 5, Secretary of State Hull sent letter to the Senate giving statistics of Americans in China and American investments there. Text: *N. Y. Times*, Jan. 16, 1938, p. 34; *Cong. Rec.* (daily), Jan. 10, 1938, p. 327.
- 10 FRANCE—EL SALVADOR. Concluded at San Salvador a reciprocal trade agreement, expiring Dec. 31, 1938. *N. Y. Times*, Jan. 11, 1938, p. 7.
- 10-12 ROME PROTOCOL STATES. Representatives of Austria, Hungary and Italy met in Budapest. Austria and Hungary opposed the Italian suggestion to join the Anti-Communist pact signed by Germany, Italy and Japan. Austria and Hungary agreed to recognize *de jure* the Franco Government in Spain. *Times* (London), Jan. 11, 1938, p. 11. The conference issued a *communiqué*. Summary: *C. S. Monitor*, Jan. 13, 1938, p. 6; *N. Y. Times*, Jan. 13, 1938, pp. 1, 5; *B. I. N.*, Jan. 22, 1938, p. 66.
- 10-14 CANADA—UNITED STATES. Civil aviation representatives met in Washington. *N. Y. Times*, Jan. 11, 1938, p. 19. Recommended international arrangements on the following subjects: (1) Air navigation dealing with technical requirements, (2) Reciprocal issuance of airman certificates, (3) Reciprocal recognition of certificates of airworthiness for export, (4) Regional arrangement governing the use of radio for aeronautical services in harmony with existing international understandings. *Press Releases*, Jan. 15, 1938, p. 106.
- 11 HAITI—UNITED STATES. Notes exchanged relative to the partial suspension by Haiti of debt payments to the United States, and the signature of an accord on the subject. Texts: *Press Releases*, Jan. 22, 1938, pp. 123-130.

- 12-22 JAPANESE FISHING. By a decree, effective Feb. 1, Panama barred Japanese fishermen from its territorial waters. *N. Y. Times*, Jan. 13, 1938, p. 7. On Jan. 21 the Government of the Netherlands East Indies announced more stringent measures against Japanese fishing boats. *N. Y. Times*, Jan. 22, 1938, p. 3. Japanese fishermen appealed on Jan. 22 to Costa Rican Government for a concession. *N. Y. Times*, Jan. 23, 1938, p. 35.
- 14 MID-EASTERN PACT OF NON-AGGRESSION. Turkey ratified the pact, signed July 8, 1937. *B. I. N.*, Jan. 22, 1938, p. 74.
- 15 FRANCE—UNITED STATES. A supplemental agreement, amending the reciprocal visa fee agreement, became effective. *Press Releases*, Jan. 22, 1938, p. 115.
- 15 to February 5 ITALY—RUSSIA. Russia suspended all commercial payments to Italy because of disagreement over delivery of Soviet oil to the Italian navy. *N. Y. Times*, Jan. 16, 1938, p. 1; *Times* (London), Jan. 17, 1938, p. 11; *B. I. N.*, Jan. 22, 1938, p. 77. *Communiqué* issued at Rome, Jan. 20, denied debt to Russia, and stated the converse was true. Text: *N. Y. Times*, Jan. 21, 1938, p. 8. Russia sent a note on Feb. 5 protesting the seizure on Jan. 20 of Russian funds in a Milan branch of the Bank of Italy to satisfy the claim of Italian builders of a Russian warship. *N. Y. Times*, Feb. 6, 1938, p. 27.
- 17-19 GREAT BRITAIN—IRELAND. Anglo-Irish conference on unity in Ireland met in London. *N. Y. Times*, Jan. 18, 1938, p. 1; *Times* (London), Jan. 18, 1938, p. 12; Jan. 21, 1938, p. 12.
- 18 VAN ZEELEND REPORT. M. van Zeeland, of Belgium, acting under the terms of a mission sponsored by the British and French Governments, issued a report which recommended an international economic pact to achieve world trade accord. *N. Y. Times*, Jan. 28, 1938, p. 1; text of report: pp. 14-15; *Times* (London), Jan. 28, 1938, p. 9; *G. B. Misc. Ser.*, No. 1 (1938), *Cmd.* 5648. Summary: *C. S. Monitor*, Jan. 28, 1938, pp. 1, 5.
- 24 LEAGUE OF NATIONS—LITHUANIA. Permanent delegation, accredited to the League of Nations, established at Geneva by Lithuania. *N. Y. Times*, Jan. 25, 1938, p. 9.
- 26/31 ALEXANDRETTA. League of Nations special committee adjusted certain differences in the regulations governing the first elections in the district. *C. S. Monitor*, Jan. 27, 1938, p. 1; *Times* (London), Jan. 29, 1938, p. 11. The report of the League Committee was adopted on Jan. 31. *L. N. Information Sec.*, Jan. 31, 1938, No. 8405.
- 26 to February 2 LEAGUE OF NATIONS COUNCIL. The 100th session opened on Jan. 26 under the presidency of M. Adle of Iran. *N. Y. Times*, Jan. 27, 1938, pp. 1, 15; *C. S. Monitor*, Jan. 26, 1938, p. 6; *Times* (London), Jan. 27, 1938, p. 12. British, French and Russian members re-affirmed their faith in the League as a force for peace. *N. Y. Times*, Jan. 28, 1938, p. 1; *Times* (London), Jan. 28, 1938, pp. 13-14. It named on Jan. 28 a committee to inquire into the status of women in all countries. *C. S. Monitor*, Jan. 29, 1938, p. 1. Adjourned Feb. 2 after adopting a resolution in answer to the Chinese appeal, with Poland and Peru abstaining, and Ecuador offering an interpretation equivalent to a reservation. *C. S. Monitor*, Feb. 2, 1938, p. 5. Text of resolution: *N. Y. Times*, Feb. 3, 1938, p. 3; *Times* (London), Feb. 3, 1938, p. 11; *L. N. Information Sec.*, Feb. 2, 1938, No. 8410.
- 27 LEAGUE OF NATIONS—HUNGARY. League of Nations Council decided to release its control of Hungarian finances, effective March 31, 1938. *Times* (London), Jan. 28, 1938, p. 13.

- 31 BULGARIA—GREECE. Six-months commercial agreement signed at Athens, following an interruption of fifteen years in commercial relations. *Times* (London), Feb. 1, 1938, p. 13.
- 31 ITALY—SPAIN. The Spanish Ambassador in London presented a note to the British Foreign Office stating that the Italian Government had given destroyers and submarines to the Franco Government. Text: *N. Y. Times*, Feb. 2, 1938, p. 2; *B. I. N.*, Feb. 19, 1938, p. 154.
- 31 to February 2 LEAGUE OF NATIONS—SANCTIONS. Delegates of Switzerland, Sweden and The Netherlands informed the League of Nations Committee of Twenty-eight that their governments held the opinion that Art. XVI of the Covenant had become optional for each member. Representatives of small nations called on the League of Nations to abandon its system of obligatory sanctions. *N. Y. Times*, Feb. 1, 1938, p. 4. On Feb. 1 the Committee of Twenty-eight on Covenant Reform decided to refer the question without advice to the Assembly, meeting September, 1938. *N. Y. Times*, Feb. 2, 1938, p. 4. Austria's disapproval of Covenant reform at present was contained in a *communiqué* issued in Vienna on Feb. 2. *C. S. Monitor*, Feb. 3, 1938, p. 5.
- February, 1938
- 1 CHILE—UNITED STATES. The provisional commercial agreement, effected by an exchange of notes at Santiago on Jan. 6, 1938, came into force provisionally, and will come into force definitely 30 days after the date on which it is ratified by the Chilean Congress. *Press Releases*, Feb. 19, 1938, p. 268.
- 1 TELECOMMUNICATIONS CONFERENCE. International conference opened at Cairo with delegates present from 62 countries. *C. S. Monitor*, Feb. 1, 1938, p. 3; *N. Y. Times*, Feb. 2, 1938, p. 5; *Times* (London), Feb. 2, 1938, p. 11. List of United States delegates: *T. I. B.*, Dec., 1937, p. 22.
- 2-5 PIRACY. Great Britain on Feb. 2 asked France, Italy and seven other nations to agree to a "quarantine" of all submarines in the Mediterranean. *N. Y. Times*, Feb. 3, 1938, p. 1. Without waiting for Italy's consent to the plan, Great Britain and France ordered seventy ships to the Mediterranean with instructions to sink at sight any submarine. *N. Y. Times*, Feb. 4, 1938, p. 1. On Feb. 4, Italy accepted the British and French proposals. *N. Y. Times*, Feb. 5, 1938, p. 1; *Times* (London), Feb. 7, 1938, p. 13; *C. S. Monitor*, Feb. 5, 1938, p. 4. Great Britain sent a note on Feb. 5 to the Government of General Franco of Spain expressing its view of Spanish responsibility for the sinking of the *Alcira* and *Endymion* (British freighter and steamship). *Times* (London), Feb. 7, 1938, p. 14.
- 3 JAPAN—RUSSIA. The arrangement, in force intermittently since 1905 for the exchange of army officers, was terminated by Japan. *C. S. Monitor*, Feb. 3, 1938, p. 7.
- 4 AMERICAN TROOPS IN CHINA. United States announced plan to reduce its armed forces in North China. *Press Releases*, Feb. 5, 1938, p. 199; *N. Y. Times*, Feb. 5, 1938, p. 2.
- 4 GERMANY. Hitler named self War Minister. *N. Y. Times*, Feb. 5, 1938, p. 1; *C. S. Monitor*, Feb. 5, 1938, p. 1.
- 7-10 REFUGEES. League of Nations international conference opened Feb. 7 at Geneva. *N. Y. Times*, Feb. 8, 1938, p. 2. Drew up a convention which was signed Feb. 10 by Belgium, United Kingdom, Denmark, Spain, Norway, France and The Netherlands, all making reservations. Seven other nations did not sign: Cuba, Luxemburg, Poland, Portugal, Sweden, Switzerland and Czechoslovakia. *N. Y. Times*,

Feb. 11, 1938, p. 8; *Times* (London), Feb. 11, 1938, p. 13; *L. N. Information Sec.*, Feb. 10, 1938, No. 8419; *B. I. N.*, Feb. 19, 1938, pp. 148-149.

- 8/10 NAVAL ARMAMENTS. In a note to the United States Senate, Secretary of State Hull denied any alliance or understanding with Great Britain relating to war; any agreement for use of the Navy in conjunction with other Powers, any agreement with other nations for the Navy to police or patrol any ocean. *C. S. Monitor*, Feb. 8, 1938, pp. 1, 4. Text: *N. Y. Times*, Feb. 9, 1938, p. 1; *Cong. Rec.*, Feb. 8, 1938, p. 2096; *Press Releases*, Feb. 12, 1938, p. 251. A letter to Congressman Ludlow from Secretary of State Hull answered requests for a clarification of naval and military expansion policy. Text: *C. S. Monitor*, Feb. 12, 1938, pp. 1, 4; *N. Y. Times*, Feb. 13, 1938, p. 2; *Press Releases*, Feb. 12, 1938, p. 251; *Cong. Rec.*, Feb. 14, 1938, pp. 2543-2544.
- 11 LEAGUE OF NATIONS—CHINA. China sent protest to the League against bombardment by Japanese airplanes of undefended villages and towns near Canton. *C. S. Monitor*, Feb. 11, 1938, p. 2.
- 12 AUSTRIA—GERMANY. Drafted a new agreement by which Hitler reaffirms recognition of Austrian sovereignty and agrees not to countenance interference in Austrian affairs by the Reich Nazi party. *Times* (London), Feb. 14, 1938, p. 12; *N. Y. Times*, Feb. 14, 1938, p. 1.
- 14 ASSISTANCE TO INDIGENT FOREIGNERS. League of Nations Committee on Assistance to Indigent Foreigners held first meeting at Geneva, with the United States representative acting in an expert and advisory capacity. *L. N. Information Sec.*, Feb. 14, 1938, No. 8421.
- 14 RUSSIA—UNITED STATES. A suit by the Soviet Government to recover \$1,000,000 from the National City Bank of New York was dismissed in the Supreme Court of New York, on the ground that all Russian claims against United States nationals were assigned to the United States Government by the Litvinoff agreement of 1933, by which diplomatic recognition was extended to Russia. *N. Y. Times*, Feb. 15, 1938, p. 10.
- 14 VATICAN—YUGOSLAVIA. Aide mémoire sent to Yugoslav Government by the Holy See reminding the government that the Concordat of July 25, 1935, has not yet been ratified. *Times* (London), Feb. 19, 1938, p. 11.

INTERNATIONAL CONVENTIONS

AÉRIAL NAVIGATION. Paris, Oct. 13, 1919.

Adhesion: Latvia. Nov. 1, 1937. *T. I. B.*, Nov., 1937, p. 20.

AÉRIAL NAVIGATION. Paris, Oct. 13, 1919. Protocol of Amendments, Paris, June 1, 1935.

Ratification deposited: Portugal. Oct. 21, 1937. *T. I. B.*, Dec., 1937, p. 16.

AIRPLANE TRANSPORT. Buenos Aires, June 19, 1935.

Promulgation: Mexico. *P. A. U.*, Jan., 1938, p. 44.

ARBITRATION CLAUSES. Protocol. Geneva, Sept. 24, 1923.

Ratification deposited: India (by Great Britain, with reservation). *T. I. B.*, Nov., 1937, p. 22.

BROADCASTING. Convention and Final Act. Geneva, Sept. 23, 1936.

Application to: Southern Rhodesia (by Great Britain). Nov. 1, 1937. *T. I. B.*, Dec., 1937, p. 8.

Ratifications deposited:

Brazil. *L. N. Information Sec.*, Feb. 11, 1938, No. 8420.

Denmark. Oct. 11, 1937. *T. I. B.*, Nov., 1937, p. 5.

EXHIBITIONS. Paris, Nov. 22, 1928.

Adhesion: Finland. Aug. 3, 1937. *T. I. B.*, Dec., 1937, p. 25.

EXTRADITION. Montevideo, Dec. 26, 1933.

Ratification deposited: Honduras. Nov. 27, 1937. *T. I. B.*, Dec., 1937, p. 14.

FLORA AND FAUNA PRESERVATION. London, Nov. 8, 1933.

Adhesion: France. Dec. 10, 1937. *Revue internationale française du droit des gens*, Dec., 1937, p. 303.

FOREIGN ARBITRAL AWARDS. Geneva, Sept. 26, 1927.

Ratification deposited: India (by Great Britain, with reservation). Oct. 23, 1937. *T. I. B.*, Nov., 1937, p. 22.

GOOD OFFICES AND MEDIATION. Buenos Aires, Dec. 23, 1936.

Text: *U. S. T. S.*, No. 925.

Promulgation: Mexico. Dec. 7, 1937. *T. I. B.*, Dec., 1937, p. 6.

HISTORY TEACHING. Montevideo, Dec. 26, 1933.

Ratification deposited: Honduras. Oct. 20, 1937. *T. I. B.*, Nov., 1937, p. 17.

INDUSTRIAL PROPERTY. Paris, Mar. 20, 1883. Revision. The Hague, Nov. 6, 1925.

Adhesion: Tanganyika (by Great Britain). *T. I. B.*, Dec., 1937, p. 20.

Ratification deposited: Germany. Aug. 10, 1937. *T. I. B.*, Nov., 1937, p. 23.

Text: *Reichsgesetzblatt II* (No. 36), Oct. 8, 1937.

INTER-AMERICAN CONCILIATION CONVENTION. Washington, Jan. 5, 1929. Additional Protocol. Montevideo, Dec. 26, 1933.

Ratification deposited: Guatemala. Oct. 1, 1937. *T. I. B.*, Nov., 1937, p. 3.

INTER-AMERICAN RADIO COMMUNICATIONS. Havana, Dec. 13, 1937.

Signatures: Canada, Cuba, Dominican Republic, Haiti, Mexico, United States. *P. A. U.*, Feb., 1938, p. 120.

INTER-AMERICAN RADIO CONVENTION. Havana, Dec. 13, 1937.

Signatures: Canada, Cuba, Dominican Republic, Haiti, Mexico, United States. *P. A. U.*, Feb., 1938, p. 120.

MAINTENANCE, etc. OF PEACE. Buenos Aires, Dec. 23, 1936.

Promulgation: Mexico. Dec. 7, 1937. *T. I. B.*, Dec., 1937, p. 5.

Text: *U. S. T. S.*, No. 922.

MARITIME BUOYAGE. Geneva, May 13, 1936.

Text: *G. B. Misc. Ser.*, No. 8 (1937), *Cmd.* 5590.

MERCHANDISE MARKS. Madrid, Apr. 14, 1891. Revision. London, June 2, 1934.

Ratification deposited: Germany. Aug. 10, 1937. *T. I. B.*, Nov., 1937, p. 24.

MONEY ORDERS. Panama, Dec. 22, 1936.

Promulgation: Mexico. Sept. 28, 1937. *T. I. B.*, Nov., 1937, p. 25.

NARCOTIC DRUG TRAFFIC. Geneva, June 26, 1936.

Ratifications deposited:

Belgium. Nov. 27, 1937.

China. Oct. 21, 1937. *T. I. B.*, Dec., 1937, pp. 14-15.

NATIONALITY CONVENTION. The Hague, Apr. 12, 1930.

Ratification deposited: Great Britain (for Australia, Papua and Norfolk Island). Nov. 10, 1937. *T. I. B.*, Dec., 1937, p. 5.

NATIONALITY. Montevideo, Dec. 26, 1933.

Ratification deposited: Honduras. Nov. 27, 1937. *T. I. B.*, Dec., 1937, p. 14.

- NON-INTERVENTION. Buenos Aires, Dec. 23, 1936.
Promulgation: Mexico. Dec. 7, 1937. *T. I. B.*, Dec., 1937, p. 7.
Text: *U. S. T. S.*, No. 923.
- NORTH AMERICAN REGIONAL BROADCASTING. Havana, Dec. 13, 1937.
Signatures: Canada, Cuba, Dominican Republic, Haiti, Mexico, United States. *P. A. U.* Feb., 1938, p. 120.
- PARCEL POST. Panama, Dec. 22, 1936.
Promulgation: Mexico. Sept. 28, 1937.
Ratification: Dominican Republic. Nov. 5, 1937. *T. I. B.*, Nov., 1937, p. 25.
- PEACE ON THE AMERICAN CONTINENT. Buenos Aires, Dec. 23, 1936.
Promulgation: Mexico. Dec. 7, 1937. *T. I. B.*, Dec., 1937, p. 6.
Text: *U. S. T. S.*, No. 926.
- PERMANENT COURT OF INTERNATIONAL JUSTICE. Optional Clause, Geneva, Dec. 16, 1920.
Ratification deposited: Colombia. Oct. 30, 1937. *L. N. M. S.*, Nov., 1937, p. 283;
T. I. B., Dec., 1937, p. 2.
- POSTAL CONVENTION AND ARRANGEMENTS. Cairo, March 20, 1934.
Texts: Congrès postal international. 10th Cairo, 1934. Documents, Tome 2.
- POSTAL UNION OF THE AMERICAS AND SPAIN. Panama, Dec. 22, 1936.
Promulgation: Mexico. Sept. 28, 1937.
Ratification: Dominican Republic. Nov. 5, 1937. *T. I. B.*, Nov., 1937, p. 25; *P. A. U.*, Jan., 1938, pp. 44-45.
- PREVENTION OF CONTROVERSIES. Buenos Aires, Dec. 23, 1936.
Promulgation: Mexico. *T. I. B.*, Dec., 1937, p. 7.
- RED CROSS. Geneva, July 27, 1929.
Ratifications deposited:
Bulgaria. Oct. 13, 1937.
Czechoslovakia. Oct. 12, 1937. *T. I. B.*, Nov., 1937, p. 5.
- REFUGEES. Geneva, Feb. 10, 1938.
Signatures (with reservations): Belgium, Denmark, France, Great Britain, The Netherlands, Norway, Spain. *L. N. Information Sec.*, Feb. 10, 1938, No. 8419.
- RIGHTS AND DUTIES OF STATES. Montevideo, Dec. 26, 1933.
Ratification deposited: Honduras. Dec. 1, 1937. *T. I. B.*, Dec., 1937, p. 5.
- SUBMARINES IN WAR. Procès verbal. London, Nov. 6, 1936.
Adhesion: The Netherlands. Oct. 29, 1937. *T. I. B.*, Nov., 1937, p. 6.
Application to: Netherlands Indies, Surinam, Curaçao. *T. I. B.*, Dec., 1937, p. 9.
- SUGAR PRODUCTION AND MARKETING. London, May 6, 1937.
Ratification: United States. Dec. 20, 1937. *Cong. Rec.*, Dec. 20, 1937, p. 2511.
Ratification deposited: Cuba. Sept. 22, 1937. *T. I. B.*, Nov., 1937, p. 20.
- TELECOMMUNICATIONS. Madrid, Dec. 9, 1932.
Adhesions: Aden and Burma. Sept. 15, 1937. *T. I. B.*, Nov., 1937, p. 27.
Ratifications:
Brazil. *T. I. B.*, Dec., 1937, p. 24.
Norway. Nov. 16, 1937. *T. I. B.*, Nov., 1937, pp. 27-28.
- TRADE-MARKS REGISTRATION. The Hague, Nov. 6, 1925. Revision. London, June 2, 1934.
Ratification deposited: Germany. Aug. 10, 1937. *T. I. B.*, Nov., 1937, p. 24.

UNDERGROUND WORK (WOMEN) CONVENTION. Geneva, June 4, 1935.

Ratification: Belgium (except Belgian Congo and Ruanda Urundi). *T. I. B.*, Sept., 1937, p. 11.

UNEMPLOYMENT INDEMNITY IN CASE OF LOSS OF SHIP. Genoa, July 9, 1920.

Application to: Papua, New Guinea.

Ratification: Australia. *T. I. B.*, Dec., 1937, p. 21.

WEIGHT OF PACKAGES ON VESSELS. Geneva, June 21, 1929.

Ratification: Hungary. *T. I. B.*, Dec., 1937, p. 20.

WHALING. Final Act. London, June 8, 1937.

Ratifications deposited:

Germany. Nov. 5, 1937. *T. I. B.*, Dec., 1937, p. 20.

Great Britain. Oct. 25, 1937. *T. I. B.*, Nov., 1937, p. 23.

Norway. Oct. 29, 1937. *T. I. B.*, Dec., 1937, p. 20.

Came into force provisionally: July 1, 1937. *T. I. B.*, Dec., 1937, p. 20.

WHITE SLAVE TRADE (WOMEN OF FULL AGE). Geneva, Oct. 11, 1933.

Ratification deposited: Poland. Dec. 8, 1937. *T. I. B.*, Dec., 1937, p. 15.

WINES (ANALYSIS). Rome, June 5, 1935.

Adhesion: Portugal (effective May 2, 1938). *T. I. B.*, Dec., 1937, p. 16.

WORKMEN'S COMPENSATION FOR ACCIDENTS. Geneva, June 10, 1925.

Ratification: Poland. *T. I. B.*, Dec., 1937, p. 21.

WORKMEN'S COMPENSATION FOR OCCUPATIONAL DISEASES. Geneva, June 10, 1925.

Ratification: Poland. *T. I. B.*, Dec., 1937, p. 21.

WORKMEN'S COMPENSATION IN AGRICULTURE. Geneva, Nov. 12, 1921.

Ratification: Mexico. *T. I. B.*, Dec., 1937, p. 20.

DOROTHY R. DART

FRANCE: COUR DE CASSATION

(Criminal Division)

DE FALLOIS *v.* PIATAKOFF, *et al.*, AND COMMERCIAL DELEGATION OF THE
U.S.S.R. IN FRANCE¹

Paris, February 26, 1937

The immunity of diplomatic agents is a matter of public policy; the judgment which, upon the exception taken of incompetence, joins the exception with the substance, cannot thereafter have a preliminary character and is open to appeal.

If we must admit that the personal immunity which the law of nations and international usage have established for the benefit of foreign diplomatic agents is an exception to the rule that laws of order and of safety are binding upon all the inhabitants of the territory, such exception, arising from the common law, cannot be extended; it is necessarily restricted to an ambassador or a minister whose independence must be protected, and to those subordinates who are vested with the same public character as an integral part of the mission.

If the Franco-Soviet agreement of January 11, 1934, made the head of the Commercial Delegation of the U.S.S.R. and his two assistants members of the Soviet Embassy in France, said Delegation prior to this agreement constituted only a commercial institution which, according to principles of our public law, could not share the sovereignty of the Soviet State, and its agents could not enjoy diplomatic immunity. It therefore follows that the decision by which a court of appeal declared itself incompetent to take cognizance of a proceeding for swindling instituted by means of a direct summons, for the sole reason that the defendants had been, prior to 1934, chief and assistant chiefs of the Commercial Delegation—when they had ceased their functions before that agreement, must be set aside.

The decree setting aside the judgment must apply also to the exemption from the proceedings of the actual head of the Delegation designated in that capacity, Article 2 of the agreement of 1934 subjecting the Delegation itself to French jurisdiction in regard to commercial transactions to which it shall have been a party.

De Fallois, the complainant, appealed from a judgment of the Court of Appeal of Paris of July 3, 1935, which in proceedings instituted by means of a direct summons against Piatakoff, Breslau and Lamosky, as chief and assistants of the Soviet Commercial Delegation in France, and against the Delegation as legally responsible, had, upon the request of the Public Prosecutor, sustained the exception based upon the diplomatic immunity of the accused.

The Court:

As to the first plea, alleging the violation of Article 199 of the Code of Criminal Instruction, Articles 451 and 452 of the Code of Civil Procedure, and Article 7 of the law of April 20, 1810, because of lack of grounds and of legal basis, in that the judgment appealed from, without determining the question raised as to the non-admissibility of the appeal from a finding of simple instruction, that is, a preparatory judgment, declared admissible the appeal of the Procurator General although it sought a judgment joining a

¹ Translated by Eleanor H. Finch from *Nouveau Revue de Droit International Privé*, Tome IV, No. 2, p. 324.

legal exception with the substance of the case, that is to say, precisely a preparatory judgment:

Whereas, having jurisdiction by virtue of the direct summons issued at the request of de Fallois against Piatakoff, Breslau and Lamosky, who had exercised respectively the functions of chief and assistant chiefs of the Soviet Commercial Delegation in France, and against Devolaïtsky, at that time head of the said Delegation, the latter being held as legally responsible for the crime of obtaining money by fraud committed by the first three, the Criminal Court of the Seine, upon the representations of the Public Prosecutor as to the inadmissibility of an action instituted against foreign nationals enjoying diplomatic immunity, limited itself to joining the legal exception to the issue to be ultimately decided, and to declaring a continuance of the case;

Whereas, the appeal having been filed by the Procurator General, the court, passing upon the arguments of de Fallois, the complaining party, declared the appeal admissible and set aside the decision of the prior judges. It is maintained that this violated Article 199 of the Code of Criminal Instruction and Article 451 of the Code of Civil Procedure, by the terms of which preparatory judgments or judgments of instruction can only be attacked on appeal after final judgment and conjointly with it;

But, considering that this rule concerning incidental findings which do not constitute a judgment on the main issue, cannot be applied in this case; that the incompetence of the French courts in regard to the diplomatic agents of foreign Powers is based upon the principle of the reciprocal sovereignty and independence of States; that the said agents being, therefore, generally immune from the jurisdiction of the French courts, the judge must in such a case, as a matter of official obligation, declare his incompetence, and the Public Prosecutor may assert it at any stage of the case. It follows consequently that the decision by which the lower court, without questioning the admissibility of the proceedings, remanded the case for argument on the merits, was subject to appeal under the general provisions of Article 199 above-mentioned, and the plea must be rejected.

But as to the second plea, alleging the violation of Article 8 of the Constitution of July 16, 1875, of the law of January 11, 1892, of Article 7 of the law of April 20, 1810, for deficiency of grounds and lack of legal basis, in that the decision appealed from gave effect to a commercial convention which had not been regularly ratified and which therefore could not be considered as having the force of law:

In view of the said articles, together with Article 3 of the Civil Code, according to the terms of which laws of police and of safety are binding upon all the inhabitants of the territory;

Whereas, if the personal immunity which the law of nations and international usage have established for the benefit of foreign diplomatic agents must be admitted as forming an exception to this rule of public law, such an exception, deviating from the general rule, cannot be extended; that it is necessarily

limited to an ambassador or a minister whose independence must be protected, and to his subordinates who, as an integral part of the mission, are vested with the same public character.

Whereas, in order to declare the incompetence of the French courts in the case in regard to Piatakoff, Breslau and Lamosky, the decree attacked was limited to the declaration that according to the statements in a communication from the Minister of Foreign Affairs, the defendants had been respectively chief and assistant chiefs of the Commercial Delegation, the status of which, by the agreement of January 11, 1934, between France and the Union of Soviet Socialist Republics, was determined in relation to the French law, Article 2 of the said agreement declaring that the head of the Delegation and his two assistants "constitute a part of the embassy and by virtue of this fact enjoy diplomatic privileges and immunities."

But, whereas, the fact appears established that Piatakoff, Breslau and Lamosky had ceased their functions prior to January 11, 1934; hence, without seeking to determine whether the Franco-Soviet agreement entailed any obligations before its ratification by the legislature, it becomes our duty to observe that until the date of the said convention at least, the Commercial Delegation, even if it could in the internal law of the Soviet Union be "an integral part of the delegation plenipotentiary," did not have such a character in relation to our laws, since the manifestations of its activity could only appear as acts of commerce to which the principle of the sovereignty of States did not apply. Consequently, in refraining to inquire by what right the above-mentioned defendants, at the time referred to, agents of an organism foreign to our public law, could be allowed the benefits of an immunity based on this same principle of sovereignty, the judgment in question did not have a legal basis for its decision and must therefore be annulled.

And whereas, in regard to Devolaïtsky, the actual head of the Commercial Delegation, if, by reason of this fact, and under the provisions of Article 2 of the convention of 1934 promulgated in France by the law of November 20, 1935, he is a part of the Embassy of the Soviet Republic and personally enjoys diplomatic privileges and immunities, he was, by the original summons of December 7, 1934, exclusively envisaged in his capacity as "representative of the Commercial Delegation." The judgment must therefore be reversed in toto; the competence of the criminal court in regard to Piatakoff, Breslau and Lamosky, in case it should be recognized, should lead the court to which the case is remanded to determine whether the acts in support of the charge against the defendants had not been committed on the occasion of commercial transactions carried on by them in behalf of the Soviet Delegation of which they were the officials in charge, and did not subject said Delegation, as legally responsible, to the jurisdiction of the French courts under the terms of Article 2 of the above-mentioned agreement of 1934.

For these reasons the judgment is set aside and the case remanded.

UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

UNITED STATES *v.* MRS. P. L. GARROW (No. 4018) ¹

March 1, 1937

1. JAY TREATY AS APPLIED TO INDIAN RIGHTS.

Article III of the Treaty of Amity, Commerce, and Navigation concluded between the United States and Great Britain on November 19, 1794, commonly known as the Jay Treaty, so far as it applied to the rights of Indians to pass and repass "with their own proper goods and effects" into the respective territories of the two parties, without the payment of "any impost or duty" of whatever nature was abrogated by the War of 1812. *Citing* Karnuth, Director of Immigration, *et al. v. United States ex rel. Albro*, 279 U. S. 231. (This JOURNAL, Vol. 23, 1929, p. 645.)

2. CANADIAN INDIANS—CITIZENSHIP.

Indians residing in Canada, although wards of the Canadian Government, are within the category of citizens or subjects of that Government. Article III of the Jay Treaty having been nullified by the War of 1812 as to Canadian citizens (*Vide* Karnuth case, *supra*), it was likewise nullified as to Canadian Indians.

3. BASKETS OF WOOD IMPORTED BY AN INDIAN.

A full-blooded Indian woman, residing in Canada near the international boundary line, entered the United States carrying certain baskets made of black ash splints, the baskets not being a part of her household effects, but manufactured for sale and brought into the United States for that purpose, was properly chargeable with duty for baskets, *wholly or in chief value of wood*, under paragraph 411, Tariff Act of 1930, there being neither any treaty of exemption of the goods from duty, nor any statutory exemption therefrom. Legislation and history of the times since the ratification of the Jay Treaty considered.

4. TREATY OF GHENT.

The Treaty of Ghent, ratified February 17, 1815, was not self-executing so far as it affected the right of Canadian Indians to enter the United States.

GRAHAM, Presiding Judge, delivered the opinion of the court:

Annie Garrow, a full-blooded Indian woman of the Canadian St. Régis tribe of Iroquois Indians, residing in Canada near the international boundary line, entered the United States at the village of Hogansburg, N. Y., carrying twenty-four baskets made of black ash splints and dyed in colors. The collector at the port imposed a duty under paragraph 411 of the Tariff Act of 1930, which provides:

PAR. 411. Porch and window blinds, baskets, bags, chair seats, curtains, shades, or screens, any of the foregoing wholly or in chief value of bamboo, wood, straw, papier-mâché, palm leaf, or compositions of wood, not specially provided for, 50 per centum *ad valorem*.

The appellee protested, claiming her said baskets to be free of duty under the provisions of Article III of the Treaty of Amity, Commerce, and Navigation concluded between the United States and Great Britain on November 19, 1794, commonly known as the Jay Treaty. (Treaties, Conventions, International Acts, Protocols, and Agreements between the United States and Other Powers, 1776-1909, by Malloy, Vol. 1, p. 590, Senate Document No. 357, 61st Congress, 2d Session.)

The material portions of the protest filed are as follows:

¹ Treasury Decisions, No. 48857, Vol. 71, p. 421. *Certiorari* denied by United States Supreme Court, Oct. 11, 1937, 302 U. S. xv.

Sir: Notice of dissatisfaction is hereby given with, and protest is hereby made against your ascertainment, assessment, and liquidation of duties (including the legality of all orders and findings entering into the same), on the entry below named. The reasons for objection are as follows:

Article 3 of the Treaty of Amity, Commerce, and Navigation, concluded between the United States and Great Britain on November 19, 1794, known as the Jay Treaty, reads in part as follows:

"No duty of entry shall ever be levied by either party on peltries brought by land or inland navigation into the said territories respectively, nor shall the Indians passing or repassing with their own proper goods and effects of whatever nature, pay for the same any impost or duty whatever. But goods in bales, or other large packages, unusual among Indians, shall not be considered as goods belonging bona fide to Indians."

This provision was in substance carried into the various tariff acts enacted during the period from March 2, 1799, to August 28, 1894.

The provision was repealed in the latter act of Section 34 of the Act of July 24, 1897, together with all the acts or parts of acts inconsistent with the repealing statute.

The repeal of the provision, in effect, abrogated that portion of the treaty above indicated, but as the repeal was inconsistent with the terms of the treaty, the legality of the repeal is questionable.

Upon a hearing before the United States Customs Court, in addition to the facts hereinbefore stated, it also appeared that at the time the international line was established between the Dominion of Canada and the United States of America, this line ran through the territory theretofore occupied by the St. Régis Tribe, with the result that a large number of this tribe reside on the American side and the rest of the tribe on the Canadian side, and that intercourse and communication between these portions of the tribe are continuous. It also appears that for some years the protestant, together with many others of her tribe, had been manufacturing baskets such as those in question here, for sale wherever they could be disposed of; that the protestant, on the occasion of the importation in question, was bringing the baskets across the line to dispose of them at the store of one McKinnon, who was in the business of purchasing such baskets from the Indians for resale; and that the amount received by the protestant for her baskets was \$2, one-half of which was paid for duty imposed. It is also shown that the protestant was not carrying these baskets as a part of her household effects but had manufactured the same, and was importing them for sale in the United States. As the baskets were brought into the United States they were in two bundles, twelve in a bundle, the baskets in each bundle being fastened together by loops through their respective handles. Each basket was about 6 inches wide and about 8 inches high. As fastened together, they fitted into each other and made compact bundles which could be easily carried.

The United States Customs Court sustained the protest, holding that the case was controlled by *McCandless v. United States*, 25 F. (2d) 71, a decision of the Circuit Court of Appeals for the Third Circuit. The Government

brings the matter here by appeal, and contends that the court below was in error for three specific reasons which are specified in the Government's brief, as follows:

(1) Article 3 of the Jay Treaty of 1794 was annulled by the War of 1812.

(2) Alternatively, if Article 3 of the Jay Treaty was not abrogated by the War of 1812, it is, nevertheless, in conflict with a subsequent statute. It is well settled that when a treaty and a statute are in conflict, that which is later in date prevails.

(3) Assuming, for the sake of argument, that Article 3 was not abrogated but is still in force and effect, the importation is not within the purview of the language of said Article 3.

On the other hand, counsel for the appellee contends that Article III of the Jay Treaty of 1794 is still in full force and effect, and that under this treaty the imported goods are free of duty. The claim is thus stated:

The appellee's claim is that Article 3 of the Jay Treaty of 1794, at least in so far as it applies to bona fide Indians, is still in effect and the merchandise in question is free from duty.

It will be necessary to examine the provisions of the involved treaty, and the legislation and history of the times since the ratification of the Jay Treaty, in order to come to a proper conclusion as to the claims of the appellee to exemption from duty.

The Jay Treaty of 1794, in Article III thereof, contained the following provisions:

It is agreed that it shall at all times be free to His Majesty's subjects, and to the citizens of the United States, and also to the Indians dwelling on either side of the said boundary line, freely to pass and repass by land or inland navigation, into the respective territories and countries of the two parties, on the continent of America (the country within the limits of the Hudson's Bay Company only excepted), and to navigate all the lakes, rivers, and waters thereof, and freely to carry on trade and commerce with each other. . . .

.

No duty of entry shall ever be levied by either party on peltries brought by land or inland navigation into the said territories respectively, nor shall the Indians, passing or repassing with their own proper goods and effects of whatever nature, pay for the same any impost or duty whatever. But goods in bales, or other large packages, unusual among Indians, shall not be considered as goods belonging bona fide to Indians.

It will be observed that the quoted provisions are self-executing and granted to the Indians named therein the right to bring their own proper goods and effects of whatever nature into the United States immediately upon the ratification of the treaty, without legislation. However, irrespective of this, the Congress of the United States, in an act to regulate the

collection of duties on imports and tonnage, enacted March 2, 1799 (1 Stat. 627), provided in section 105 thereof (p. 702), as follows:

SEC. 105. *And be it further enacted*, That no duty shall be levied or collected on the importation of peltries brought into the territories of the United States, nor on the proper goods and effects of whatever nature, of Indians passing, or repassing the boundary line aforesaid, unless the same be goods in bales or other large packages unusual among Indians, which shall not be considered as goods belonging bona fide to Indians, nor be entitled to the exemption from duty aforesaid. . . .

This was the situation of affairs at the time of the declaration of war between the United States and Great Britain on June 18, 1812. This war was concluded by the Treaty of Peace made at Ghent on December 24, 1814, and ratified February 17, 1815. (*See Malloy's Treaties, Conventions, etc., supra*, pp. 612-620.) Article IX of said treaty contained the following provision, among others:

The United States of America engage to put an end, immediately after the ratification of the present treaty, to hostilities with all the tribes or nations of Indians with whom they may be at war at the time of such ratification; and forthwith to restore to such tribes or nations, respectively, all the possessions, rights, and privileges which they may have enjoyed or been entitled to in one thousand eight hundred and eleven, previous to such hostilities: . . .

Following the Treaty of Ghent, the Congress, on various occasions, enacted legislation dealing with duties on imports into the United States. A citation of some of these acts is given in a marginal note.²

² An act to regulate the duties on imports and tonnage, of April 27, 1816. S. L., Vol. 3, Chap. CVII.

An act in alteration of the several acts imposing duties on imports, of May 19, 1828. S. L., Vol. 4, Chap. LV.

An act to alter and amend the several acts imposing duties on imports, of July 14, 1832. S. L., Vol. 4, Chap. CCXXVII.

An act to provide revenue from imports, and to change and modify existing laws imposing duties on imports, and for other purposes, of August 30, 1842. S. L., Vol. 5, Chap. CCLXX.

An act reducing the duty on imports, and for other purposes, of July 30, 1846. S. L., Vol. 9, Chap. LXXIV.

An act to provide for the payment of outstanding Treasury notes, to authorize a loan, to regulate and fix the duties on imports, and for other purposes, of March 2, 1861. S. L., Vol. 12, Chap. LXVIII.

An act to provide increased revenue from imports, to pay interest on the public debt, and for other purposes, of August 5, 1861. S. L., Vol. 12, Chap. XLV.

An act to increase the duties on tea, coffee, and sugar, of December 24, 1861. S. L., Vol. 12, Chap. II.

An act to increase duties on imports, and for other purposes, of June 30, 1864. S. L., Vol. 13, Chap. CLXXI.

An act to reduce internal taxes, and for other purposes, of July 14, 1870. S. L., Vol. 16, Chap. CCLV.

An act to reduce duties on imports, and to reduce internal taxes, and for other purposes, of June 6, 1872. S. L., Vol. 17, Chap. CCCXV.

These various acts were not express repeals of the preceding acts, but usually were amendatory thereof, and in most cases were introduced with the phraseology, "The duties heretofore laid by law, on goods, wares, and merchandise, imported into the United States, shall cease and determine, and there shall be levied, and collected, and paid, the several duties herein-after mentioned," or similar language.

The Congress, in the first session of the 43rd Congress of 1873-1874, caused to be issued, as a part of the Statutes at Large, a volume entitled "Revised Statutes of the United States." Herein was incorporated substantially the provision hereinbefore quoted from the statute of March 2, 1799, as Section 2515. The section follows:

SEC. 2515. That no duty shall be levied or collected on the importation of peltries brought into the Territories of the United States, nor on the proper goods and effects, of whatever nature, of Indians passing or repassing the boundary-line aforesaid, unless the same be goods in bales or other large packages unusual among Indians, which shall not be considered as goods belonging to Indians, nor be entitled to the exemption from duty aforesaid.

In the revision of 1878, the same section was repeated.

It is significant that in a marginal note, printed in connection with Section 2515, both in the Revised Statutes of 1873-1874 and 1878, the compiler refers to the statute of March 2, 1799, heretofore referred to.

This condition continued until, in the Tariff Act of March 3, 1883, S. L., Vol. 22, Chap. CXXI, a section known as Section 2512 was incorporated, which is, in substance and effect, similar to the provision of the statute of 1799, heretofore quoted.

Again, in paragraph 674 of the Tariff Act of October 1, 1890, S. L., Vol. 26, Chap. 1244, this provision was made:

674. Peltries and other usual goods and effects of Indians passing or repassing the boundary line of the United States, under such regulations as the Secretary of the Treasury may prescribe: *Provided*, That this exemption shall not apply to goods in bales or other packages unusual among Indians.

Exactly the same provision was repeated in the tariff revision of August 27, 1894, paragraph 582, S. L., Vol. 28, Chap. 349.

The next general revision of the Tariff Act was that of July 24, 1897, S. L., Vol. 30, Chap. 11. The provision which had been carried in the three preceding acts, as to the goods of Indians passing and repassing, was omitted from the said Tariff Act of July 24, 1897, and no reference has been made to this provision in any succeeding act. However, in not only the said act of 1897, but in succeeding acts, duties have been imposed upon goods similar to those which were imported in this case.

In the said Tariff Act of July 24, 1897, appeared Section 34. The following portion of said section is material here, and is as follows:

SEC. 34. That sections one to twenty-four, both inclusive of an Act entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," which became a law on the twenty-eighth day of August, eighteen hundred and ninety-four, and all acts and parts of acts inconsistent with the provisions of this Act, are hereby repealed, said repeal to take effect on and after the passage of this Act, . . .

The quoted provisions of Article III of the Jay Treaty of 1794 were as we have heretofore stated, self-executing. The Act of March 2, 1799, Section 105, was therefore not requisite to give the provisions of said Article III full force and effect, but was only confirmatory of the rights granted by said treaty.

The trial court relied strongly upon *McCandless v. United States*, *supra*, decided March 9, 1928. In that case, which involved a writ of *habeas corpus*, a full-blooded Indian of the Iroquois tribe, born in Canada, crossed the border line from Canada and was arrested on complaint of the Commissioner of Immigration for an alleged violation of law in entering the United States without complying with the immigration laws. He was ordered deported, whereupon he sued out a writ of *habeas corpus*. The United States District Court granted the writ and discharged the petitioner. The Circuit Court, speaking through Buffington, Circuit Judge, affirmed the order of discharge, holding that the general acts of Congress did not apply to members of the Indian tribes. Article III of the Jay Treaty was brought into question and was discussed at length. The court held that the declaration of the War of 1812 did not end the treaty rights secured to the Indians through the said Jay Treaty, so long as they remained neutral. Finally the court held that the rights granted by said Article III were permanent, and were, at most, only suspended during the existence of the War of 1812. Therefore, it was held that the petitioner might pass and repass freely, under and by virtue of the provisions of said Article III. This case was not appealed to the Supreme Court. This may have been occasioned by the fact that on April 2, 1928, an act of Congress was approved which provided that the Immigration Act of 1924 should not apply to Indians crossing the international border (45 Stat. 401).

In 1929, the case of *Karnuth, Director of Immigration, et al. v. United States ex rel. Albro*, came before the Supreme Court, and was decided. (279 U. S. 231.) A writ of *habeas corpus* had been sued out on behalf of two aliens who were detained by immigration officials, and who had entered this country from Canada. The respondent Mary Cook was a British subject, born in Scotland, who came to Canada in 1924. The respondent Antonio Danelon was a native of Italy who came to Canada in 1923. These persons resided at Niagara Falls, Ontario. The latter claimed to be a Canadian citizen, by reason of his father's naturalization. Both respondents had been crossing back and forth over the boundary line, in pursuance of employment in the United States, for a considerable period before their detention. The

Federal District Court sustained the action of the immigration officials, and dismissed the writ. This judgment, on appeal, was reversed by the Circuit Court of Appeals, which held that if the statute were so construed as to exclude the aliens in question, it would conflict with Article III of the Jay Treaty of 1794. *Certiorari* was granted and the case came before the Supreme Court. That court referred to the hereinbefore quoted provisions of said Article III of the Jay Treaty. The contention made by Government counsel was that the treaty provision relied on was abrogated by the War of 1812, and it was upon this point that the case was decided. The court, speaking through Mr. Justice Sutherland, expressed the views that the doctrine that war *ipso facto* annuls treaties of every kind between the warring nations was repudiated by the great weight of modern authority, and that whether the stipulations of a treaty are annulled by war depends upon their intrinsic character. The court cites, as instances of treaty obligations which remain in force during the state of war, such treaties as those of—

. . . session, boundary, and the like; provisions giving the right to citizens or subjects of one of the high contracting powers to continue to hold and transit land in the territory of the other; and, generally, provisions which represent completed acts.

On the other hand, the court held that treaties of—

. . . amity, of alliance, and the like, having a political character, the object of which "is to promote relations of harmony between nation and nation," are generally regarded as belonging to the class of treaty stipulations that are absolutely annulled by war.

Pursuing the matter further, the Supreme Court said, in part:

These cases are cited by respondents and relied upon as determinative of the effect of the War of 1812 upon Article III of the treaty. This view we are unable to accept. Article IX and Article III relate to fundamentally different things. Article IX aims at perpetuity and deals with existing rights, vested and permanent in character, in respect of which, by express provision, neither the owners nor their heirs or assigns are to be regarded as aliens. These are rights which, by their very nature, are fixed and continuing, regardless of war or peace. But the privilege accorded by Article III is one created by the treaty, having no obligatory existence apart from that instrument, dictated by considerations of mutual trust and confidence, and resting upon the presumption that the privilege will not be exercised to unneighborly ends. It is, in no sense, a vested right. It is not permanent in its nature. It is wholly promissory and prospective and necessarily ceases to operate in a state of war, since the passing and repassing of citizens or subjects of one sovereignty into the territory of another is inconsistent with a condition of hostility. See 7 Moore's Digest of International Law, Sec. 1135; 2 Hyde, International Law, Sec. 606. The reasons for the conclusion are obvious—among them, that otherwise the door would be open for treasonable intercourse. And it is easy to see that such freedom of intercourse also may be incompatible with conditions following the termination of the war. Disturbance of peaceful relations between

countries occasioned by war, is often so profound that the accompanying bitterness, distrust, and hate indefinitely survive the coming of peace. The causes, conduct, or result of the war may be such as to render a revival of the privilege inconsistent with a new or altered state of affairs. The grant of the privilege connotes the existence of normal peaceful relations. When these are broken by war, it is wholly problematic whether the ensuing peace will be of such character as to justify the neighborly freedom of intercourse which prevailed before the rupture. It follows that the provision belongs to the class of treaties which does not survive war between the high contracting parties, in respect of which, we quote, as apposite, the words of a careful writer on the subject: . . .

.

These expressions and others of similar import which might be added, confirm our conclusion that the provision of the Jay Treaty now under consideration was brought to an end by the War of 1812, leaving the contracting powers discharged from all obligation in respect thereto, and, in the absence of a renewal, free to deal with the matter as their views of national policy, respectively, might from time to time dictate.

Finally, the judgment of the Circuit Court of Appeals was reversed, and the action of the Commissioner of Immigration was sustained.

The view of the Supreme Court on this interesting question, expressed in the case last cited, was confirmatory of views held by that court from the initiation of our Government. See *Society for the Propagation of the Gospel in Foreign Parts v. Town of New Haven and William Wheeler*, 8 Wheat. 464 (494).

It was also obviously in conformity with the current of authority both in the United States and England. Moore's International Law Digest, Vol. V, paragraph 779.

It is contended by the appellee that some distinction should be made between the members of an Indian tribe and the immigrants in the *Karnuth* case, *supra*. We know of no authority which states or indicates that any such distinction exists, especially as to Indians domiciled in a foreign country. There is no such line of demarcation indicated in the opinion of Mr. Justice Sutherland, hereinbefore quoted. If Article III of the Jay Treaty was nullified by the War of 1812, as to Canadian citizens or subjects, it certainly was nullified, so far as Indians residing in Canada were concerned, for, although wards of the Canadian Government, they were certainly within the category of citizens or subjects.

We think, therefore, it must be said that so far as the provision under which the appellee here claims is concerned, the War of 1812 ended the right which the appellee now claims of bringing her goods across the border and into the United States without the payment of duty.

However, the War of 1812 did not annul or repeal the Tariff Act of March 2, 1799, which was still in full force and effect during the entire period of the duration of the war.

The Treaty of Ghent of 1814, Article IX, as it will be observed, was not self-executing. It constituted a contract on the part of the United States of America that it would, by the necessary legislation,

. . . restore to such tribes or nations, respectively, all the possessions, rights and privileges which they may have enjoyed or been entitled to in one thousand eight hundred and eleven, previous to such hostilities: . . .

So far as we are advised, no such ratifying legislation was ever enacted. Presumably it was not thought necessary to do so, so far as Indian rights are concerned, as at that time the cited provision in the Tariff Act of March 2, 1799, was in full force and effect, and had been so since its enactment.

Evidently, in the Congressional enactments known as the Revised Statutes of 1873-1874 and 1878, Congress still considered said act of March 2, 1799, in full force and effect. It was so noted in marginal notes, and was considered as a part of the statutory law of the land at those times.

The Congress, as has been stated, reenacted the said provision of the act of March 2, 1799, in the Tariff Act of March 3, 1883, in Section 2512 thereof. In the Tariff Act of October 1, 1890, paragraph 674, a reenactment of this provision was made with changed language; that is, instead of permitting the free entry of peltries of every kind, the language implies that only peltries of Indians should be admitted free of duty, and then under such regulation as the Secretary of the Treasury should prescribe. This was also the purport of the revision of August 27, 1894, paragraph 582.

Thus far the rights of the Indians of Canada to bring their peltries and goods into the United States free of duty were, if we concede the facts and conclusions hereinbefore stated, granted by statute and not by treaty, at least after the declaration of the War of 1812.

In 1897, when a general revision of the import duty laws of the United States was undertaken, apparently there was a change in Congressional policy, as the provision for the free entry of peltries and goods of Indians was omitted from that revision, and duties were generally imposed by various provisions of said act upon the goods herein involved.

As will be noted by the hereinbefore quoted portion of Section 34 of the Tariff Act of July 24, 1897, said section expressly repealed certain of the provisions of the Tariff Act of August 28, 1894, and added this in the repealing act: ". . . all acts and parts of acts inconsistent with the provisions of this Act."

In the protest of the appellee, it will be noted that appellee concedes that said Section 34 repealed the hereinbefore mentioned provisions of the Tariff Acts of March 2, 1799, and of August 28, 1894. Irrespective of this concession, it must be manifest that such was the legal effect of said Section 34 of the act of July 24, 1897.

At the time of the entry of the goods here in question, therefore, there was no provision of the law exempting the said goods of the appellee from duty,

but in fact they were especially made dutiable under paragraph 411 of the Tariff Act of 1930, as hereinbefore indicated. There being neither any treaty exemption of appellee's goods from duty, nor any statutory exemption thereof, it follows that they are dutiable, as claimed by the collector.

This being our conclusion, it is unnecessary to decide the other points presented by counsel for the Government.

The judgment of the United States Customs Court is, therefore, *reversed*.

SUPREME COURT OF THE UNITED STATES

COMPANÍA ESPAÑOLA DE NAVEGACIÓN MARITIMA, S. A., *v.* SPANISH
STEAMSHIP *Navemar*¹

[January 31, 1938]

It is open to a friendly government to assert the public status of a vessel engaged in the carriage of merchandise for hire and to claim her immunity from suit either through diplomatic channels or in the courts of the United States. If the claim is recognized and allowed by the executive branch of the Government, it is then the duty of the courts to release the vessel upon appropriate suggestion by the Attorney General of the United States, or other officer acting under his direction.

The foreign government is also entitled as of right upon a proper showing, to appear in a pending suit, there to assert its claim to the vessel, and to raise the jurisdictional question in its own name or that of its accredited and recognized representative; but the court is not bound to accept the allegations of the plea to the jurisdiction as conclusive. The Department of State having declined to act, the want of admiralty jurisdiction because of the alleged public status of the vessel and the right of the foreign government to demand possession of the vessel are appropriate subjects of judicial inquiry upon proof of the matters alleged.

Mr. Justice STONE delivered the opinion of the Court.

In a suit in admiralty, brought in a District Court by the alleged owner to recover possession of a Spanish merchant vessel, the Spanish Ambassador asked leave to intervene as claimant on the basis of an affidavit of the Spanish Acting Consul General suggesting that when the suit was brought the vessel was the property of the Republic of Spain, by virtue of a decree of attachment promulgated by the President of the Republic, appropriating the vessel to the public use, and that it was then in the possession of the Spanish Government. The principal question for decision is whether it was the duty of the court, upon presentation of the suggestion, to dismiss the libel for want of admiralty jurisdiction.

Petitioner, a Spanish corporation, brought the present suit in admiralty in the District Court for Eastern New York against the Spanish steamship *Navemar*, five members of her crew, and all persons claiming an interest in her, to recover possession of the vessel. The libel alleged that petitioner was owner of the vessel, which was within the territorial jurisdiction of the court; and that while she was in petitioner's possession the individual respondents, acting as a committee of the crew, had wrongfully and forcibly seized, and had since retained possession of the vessel. After hearing evi-

¹ No. 242, October Term, 1937.

dence in support of the petition, the District Court rendered its decree upon default, directing the marshal to place libelant in possession.

Thereupon the Spanish Ambassador filed a suggestion in the cause, challenging the jurisdiction of the court on the ground that the *Navemar* was a public vessel of the Republic of Spain, not subject to judicial process of the court, and asking that it direct delivery of the vessel to the Spanish Acting Consul General in New York. The suggestion alleged that when the suit was brought the *Navemar* was the property of the Spanish Government by virtue of its decree of October 10, 1936, and was in the possession of the Republic of Spain. The District Court issued its order to show cause why the default should not be opened and the Ambassador permitted to appear specially as claimant of the vessel. After a hearing the court denied the application but with leave to the Ambassador to make further application upon fuller presentation of the facts showing the ownership and possession of the vessel by the Spanish Government.

Meanwhile the Department of State had refused to act upon the Spanish Government's claim of possession and ownership of the *Navemar*, had declined to honor the request of the Ambassador that representations be made in the pending suit by the Attorney General of the United States in behalf of the Spanish Government, and had advised the Ambassador that his Government was entitled "to appear directly before the court in a case of this character."

A second application by the Ambassador for leave to appear as a claimant upon a verified suggestion, stating additional circumstances relied upon to establish possession of the vessel by the Republic of Spain, was denied. 18 Fed. Supp. 153. On appeal the Court of Appeals for the Second Circuit, after restricting the appeal to the order of the District Court on the second application, reversed that order and directed that the libel be dismissed. 90 F. (2d) 673. We granted *certiorari*, 302 U. S. ix, because the case is of public importance and because of alleged conflict of the decision below with our decision in *The Pesaro*, 255 U. S. 216,² and with that of the Court of Appeals for the Fourth Circuit in *The Attualita*, 238 Fed. 909.

Respondent's suggestion on the second application presented two contentions: one, a challenge to the jurisdiction on the ground that the *Navemar* was a public vessel, immune from arrest and process of the court; the other, that the Spanish Government was owner of the vessel and entitled to her possession by virtue of the decree of attachment.

In addition to the general allegations of ownership and possession of the vessel by the Spanish Government in the first application, the suggestion in the second set up the acquisition of possession in behalf of the Spanish Government by specific acts of its consular officers in Argentina and in New York. It alleged that on October 26, 1936, the Spanish Consul at Rosario, Argentina, had endorsed on the ship's roll a statement that "Through

² This JOURNAL, Vol. 20 (1926), p. 811.

a cable dated 26 of the inst month from the Director General of the Merchant Marine this ship has become the property of the State through attachment according to the Decree of Oct. 10, 1936," and that on October 28 the Spanish Acting Consul General at Buenos Aires had made a similar endorsement on the ship's register. It was also alleged that on arrival in New York in November the Spanish Acting Consul General at that port, by direction of the Ambassador, had instructed the master of the *Navemar* "to await and abide further instructions . . . as regards any further use of the" vessel, and that on November 28 he had instructed the master to render a detailed account of the expenses of the *Navemar* and of minor repairs that she might require. There was no averment that the alleged seizure by the members of the crew was an act of or in behalf of the Spanish Government.

The District Court allowed a full hearing upon the suggestion and upon reply affidavits submitted by libellant, in the course of which there was opportunity for the parties to present proof of all the relevant facts. Cf. *Ex Parte State of New York*, No. 2, 256 U. S. 503. The court found that no one had taken possession of the *Navemar* in behalf of the Spanish Government. It pointed out that neither the ship's roll nor its register is a document of title or possession, the ship's roll being merely a record, in the case of Spanish vessels usually deposited with the Spanish consul while in port, showing arrivals and sailings of the vessel, the kind of cargo carried, the list of passengers, and the enrollment of the members of the crew, and the ship's register being only a record of the nationality of the vessel as determined by the place of her home port. It found that none of the consular officers mentioned had done any act purporting to take possession of the vessel; that none of them had informed the master that he wished to take possession or had any intention of doing so; that the vessel had proceeded under command of her master upon her voyage from Buenos Aires to New York, manned by officers and crew in the employ of petitioner; that upon arrival, the master, under direction of the ship's agent, had discharged cargo; and that before discharge the freight money was paid by the consignees to the agents of the time charterer in New York.

The District Court, upon this and other evidence not necessary to detail, concluded that the *Navemar* was never in possession of the Spanish Government before her seizure by the members of the crew in the territorial waters of the United States, and that she was not a vessel in the public service of the Spanish Government.

The Court of Appeals, without reviewing the findings of the District Court, or the evidence, adverted to the allegation of the first suggestion, substantially repeated on information and belief in the second, that the Spanish Consul at Rosario "pursuant to instructions from the Director General of the Spanish Merchant Marine, took possession of the . . . *Navemar* in the name of the Republic of Spain . . . whereby the . . . *Navemar* then and there became and at all times since has remained the

property of the Government of the Republic of Spain." Declaring that the court was bound to accept this allegation as conclusive, it held that the vessel must be taken to be a public vessel owned by and in the possession of the Spanish Government, and as such immune from suit in the courts of the United States.

This we think was a mistaken view of the force and effect of the suggestion. Admittedly a vessel of a friendly government in its possession and service is a public vessel, even though engaged in the carriage of merchandise for hire, and as such is immune from suit in the courts of admiralty of the United States. *Berizzi Bros. Co. v. S. S. Pesaro*, 271 U. S. 562; compare *The Exchange*, 7 Cranch 116. And in a case such as the present it is open to a friendly government to assert that such is the public status of the vessel and to claim her immunity from suit, either through diplomatic channels or, if it chooses, as a claimant in the courts of the United States.

If the claim is recognized and allowed by the executive branch of the government, it is then the duty of the courts to release the vessel upon appropriate suggestion by the Attorney General of the United States, or other officer acting under his direction. *The Cassius*, 2 Dall. 365; *The Exchange*, *supra*; *The Pizarro*, 19 Fed. Cas. No. 11,199; see *The Constitution*, L. R. 4 P. D. 39; compare *Ex Parte Muir*, 254 U. S. 522; *The Parlement Belge*, L. R. 4 P. D. 129. The foreign government is also entitled as of right upon a proper showing, to appear in a pending suit, there to assert its claim to the vessel, and to raise the jurisdictional question in its own name or that of its accredited and recognized representative. *The Sapphire*, 11 Wall. 164, 167; *The Anne*, 3 Wheat. 435, 445-446; *The Santissima Trinidad*, 7 Wheat. 283, 353; *Colombia v. Cauca Co.*, 190 U. S. 524; *Ex Parte Transportes Maritimos*, 264 U. S. 105; *Berizzi Bros. Co. v. S. S. Pesaro*, *supra*.

After refusal of the Secretary of State to act upon the present claim, the Ambassador adopted the latter course. His application to be permitted to appear and present the claim was properly entertained by the District Court. But it was not bound, as the Court of Appeals thought, to accept the allegations of the suggestion as conclusive. The Department of State having declined to act, the want of admiralty jurisdiction because of the alleged public status of the vessel and the right of the Spanish Government to demand possession of the vessel as owner if it so elected, were appropriate subjects for judicial inquiry upon proof of the matters alleged.

But the filed suggestion, though sufficient as a statement of the contentions made, was not proof of its allegations. This court has explicitly declined to give such a suggestion the force of proof or the status of a like suggestion coming from the executive department of our government. *Ex Parte Muir*, *supra*; *The Pesaro*, *supra*. *Berizzi Bros. Co. v. S. S. Pesaro*, *supra*, did not hold otherwise for there it was stipulated that the vessel, when arrested, was owned, possessed and controlled by a foreign government and used by it in carrying merchandise for hire. The sole question was one of law, whether, upon the facts stipulated, the vessel was immune from suit.

The District Court concluded, rightly we think, that the evidence at hand did not support the claim of the suggestion that the *Navemar* had been in the possession of the Spanish Government. The decree of attachment, without more, did not operate to change the possession which, before the decree, was admittedly in petitioner. To accomplish that result, since the decree was *in invitum*, actual possession by some act of physical dominion or control in behalf of the Spanish Government, was needful, *The Davis*, 10 Wall. 15, 21; *Long v. Tampico*, 16 Fed. 491, 493, 494; *The Attualita*, *supra*; *The Carlo Poma*, 259 Fed. 369, 370, reversed on other grounds, 255 U. S. 219, or at least some recognition on the part of the ship's officers that they were controlling the vessel and crew in behalf of their government.³ Both were lacking, as was support for any contention that the vessel was in fact employed in public service. See *Long v. Tampico*, *supra*, 493, 494; *cf. Berizzi Bros. Co. v. S. S. Pesaro*, *supra*.

The District Court rightly declined to treat the suggestion as conclusive or sufficient as proof to require the court to relinquish its jurisdiction. But as the suggestion was tendered in support of an application to appear as a claimant in the suit, and as it put forth a claim to title and right to possession of the vessel, the Ambassador should have been permitted to intervene and, if so advised, to litigate its claims in the suit. In *Ex Parte Muir*, *supra*, and in *The Pesaro*, *supra*, 219, the Ambassador of the intervening government challenged the jurisdiction of the court, but did not place himself or his Government in the attitude of a suitor. Here the application as construed by the trial court was for permission to intervene as a claimant. We think the applicant should be permitted to occupy that position if so advised.

The decree of the Court of Appeals will be reversed. The respondent will be permitted to intervene for the purpose of asserting the Spanish Government's ownership and right to possession of the vessel, and the order of the District Court will be modified accordingly.

So ordered.

Mr. Justice CARDOZO took no part in the consideration or decision of this case.

³ In *The Jupiter*, 1924 P. 236, 241, 244 (compare *The Jupiter* No. 2, 1925 P. 69; *The Jupiter* No. 3, 1927 P. 122, 125), and in the recently reported *The Christina*, 59 Lloyd's List Law Reports 43, 50, on which respondent relies, the possession taken in behalf of the claimant government was actual. The judgment in *The Christina* appears to have proceeded on that ground. In *The Jupiter*, it appeared that before the suit was brought the master had repudiated the possession and ownership of the plaintiffs and held the vessel for the claimant government. The report of *The Christina* in the Admiralty Division, 59 Lloyd's List Law Reports 1, 3, indicates that the master and crew were in the pay of the Spanish Government.

BOOK REVIEWS AND NOTES*

Cases on International Law. (2nd ed.) By James Brown Scott and Walter H. E. Jaeger. St. Paul: West Publishing Co., 1937. pp. lxxii, 1062. Index. \$5.50.

This volume is in a sense the third edition of Dr. Scott's first casebook on international law published in 1902. The first edition was based on the cases and opinions on international law by Freeman Snow of Harvard University. Each succeeding edition has given increased space to decisions of international tribunals and foreign courts. There are nearly three hundred and fifty cases reported, of which less than half were in the preceding edition.

This volume is evidently much more international in content and point of view than the previous edition. It seems a special effort has been made to discover and add decisions of national courts on questions of international law, which compose about sixty per cent. of the cases reported, excluding American cases which make up twenty per cent., leaving twenty per cent. of international cases. The reason for this may be questioned in some quarters on the ground that national courts may not have the same freedom to expound and apply principles of international law as do international tribunals. Still it has been found by the Harvard Research in International Law that unanimity of national laws and decisions form a sound basis for deduction of a rule of international law. Indeed, international tribunals resort to this source when the international rule is in doubt. The use of decisions of national courts is perhaps most prominent in Chapter 2 on Members of the International Community, Chapter 5 on Jurisdiction, Chapter 6 on Immunity from Jurisdiction, and Chapter 7 on Treaties.

An innovation in this edition is the division of the book into two main parts dealing with "Substantive Law" and "Procedural Law" instead of the customary classification of cases under Peace, War, and Neutrality. Under "Substantive Law" are treated the Rights and Duties of States, subdivided into International Law, Members of the International Community, Nationality and Domicile, Territory, Jurisdiction, Immunity from Jurisdiction, and Treaties. The usual subjects of international law very generally follow the topics of the prior edition with necessary rearrangements and also with additions to bring the volume fully up to date. For example, in the prior edition under Nationality were treated Allegiance, Naturalization, and Expatriation, covering forty pages, whereas in the new edition to these are added Married Women, Citizenship, Diverse Nationality, Stateless Persons, Business and other Entities, and Domicile, covering eighty pages. New

* The JOURNAL assumes no responsibility for the views expressed in book reviews and notes.—ED.

topics catch the eye, such as De Facto and De Jure Recognition, Extinction of States, Mandates, and Air, the last under Territorial Boundaries.

Under "Procedural Law" are given the Methods of Redress and Settlement of International Disputes in time of Peace and in time of War, with a final chapter on Neutrals and Belligerents.

In this part there is an entirely new section on "International Actions and Claims" covering the origin and nature of an international claim (including claims founded in tort or contract); pleadings; nationality; evidence; and damages. This is followed by a section on Appellate Jurisdiction and Prescription. Apparently none of the cases under these headings is found in the earlier edition. The chapter on the Pacific Settlement of International Disputes of the last edition has here been condensed in a footnote. These peaceful methods of settling disputes by arbitration are followed by a section on "Compulsive Measures" covering the usual subjects of non-intercourse, embargo, retaliation, display of force, pacific blockade, and reprisals. The cases have practically all appeared in the last edition.

The chapters on "In Time of War" and "Neutrals and Belligerents" cover familiar ground. The cases are largely reproduced from earlier editions.

Finally, attention may be called to a novel feature of the book, the addition of "Problem Notes" at the close of each chapter for use in teaching. They are statements of fact with references to cases by which the problems may be solved. The teacher, student and practitioner will find this volume a helpful, carefully prepared and thought-provoking collection of cases.

L. H. WOOLSEY

The Law of Nations. Cases, Documents, and Notes. Edited by Herbert W. Briggs. New York: F. S. Crofts & Co., 1938. pp. xxxii, 984. Index. \$8.00; text ed., \$6.00.

The tendency in casebooks today seems to be toward fewer cases, more illustrative materials of other kinds, and more explanatory notes. In the revised edition of his casebook, Dr. Hudson brought many of his footnotes up into the text as comment, thereby distinctly increasing its utility, so far as this reviewer is concerned. Professor Briggs carries the tendency still further, with corresponding gain. His book is a happy combination of textbook and casebook, fortified by references which enable a student to run down a subject as far as he wishes to go. If it does not have as many cases as others, it compensates by offering a much more extended critical comment. Professor Briggs has manifestly done much research and study for his editorial notes.

The book contains some 200 cases, of which about one-half or more comes from international tribunals, and the other half is divided between United States and foreign courts, almost as many of the latter as of the former. It is now possible to offer many more opinions from international courts than could be done in earlier casebooks. Fifty-eight quotations from documents

are given. They include such materials as the Argentine Anti-War Treaty, the Brussels Convention on Immunities of Government Vessels, Hague Conventions, Resolutions of the Institute of International Law, the Covenant of the League of Nations and various documents in interpretation or application thereof, domestic statutes, *et cetera*. These documents illustrate international legislation, and are as valuable as cases for the study of international law. Finally, there are 93 editorial notes, ranging from a few lines to many pages each.

The chief contribution which Professor Briggs makes is to be found in these notes. Each reader, according to his own views, will quarrel with statements or omissions, but the standard for each is high. The notes are longer when dealing with new or insufficiently studied subjects—such as the effects of recognition, the definition of war, or sanctions. The note concerning jurisdiction over aliens (p. 302) is an example; it might have included something of the developing international penal law. The matter of title derived from conquest might have been handled under that heading, rather than under treaties made by duress. Where a note is interrupted by a case (pp. 92, 95) it would be helpful to mark it "Continued on p.—." Professor Briggs is fair enough in his notes; his own views are not concealed, and occasionally crop out in such phrases as "fished up" (p. 641), or "excited political manifesto" (p. 632). A sense of humor is occasionally revealed, and becomes irrelevant (though none the less enjoyable) in the note on page 960.

It is a compact little book, more convenient for handling than any other. To one who, like this reviewer, is not content with a mere collection of cases from which the student is to make such deduction as he can, this book appeals very much. It will be welcomed by those who like a text with illustrative cases, and by those who like a casebook with comment and explanation.

CLYDE EAGLETON

Boundaries, Possessions and Conflicts in South America. By Gordon Ireland. Cambridge, Mass.: Harvard University Press, 1938. pp. xii, 345. Folder map of South America. Index. \$4.50.

Within the limits of 334 pages the author has made diligent effort to tell "the factual story of the boundary disputes which have constituted so large a proportion of the international problems of the South American Republics for over a hundred years," and also to cover the matter of "island Possessions" and "existing treaty relations," and to add three appendices. Of necessity he has been obliged to omit much and to say little. Hence, it would perhaps be unfair to charge remissness because of his omission of reference to matters that it might have been well to mention or emphasize, such, for example, as the reservation under which Argentina, late in 1932, accepted the declaration of nineteen American Republics concerning non-recognition of territorial acquisitions by force of arms. It occasions surprise that the author, writing as he did late in October, 1937, should declare that under the Covenant of the

League of Nations "the members of the League must immediately sever all relations with the offending country" which in violation of Articles 12, 13 or 15 of the Covenant should embark upon war. (p. 82.)

Despite his announcement that "earnest endeavor has been made to present every situation unemotionally and impartially" (p. v), the author declares (p. 89) that the Assembly of the League of Nations on May 21, 1935, "influenced by a mixture of pacifism, political opportunism and timidity," decided to postpone until a certain event, a final decision in relation to the existing dispute between Bolivia and Paraguay. Again, in discussing the Tacna-Arica dispute, he declares (p. 169) that "the usual United States ignorance or inappreciation of South American realities and reactions, which in 1922 in a legalistic gesture to Bolivia closed the door to such broadening of the discussion as might have alleviated or even averted the Chaco War, thus went on in 1925, etc." In relation to the pending and important controversy between Peru and Ecuador, the author states that (p. 229), "If the whole arbitration does not break down over some foolish pride or politician's selfishness the formal case will doubtless be presented and argued before some United States lawyer or judge appointed by President Roosevelt with the assistance of the State Department; and after solemn deliberation he will recommend and the President will announce a compromise award splitting the remaining disputed area." It is to be regretted that the author has thus publicly suggested that the Chief Executive of the United States may be expected to exercise the arbitral function, if committed to him, in a way that the author must realize would probably constitute an abuse thereof.

Such blemishes do not detract, however, from the value of the work of the author in portraying the relevant facts pertaining to the controversies discussed. He has successfully mirrored the texts of pertinent treaties. He has placed within reach of his readers reliable means of getting at the facts which have disturbed adjacent states of South America in relation to their common boundaries. Adequate documentation is generally given, although in regard to the late and most recent phases of particular differences the sources of statements of fact are at times omitted.

In his Chapter III the author offers "general considerations" pertaining to the arbitration of boundary disputes between Latin American Republics. He is pessimistic as to the value of arbitration or the likelihood or success of its use in South American boundary disputes. He declares (p. 275), "There is little reason to expect better results in the future when a territorial conflict suddenly arises. The government in power on either side will push its claims to the utmost, to gain domestic support, and diplomatic correspondence, strategy and maneuvers will postpone as long as possible facing the critical choice between an expensive appeal to force and public-pride-wounding resort to arbitration." It is perhaps unnecessary to suggest that there may be reasons for a more hopeful view.

In his Appendix B on *Uti Possidetis*, the author is not at his best. To de-

clare, as he does (p. 233), that the signing at Madrid on January 13, 1750, of a treaty by Spain and Portugal "virtually recognized the *uti possidetis*" is an anachronism. The author has not informed his readers that, regardless of practices which the term *uti possidetis* was employed to describe, the American Republics of Spanish origin felt no obligation to respect, and were not in fact disposed to respect, a boundary laid down by the Spanish monarch in the last days of the monarchical régime when for any reason it did not correspond with what revolutionary or post-revolutionary acts served to place within the control of neighboring states. The United States, notwithstanding the excerpt quoted by the author from Secretary Marcy's dispatch of July 26, 1856 (p. 328), made clear its position in the declaration of Mr. John Quincy Adams in his communication to the President of August 24, 1818, in relation to the efforts of Buenos Ayres to demand recognition of its claims to dominion over the whole Vice-Royalty of the La Plata (see Moore, Digest, I, 78-79), a document to which the author does not advert.

The reviewer is far from desirous of laying undue stress on strictures which are not designed to indicate lack of deference for the author's major endeavor. He is entitled to much credit for assembling the documents which he has paraphrased, for the interest which he has inspired, and for giving us the fruits of his indefatigable labors. His book will be read with great interest by all who are concerned with the amicable adjustment of territorial differences in any land. The reviewer would express the hope that the author may regard his present work as merely a preliminary step in a path where he may proceed further.

CHARLES CHENEY HYDE

De Re Militari et Bello Tractatus. By Pierino Belli. With an Introduction by Arrigo Cavaglieri. (The Classics of International Law, No. 18.) Vol. I: Photographic reproduction of the edition of 1563, pp. lxvi, 300, Index; Vol. II: Translation of the text, by Herbert C. Nutting, with translation of the introduction and indexes, pp. xl, 411, Index. Washington: Carnegie Endowment for International Peace; New York: Oxford University Press; London: Humphrey Milford; Oxford: Clarendon Press, 1936. \$7.50; 30 s.

With the exception of Legnano's fourteenth-century treatise on war, reprisals, and dueling (No. 8 in the series), Belli's work on military affairs and war is the earliest so far chosen for presentation as a classic of international law, pursuant to the suggestion made by Dr. Scott more than thirty years ago. The standing of Belli as a forerunner of Grotius has been the subject of some controversy, the details of which are discussed, with a conclusion highly favorable to the author, in the introduction by the late professor of international law in the University of Naples. Readers who have heretofore been deterred by the scarcity and the difficulty of the renaissance Latin text will be enabled by Professor Nutting's excellent translation to form their own judgment as to the contribution of Belli to the development of international law.

The work was heralded by its first publisher as a practical treatise "very essential for all judges," and merit was claimed for its incidental treatment of "many points . . . which concern civil administration" as well as for its discussions of military matters. Approximately half of the treatise is devoted to such subjects as military organization, military offenses, and the privileges and pay of soldiers. The chapters which give permanent value to the treatise are chiefly those which relate to declarations of war, the treatment of prisoners, the effect of truces, the issue and use of safe-conducts, and the rights and duties of parties to treaties of peace.

The principal authorities cited by Belli are the *Corpus Juris Civilis* and the *Corpus Juris Canonici*. Numerous Italian jurists are also cited, and illustrations and apt quotations are freely drawn from the Bible and from Homer, Virgil, Ovid, Livy, Cicero, Tacitus, Demosthenes, Quintilian, Plutarch, and others whose names rarely appear in modern legal treatises. The author's style is not notable for felicity, but it seems likely that in the near future writers in the field of international law will be found to be making use of such expressions as the following, which are found in the translation at the pages cited: Unjust wars are sheer brigandage (p. 59); there is no peace apart from justice (*ibid.*); it can hardly be that it is permissible to resist a party enforcing his right under the law of nations (p. 64); hostilities must not be begun before a declaration of war (p. 78); no one should employ poison against an enemy, be he ever so aggressive and dangerous (p. 89); war is preferable to a doubtful peace. . . . And with this accords the high-spirited reply of the Privernian in the Roman Senate: "If you grant us a righteous peace," said he, "we will keep it forever, but a bad peace we shall not keep long" (p. 279).

With respect to the editing of the work, it is sufficient to say that the high standard set in previous numbers of the series is maintained.

EDGAR TURLINGTON

Die Lehre vom Primat des Völkerrechts in der neueren Literatur. By Walter Schiffer. Leipzig and Vienna: Franz Deuticke, 1937. pp. 286. Rm. 12.

This is an excellent and detailed analysis of the theories of the primacy of international law, developed in the more recent literature. This theory has been built up particularly by the authors of the so-called "Vienna School," but is, by no means, restricted to this school. Representatives of this theory are to be found in many lands among modern writers, who, sometimes, are influenced by the ideas of the "Vienna School," but often also are quite independent of this school, anchoring their constructions in a theoretical and philosophical basis very different from that of the "Vienna School."

It is, unfortunately, impossible, within the framework of a short review, to give details of the rich contents of the book under review. All that can be done here is to give a few summary indications. As a starting point the author takes Triepel's famous dualistic doctrine which, notwithstanding its dualism, had been inspired by the wish to found the superiority of interna-

tional law in something other than the will of the single state. Up to the present day, Anzilotti, co-founder of the dualistic doctrine, and later strongly influenced by the ideas of the "Vienna School," tries to combine this dualism with the primacy of international law.

The author analyzes the theory of the primacy of international law in the writings of five of its principal representatives: Krabbe, who bases the validity of law on the juridical conscience of men; Duguit and Scelle, who belong to a sociological, "realistic," biological school; and Kelsen and Verdross as representatives of "pure jurisprudence," although Verdross' theory has taken, in the last years, an openly avowed turn to a full natural law theory.

Their constructions, although different, are all monistic. They try to do away with the sovereign state and its will as the only source of all law; they, therefore, concentrate their attacks on the dogma of sovereignty. But the weakness lies, according to the author, in the fact that they have been unable—with the exception of Kelsen—definitely to clarify the fundamental problem of the relation between law and state, law and power, law and organization, that they all—again with the exception of Kelsen—work with a dualism of legal orders, the positive law and a "higher law."

The author's criticism is purely immanent, showing the intrinsic contradictions of the theories, while taking their bases for granted for the purposes of his criticism. He shows that under the common denominator of the "primacy of international law," are not only to be found different constructions, but that the formula itself has not always the same meaning. But all these theories try to find a basis for a truly supra-national law in something other than the powerful will of the separate states. All these theories have in common that they are in an intimate relation with the given historical situation at the end of the World War, when the foundation of the League of Nations seemed to promise, if not the realization, at least the beginning of a "new international law," different not only in degree but in kind from the international law of pre-war days. That is why the present international law is nearly always conceived as a primitive law, on the road to higher development that leads to the super-state. And as all these theories have further an intimate connection with democratic ideals and the idea of human progress, they conceive this world-wide super-state not as a World Empire, but as a World Federal State.

Notwithstanding the fact that today international events are moving in a very different direction from that promised in 1919, these theories have a lasting importance. They have recognized that the "quasi-anarchical" situation of pre-war days is, by no means, a logical necessity, nor an unchangeable and final point of historical development. They have, further, made it plain that a mature international law, as distinguished from a primitive law, is indissolubly connected with a powerful organization to enact and to enforce the law. And this is no small gain. For, as the author correctly

states, no solution of the very practical problems of the reorganization of international relations is possible without theory. JOSEF L. KUNZ

Henry Wheaton, 1785-1848. By Elizabeth Feaster Baker. Philadelphia: University of Pennsylvania Press, 1937. pp. xii, 425. Index. \$4.00.

Henry Wheaton deserved an adequate biography and Dr. Baker has provided it. Few Americans have had careers so varied and yet so unified as to results as Wheaton, and yet few have had so many disappointments. Wheaton's *Reports*, Wheaton's treaties and Wheaton's *International Law* are three great monuments of a great man. Dr. Baker, using unpublished official and private papers to be found not only in the Department of State but in foreign archives and in many American libraries, has managed to let Wheaton's character and personality emerge from the documents and to portray it upon her printed pages. Only by the large use of the Wheaton papers at Brown University was made possible a narrative such as the present volume contains.

Henry Wheaton (1785-1848) came of Rhode Island seafaring stock, which may account for his early interest in maritime law. At Brown University (he graduated in 1802), he became a good Latin scholar and had an interest in history. His law studies were in a lawyer's office at Providence. He had the benefit of a year of European travel, during which he observed and studied French and English court systems and practice. He translated the Code Napoleon into English. Returning to America, he was an editor and, then, during the War of 1812, a lawyer in New York, a counsel in prize cases, author of a work on prize law, a division judge-advocate in the Army and Chief Justice of the Marine Court of New York, all of this before he was thirty years of age. Then he became reporter of the United States Supreme Court (1817-1827), one of the revisers of New York State laws (a member of the New York Assembly in the meantime), until he was appointed by J. Q. Adams as *Chargé d'affaires* to Denmark. His diplomatic career lasted until 1846, when Polk appointed in his place Andrew Jackson Donelson, as a deserving democrat. In these nineteen years, he acted as *Chargé* to Denmark, as Minister to Prussia and to other German states. During this period, he negotiated a claims convention with Denmark (1830), emigration treaties abolishing *droit d'aubaine* with Hanover (1840), Hesse (1844), Württemberg (1844), Bavaria (1845), Saxony (1845), Nassau (1846), all of which were ratified, and laid the foundations for later similar conventions with other German states, by which the current of German emigration to the United States was regularized. His greatest diplomatic victory—that with the Zollverein in 1844—was rejected by the Senate. An account of diplomatic negotiations is not apt to be interesting, but Dr. Baker has made a readable story of Wheaton's labors. Had Wheaton done nothing during these years outside the scope of his official duties, his place in the history of American foreign policy would be secure. As industrious as the President who first appointed him, he wrote the history of the Northmen (1831), of Scandinavia (1838), his

Elements of International Law (1836), and his *History of the Law of Nations* (1842), in addition to numerous essays on international law and other topics, legal, political and literary, which appeared in the periodicals of Europe and America. Wheaton's copyright difficulties over his Supreme Court Reports and the later controversy over the posthumous editions of the *Elements*, to which the names of Lawrence and Dana are attached—all are adequately discussed. There is a full and useful bibliography of Wheaton's writings. Mechanically, the book is excellent. Altogether, it is an important addition to the American literature of international law. JESSE S. REEVES

Peaceful Change. An International Problem. A Symposium by C. K. Webster, Arnold J. Toynbee, L. C. Robbins, T. E. Gregory, Lucy P. Mair, Karl Mannheim, H. Lauterpacht and C. A. W. Manning. Edited by C. A. W. Manning. New York: Macmillan Co., 1937. pp. viii, 193. Index. \$2.50.

This little volume contains eight lectures delivered at the London School of Economics, mostly during the early months of 1937, by members of the staff of the School. The inspiration for the project was drawn from the program of the International Studies Conference which dealt with the problem of peaceful change. Although there is an introductory lecture by Professor Webster and a summary lecture in conclusion by Professor Manning, there is no pretense of presenting an integrated analysis of the subject. The various lecturers address themselves to different aspects of the problem and approach it each in his own way. Professor Toynbee discusses "the lessons of history"; there are two discussions of the economic aspects, one by Professor Robbins and the other by Professor Gregory; Dr. Lucy P. Mair approaches the subject from the standpoint of an anthropologist, while Dr. Karl Mannheim considers the psychological aspects and Professor Lauterpacht the legal aspect.

One must agree with the final sentence of Professor Manning's concluding lecture: "Our—that is, *the*—problem has yet to be fitted with a key." However, only the egregious optimist would expect any book on peaceful change to offer a complete solution. In the introductory lecture, Professor Webster takes a refreshingly realistic slant, passing over as impracticable in the world of today an "international police force and an equity tribunal with power." He also discards "that type of proposal which looks to the practice of altruism on the part of sovereign states." Professor Toynbee discusses certain instances in which peaceful changes have been made in the world but in the short space of his lecture he could not deal with the subject exhaustively, and the reviewer did not feel that his consideration of the problem had advanced the subject to any appreciable degree. The reviewer was also disappointed in the two lectures on economic aspects. Both Professor Robbins and Professor Gregory analyze a number of the economic arguments advanced in favor of particular changes, paying particular attention to the German demand

for the return of the colonies. Professor Robbins is forced to wind up with what he admits is a Utopian suggestion that "the national states must learn to regard their functions as the functions of international local government." Professor Gregory is inclined to write off the popular talk about the German demands, both because he feels the real difficulties are due to tariff restrictions and not to territorial sovereignty, and because he feels that the economic advantages of territorial sovereignty are not as great as is sometimes alleged. It seems to the reviewer that neither one of the economists pays sufficient attention to the political issues which underlie economic theory, although both of them make passing references to these factors. Dr. Mair speaks with authority on the problems of the treatment of the natives in Tanganyika. Her authoritative discussion of native customs and needs and the manner in which they have been met by colonial administrators is novel and valuable. She has warm praise for some aspects of British colonial administration but is very honest in criticizing certain defects. Dr. Mannheim's thesis is that "if one wants to understand the complete dynamics of the origin of war, one has to use psychology. Without psychology, the most important details remain hidden." He presents some very interesting remarks based on studies of the habits of the bees. The reviewer was struck by the following pungent comment by Dr. Mannheim:

This kind of social science which divides itself into watertight compartments, indulges in the mere collection of insufficiently analysed "facts", and works with some kind or other of fictitious *ad hoc* instinct-philosophy, is itself part of a mentality which is unconsciously making for war. (pp. 131-32.)

Whatever Professor Lauterpacht writes is worth reading, but the reviewer is compelled to admit that he did not find this particular expression of Dr. Lauterpacht's views as valuable as many other things which he has written. His thesis may be summarized as follows: after discussing the possibilities and difficulties of Article 19 of the Covenant, he concludes that a legal institution for effective peaceful change must be based on international legislation. "But international legislation means an International Legislature. And an International Legislature is a World State. If that word and its implications have sufficient deterrent power to cause us to reject the solution involved in peaceful change as an organic and effective institution of international law, then that must be the end of the matter." He also suggests that "it is the business of statesmanship and of the science of ethics and international politics to evolve generally applicable standards of representation in substitution for the mechanical, unworkable and essentially immoral principles of equality."

Professor Manning comments with a light touch upon the views of various other lecturers, paying particular attention to the arguments of Dr. Lauterpacht and indicating his regret that Dr. Lauterpacht should "give his sufficiently unprepossessing dog such a bad name."

This book is perhaps chiefly significant as one further evidence of the welcome fact that scholars have at long last begun to devote themselves in earnest to this fundamental difficulty of peaceful change. PHILIP C. JESSUP

The Process of Change in the Ottoman Empire. By Wilbur W. White. Chicago: University of Chicago Press, 1937. pp. x, 315. Index. \$3.50.

The author states that "the present study is an attempt to analyze the process of change, not from the point of view of isolated institutions and procedures, but from the point of view of the historical process in a particular area, including chiefly such mechanisms and processes that may be observed to have had a bearing on, or are contemplated in the given political metamorphosis." (page vii.) In his conclusions he further states that since the World War "there have been certain procedures provided which conceivably make it possible to arrive at changes in status by legal steps and in a peaceable manner. It is conceded that these new procedures are not as strong as some would wish." (page 279.) The author does not seem, however, to have succeeded in his avowed purpose. The "process of change" to which he refers appears to me to be little else than a historical statement of the break-up of the Ottoman Empire. The "procedures" for peaceful change, with the exception of the provisions in the Covenant of the League of Nations concerning mandates, are only such alterations in territory and political status as may come about naturally in any nation, whether Turkey, Russia, or any other country. In other words, I am of the opinion that Mr. White has not been able to sustain his general thesis. He has, however, done a thorough, scholarly piece of work and provided within the compass of one volume the essential facts concerning the dissolution of the Ottoman Empire. These facts have already been brought out in various works on the subject. The value of this volume consists in the thorough way in which these facts are assembled for the convenience of anyone particularly interested in the Near East. Of particular service are the chapters dealing with the changes brought about in Egypt, Palestine, Syria, Iraq, and the other Arab states since the World War. PHILIP MARSHALL BROWN

Great Britain and Palestine. By Herbert Sidebotham. New York and London: Macmillan Co., 1937, 1938. pp. x, 310. Index. \$4.00.

The theme of this book, as the author explains at the beginning, deals with Palestine not only as a trustee of a mandate, but in its "bearings on international policy and on the whole future of the East." Although a non-Jew, he propounds with deep feeling the aims and ideals of Zionism; he describes the steps which led to the Balfour Declaration, which, because of its failure to provide for a Jewish State, he calls the "Modified Promise." The idea of a "National Home for the Jewish People," contained in the Declaration, hardly coincided with the author's argument, put forward by him during the early years of the World War, that Great Britain should invade Palestine and

found a Jewish State there. This was advocated with the idea of forming a Jewish-British alliance.

Four chapters contain a description of Jewish achievements in Palestine. They were not written by the author, however, but at his request by Mr. J. L. Cohen, who has given an interesting exposition of the development of Jewish activities in Palestine.

Four chapters follow, entitled, "The British Performance." The author is severely critical of Great Britain as a trustee, chiefly because of the failure to preserve law and order. The uprisings of the Arabs are, in his opinion, due to mistakes and faults of the Mandatory Power. He censures the government for its "repeated offers of conciliation" to the Arabs, but he does not explain why the Arabs will not be conciliated. Here, the reviewer wishes to make the observation, that a more careful weighing of all the elements in the problem would add much to the value of the discussion.

The author stands firm in his contention that the method of ruling Palestine should be determined according to its importance in world progress. "Nor has any race," he says, "an absolute right to 'determine' its own future at the expense of some other race which may have more to give the world." The above is quoted from the discussion of Jewish and Arab rights at the Wailing Wall.

In the chapter on "Hitler and Mussolini," the author looks at Palestine as a vital factor in British politics. "In Palestine," he says, "are the keys alike of war and of peace in the Near East; it is the pith and core of a new Eastern problem."

A whole chapter is devoted to a recital of the Arab Rising of 1936, followed by later chapters on the Report of the Royal Commission, appointed to inquire into the 1936 disturbances. The Commission recommended that the mandate should terminate and that Palestine be divided into three parts—one for Great Britain, the second for a new Arab State and the third for a Jewish State. A significant quotation from the report is given: "The trouble is political and arises from the clash of two nationalisms between which no compromise is possible." This was a great surprise to the author. To use his own words, he was not prepared for "so sudden a swerve." Seemingly he had not realized the import of the difference between the 848,000 Arabs in the country and the 370,000 Jews, all of whom were jealous of their rights and determined to gain their aspirations.

The book contains two chapters on the partition—one reciting the case against partition, and the other for partition.

By inserting maps which show the proposed plan of the Royal Commission, Mr. Sidebotham ("Scrutator") has rendered a useful service to those who are studying the subject, and throughout the entire text he has revealed the great complexity of the problem. Moreover, he must have satisfied his desire which he expressed in the foreword, namely, to publish the book before the matter is settled, as he says: "although the story is still incomplete, it

seemed better to publish now while public opinion has still a chance of influencing the result than to wait until a final settlement has made the issue a subject of history."

FANNIE FERN ANDREWS

Japan in American Public Opinion. By Eleanor Tupper and George E. McReynolds. New York: Macmillan Co., 1937. pp. xxii, 465. Index. \$3.75.

Two historians, impressed that relations between Japan and the United States have been important for several decades rather than for the past few years, have attempted to disclose the significance of those relations through an examination of American public opinion with respect to Japan. Beginning with Port Arthur and Portsmouth, the authors trace the development of this opinion, with its elevations and depressions, through the closing of the door to Japanese in the United States, the clash of interests in the Pacific, relations during and following the World War, at the Washington and Paris Conferences; the fight for the immigration quota; negotiations during the London Conference and after; and complications of the Far Eastern War of 1931-1933. The book closes with an account of the relations dealing with the guardianship of peace in the Pacific by these two leading Pacific Powers.

The greatest single source tapped by the authors is the American newspaper. Its editorial comments and news columns are repeatedly quoted, summarized, analyzed, and discussed. Other sources examined are the opinions and views of publicists, professors, Congressmen, diplomats, state government officials, and ministers of religion; and the corporate views of such organizations as Chambers of Commerce, labor groups, women's clubs, churches, veterans' associations, patriotic societies, and agricultural organizations. Only a study in public opinion can safely and profitably be based on newspaper reports and editorials, opinions of individuals, and resolutions of interest and pressure groups. Especially suspect as a reliable source is the newspaper. It has the advantage of being available. It is easy to glean and to order information from news publications. But such news is hastily assembled. And newspaper editorial positions are frequently biased, and dictated by the economic interests of the publisher. In the field of public opinion however, where what the people believe to be the facts is as important as the facts themselves, such sources are both valid and important.

The authors have charted the rise and fall of favorable Japanese opinion in the United States both accurately and in an intriguing manner. American opinion was at first most favorable to Japan, in her Pacific and international relationships. There was great admiration for the rise of this progressive country to the position of a Great Power. Sympathy and admiration were almost universally expressed for the Japanese. Only after Japan's aims in China became clear, and after her determined renunciation of her engagements as regards China's integrity and the control of the Pacific, did the friendship develop into hostility.

The bitterest criticism of Japan, speaking historically, grew out of economic and social clashes between Americans living on the Pacific Coast and Japanese settling in this region. Such social and economic differences led to political ruptures with Japan and resulted eventually in discriminatory legislation against the Japanese. These safeguards, while effective in protecting the interests of certain American groups, greatly offended the pride of the Japanese people. This result could have been avoided with a wiser choice of means.

The authors have produced an admirable volume which is most instructive and helpful in understanding the course of American relations with Japan over the past three decades. It is a thorough, faithful and painstaking effort which should provide a model for similar studies of American opinion in foreign relations. This book speaks more eloquently than volumes of diplomatic correspondence in explanation of American attitudes toward Japan. In the present unfortunate situation, and in the difficult times which lie ahead, the detachment of this volume should do much to cause passion and prejudice to yield to reason and understanding, in the adjustment of the mutual problems of the two leading Powers of the Pacific.

CHARLES E. MARTIN

Malaysia. A Study in Direct and Indirect Rule. By Rupert Emerson. (Bureau of International Research, Harvard University and Radcliffe College.) New York: Macmillan Co., 1937. pp. xiv, 536. Index. \$5.00.

In recent years the doctrine of indirect rule has received widespread acceptance as the most enlightened policy of colonial administration. It appealed to people of widely differing points of view. It appealed to many liberals because to them it meant respect for native customs and institutions and measures for their preservation from the dissolving inroads of Western influences. The imperialist also found much in the policy to commend because it offered hope of retarding the development of Western democratic ideas. This diversity of motives among the supporters of the policy reflects something of the confusion surrounding the question.

Instead of another book of theoretical discussion, Professor Emerson presents an examination of the policy in practice. He could not have chosen a better section of the colonial world for this study. In Malaysia there is a wealth of comparative material, for here the British and the Dutch have had decades of experience with various forms and degrees of indirect rule. Here also are found racial diversity and social and economic heterogeneity such as to put any policy to a thoroughgoing test. Emerson lays bare the difficulties and contradictions inherent in the policy. He concludes that as practiced in Malaysia indirect rule brings with it important advantages for the ruling countries, such as simplicity, low cost of administration and an efficient device for breaking up potential nationalist movements. For the ruled it "brings advantages to the extent that it actually lives up to its ethical pretensions,"

but, under the sway of the imperialist mentality, "neither direct nor indirect rule can basically be more than a convenient machinery for the exercise of political and economic control." The book is a valuable addition to the literature of colonialism.

A. VANDENBOSCH

The History of Militarism. By Alfred Vagts. New York: W. W. Norton & Co., 1937. pp. x, 500. \$4.75.

This book is a strange one, and not easy to grasp and follow. Possibly this may be due in part to the background of the author, who served throughout the recent war in the German army, came very recently to the United States, and perhaps may have an internal spiritual war of his own. The style reminds one a trifle of Clausewitz—an idea which would probably not please the author.

His definite thesis is opposition to militarism; this makes important his definition of militarism. "It is not militarism when armies call for and make efficient, rational, up-to-date, and, to a certain extent, humane use of the materials and forces available to them; when they prepare themselves for war decided upon, not by themselves, but by the civilian powers of the state; when they refrain from perpetuating themselves for the purpose of drawing money, enjoying power and honor, governing soldiers in peace time, and drilling them in accordance with the rules of previous wars; when they get ready for the true future war which is not 'in the air,' but which takes the form of an image deduced from the general economy of contemporary society."

With this idea few Americans will quarrel, but the development of the theme is a bit obscure to the American mind—the organization of the material and the style being perhaps dictated by the author's German philosophical background rather than by familiarity with an American audience. The author seeks to trace the development of the present-day army from feudal times, then to comment upon that army in its relation to the civil government; and he makes many telling points, notably on the liberalizing influence of the American Revolution in the military field. He finds no novelty in the ideas of disarmament, prohibition of new and strange weapons, and armament for the sake of putting money into circulation; and he finds them always equally ineffective. To clarify thought on his general subject, he calls for better writing of military history, both by military men and by civilians.

All countries come in for his criticism, but America for the least—and that coupled with many bits of praise. Any militarism that he thinks he discovers in this country he traces to our sudden and unexpected plunge into international affairs in 1898, and to the fact that we have not yet fully found ourselves. Conspicuously, he notes that "the old Christian international ideal of honor would appear to survive better in newer countries with less of a feudal heritage, as in the United States"; and he quotes an address by Mr. Weeks to a West Point graduating class, emphasizing this ideal.

Mention of the navy and of sea power is conspicuous by its absence; this is a landsman's book entirely.

In general, the book is distinctly moderate of its type, but the publisher seems to have felt that it needed to be "pepped up." He has furnished his own brief review on the dust-jacket, which says little but hints at sensational developments—which do not occur; and he has distributed through the book a dozen or two lurid illustrations bearing no relation whatever to the text.

The grouping of the notes by chapters at the end of the book makes them difficult of reference; and an index would have been useful.

OLIVER LYMAN SPAULDING

Les Origines du Conflit Italo-Ethiopien et la Société des Nations: Des Incidents de Oual-Oual à l'Agression Italienne. Edited by R. Mennevée. Paris: Les Documents Politiques, 1936. pp. 379. Fr. 100.

This volume, which treats of the Italo-Ethiopian conflict from the outbreak at Wal Wal in November, 1934, to the decisions taken by the League of Nations in October, 1935, has the merit of presenting in convenient form the extensive series of documents which are essential to an understanding of the development of the conflict, such as treaties, various memoranda submitted by Italy and Ethiopia to the League of Nations, the award of the Commission of Arbitration, the reports of the Committees of Five, Thirteen and Six, records of debates in the British House of Commons, and numerous press reports and comments. Particularly to be mentioned are the chapters devoted to the tripartite negotiations which took place during the summer of 1935 between representatives of Great Britain, France and Italy. In formulating his conclusions as to the conflict, the editor expresses the opinion (p. 270) that "it is France which has been responsible for the shortcomings on the part of England and for the failure of the League of Nations."

Without taking into consideration the question as to the merits of the general conclusions of the editor, this volume is not free from certain inaccuracies and defects. The editor would appear to give undue weight to the extent of Japanese influence in Ethiopia in interpreting the somewhat passive attitude adopted by Great Britain in the earlier stages of the conflict as being due to the belief that the rapid growth of Japanese interests in Ethiopia would serve to check the extension of Italian domination. Also of questionable accuracy is the interpretation which the editor places on the Rickett (Standard Oil) Concession, namely, that it constituted an "Italo-American maneuver against England." The treatment of the Wal Wal arbitration is somewhat inadequate and omission is made of memoranda submitted to the Commission of Arbitration. It is to be regretted that the editor did not see fit to include in his compilation of treaties the interesting series of boundary treaties concluded between and among the limitrophe countries in the last years of the nineteenth century, or the Klobukowski Treaty with France which laid the basis for modern extraterritorial jurisdiction in Ethiopia. Finally, it is also

to be regretted that the editor would appear at certain points to have deviated somewhat from a strictly objective treatment of the subjects under examination.

JOHN H. SPENCER

The Dollar. A Study of the "New" National and International Monetary System. By John Donaldson. New York: Oxford University Press, 1937. pp. xxii, 271. Index. \$3.75.

Here is a scholarly survey and analysis of American monetary policies from 1933 to 1936 which the student of monetary problems will find a useful addition to his library. After brief attention to the connotation of certain monetary terms, the principal dollar measures of the period are carefully outlined. Since these measures were, in varying degree, based on, or influenced by, monetary ideas, a discussion of the pertinent monetary theories is next undertaken. Then follows an attempt to estimate the effects of the measures on the internal economy and particularly to assess the extent to which the results have been in accord with the theoretical assumptions.

The second part of the volume is devoted to a parallel treatment of the external aspects of the monetary experiment. A sketch of the international events leading up to the dollar devaluation, an examination of the theories dealing with international trade, price, and currency relationships, a study of the actual behavior of American external trade and dollar exchange rates, and a comparison of domestic and foreign price trends are presented in turn. While it is impossible to dissociate the internal and external aspects of the whole monetary experiment, the author arrives at the conclusion that "on balance the external results appear to have approximated the objectives sought somewhat more than have the internal."

In the closing chapter of the volume brief consideration is given to the problem of international stabilization. The international monetary arrangement of September, 1936, constitutes, in the author's view, a "new" approach to the problem. It enables the participants to enjoy a flexibility in adjusting their national policies to the international situation of which the old gold standard with its essential rigidity did not allow. He regards it, then, as more likely that they will prefer "to pursue further the recent evolution of the 'new' monetary system rather than to return to the 'fixity of the old order'."

The statistical material drawn upon by the author is mainly embodied in a series of tables published in the appendix.

W. H. WYNNE

Briefer Notices

Treaties and Other International Acts of the United States of America. Edited by Hunter Miller. Vol. 5. Documents 122-150: 1846-1852; Document 151: 1799. Department of State Publication No. 1017 (Washington: Government Printing Office, 1937. pp. xxxii, 1103. \$5.00.) With the appearance of each volume of this magistral collection, the usefulness of the series becomes more and more appreciable. The work is being done so

thoroughly that it will probably stand as definitive for many generations to come. The editor's effort to illuminate the dark corners of our treaty history is not confined to exhausting the official records, but extends to secondary literature as well. As eleven of the thirty "documents" in this volume deal with claims, the series promises to be a valuable sourcebook on that subject, also. Of chief interest in the volume is the material on the Oregon Treaty of 1846 (to which 100 pages are devoted), on the Guadalupe Hidalgo Treaty of 1848 (222 pages) and on the Clayton-Bulwer Treaty of 1850 (132 pages).

MANLEY O. HUDSON

Theory and Practice in International Relations. By Salvador de Madariaga. (Philadelphia: University of Pennsylvania Press, 1937. pp. vi, 105. \$1.50.) The lectures which are here presented were the William J. Cooper Foundation Lectures of 1937 at Swarthmore College. The five lectures, separate chapters, are: Theory and Practice in International Relations, Psychological Factors in International Relations, Limitations of Sovereignty, The Non-National Pattern, and A General View. The comments on the Covenant of the League of Nations are especially illuminating because of the author's long experience in the field of international relations. He has faith "in the evolution of the world toward unity, consciousness, and government." He considers that the League of Nations has brought into existence "a rudiment of world government," and, if this international machinery should fail a hundred times, it should not be scrapped: "That nucleus of world government is there, tangible, and we know what it is." The final conclusion is that international affairs are infinitely more difficult than national affairs, and it is impossible for any government to succeed in the administration of its foreign policy until *foreign* affairs are seen as *world* affairs. Nothing less than the creation of a permanent council of world government, in the view of the distinguished statesman, can solve the problems raised by foreign affairs.

CHARLES W. PIPKIN

System des Internationalen Minderheitenrechtes. By Ernst Flachbarth. (Budapest: R. Gergely Verlag, 1937. pp. xxxii, 475.) This is the first volume of the publications of the Institute for the Law of Minorities at Budapest University. According to the author's preface, he spent a decade struggling for the rights of the Hungarian minority in Czechoslovakia, and then, after being obliged to give up this work and leave his beloved country, he sought solace in science, and presents here the fruits of his studies which served to add theoretical profundity to his knowledge of the law regarding nationalities and minorities. This volume contains a historical view of the subject, and the substantive law. Procedural provisions of positive law and his views *de lege ferenda* will be contained in a second volume, which will also bring the substantive law down to date and contain an index. While giving a detailed treatment of positive law, the author takes pains to disclaim adherence to the positivistic school of jurisprudence, and to point out that law regarding minorities is no substitute for territorial readjustment. He regards minorities provisions as special international law (*partikuläres Völkerrecht*), and accepts a subjective definition of nationality. Switzerland serves as an illustration. Likewise "The Yankees speak English, they possess the same literature and civilization as the Englishers and nevertheless confess themselves as belonging to their American nation. In both these typical cases it was the state which has created the nation." (p. 130.)

EDWARD DUMBAULD

The Carriage of Goods by Sea Act, 1924. With an Explanation of the Hague Rules and Full Notes. (4th ed.) By Sanford D. Cole. (New York: Pitman Publishing Corp.; London: Sir Isaac Pitman & Sons, Ltd., 1937. pp. xvi, 138. Index. \$3.00.) Mr. Cole's useful little book on the Hague Rules relating to bills of lading, first published in 1924, is now brought up to date by the present edition. The rules were adopted at the Hague Conference of the International Law Association in 1921, and were substantially embodied in a draft convention at the International Conference on Maritime Law, held in Brussels in October, 1922. The British statute which forms the subject of this book was passed in accordance with the recommendations of the delegates for uniform adoption. Since 1924, corresponding rules have been adopted by legislation in many of the British dominions and colonies. The Canadian statute was passed in 1936. The Carriage of Goods by Sea Act, of the United States, came into force July 15, 1936, and corresponds substantially though not entirely with the British. The author discusses the British Act in connection with the text of each article, adding cases for interpretation. The appendices furnish the text of the Hague Rules in English and in French, the United States Act of April 16, 1936, and the French statute of April 2, 1936. The book is a helpful guide to the obligations of carriers under bills of lading, a branch now tending to become practically uniform in many countries by standardized legislation.

ARTHUR K. KUHN

Essays in Political Science in Honor of Westel Woodbury Willoughby. Edited by John Mabry Mathews and James Hart. (Baltimore: Johns Hopkins Press, 1937. pp. viii, 364. \$3.00.) This is a collection of essays, not before printed, upon various topics in political science in recognition of the long and distinguished services of Professor W. W. Willoughby in this field as teacher at Johns Hopkins, as author and as adviser to governments. Professor Garner contributes a just estimate of Willoughby's work and all will join in his praise. There are significant essays in international law by three of Willoughby's former students, by Professor Fenwick upon Political Disputes in International Law, by Dr. C. Walter Young on the Legal Aspects of the Lytton Report, and by Professor Briggs on the Nature of Damages in Case of the Failure of a State to Prosecute or Punish. An appendix provides a full bibliography of Professor Willoughby's writings.

Diplomatic Correspondence of the United States. Inter-American Affairs, 1831-1860. Selected and arranged by William R. Manning. Vol. IX: Mexico, 1848 (mid-year)-1860. Documents 3772-4476. (Washington: Carnegie Endowment for International Peace, 1937. pp. xlviii, 1251. Index. \$5.00.) This volume, compiled in the same excellent manner as its predecessors, completes the series as far as the relations of Mexico and the United States are concerned, for the whole work as planned ends with the year 1860. The period covered, hence, is from the close of the Mexican War to the eve of the American Civil War, a period of many important events and developments in these relations: the partial re-negotiation of the Treaty of Guadalupe Hidalgo, the Gadsden Purchase, the Tehuantepec question, and the more or less chronic problems raised by civil disturbances in Mexico, colored by hints of intervention, European or American. The negotiation of the Gadsden Purchase Treaty may now be examined as it could not have been before. Evidently there is some restriction upon the publication of all of the correspondence referring to this negotiation, else why were omitted the first eight pages of Gadsden's dispatch of September 5, 1854, entitled "Memorandum of facts and speculations on the past, present and probable future conditions of

Mexico"? The text of the treaty as originally signed, and not easily accessible, will be found printed in full (pp. 691-694). The reader will gain some knowledge of Gadsden's character and attainments by reading his illuminating although ill-written communications. A despatch from John Forsyth, March 18, 1858, reports what might be called Santa Anna's swan song. Remarking that this worthy Mexican patriot might again be in power, Forsyth wrote, "I have stronger hopes of making a favorable treaty with Santa Anna than I have with the present Government. Santa Anna *will* have money, and he is not afraid to sell territory if that be necessary to obtain it." Fortunately for all concerned, Forsyth was not a good prophet.

J. S. REEVES

The Origins of American Intervention in North Russia (1918). By Leonid I. Strakhovsky. (Princeton: Princeton University Press; London: Humphrey Milford, Oxford University Press, 1937. pp. xii, 140. Index. \$2.00.) In this well-written and scholarly study Dr. Strakhovsky traces the *origins* of American intervention in North Russia. On the basis of data heretofore inaccessible to historians, the author is able to give an objective account of a military venture which not only "contributed to the early defeat of the Central Powers," but which also prevented the British and French Governments from carrying out "their agreement of December 23, 1917, for the dismemberment of Russia." Dr. Strakhovsky clearly indicates the military weakness of the Soviet Government in the spring and summer of 1918; a factor of such importance that Soviet policy was forced to maintain an uncertain balance between overtures to the Allies and final submission to German demands. In this regard Dr. Strakhovsky brings out a fact of paramount importance: intervention in North Russia was the result of an invitation from the Soviet Government to the Allies to land troops in Murmansk for the protection of Russian soil. It was this fact that led President Wilson to favor the project even though General Peyton C. March, the Chief of Staff, had outlined his objections to American participation. But the President's half-hearted decision to send American troops to North Russia was hardly more than a gesture of concurrence with the Allies. He must have clearly understood the fact that the small number of American troops that were sent to the Murman coast could render no significant service. It is on the shoulders of President Wilson, therefore, that the responsibility for the failure of the North Russian venture falls. He had the "opportunity and the actual possibility of diverting a sufficient number of troops to North Russia, yet he agreed to the dispatch of one regiment only."

CHARLES CALLAN TANSILL

Nyugat Magyarorszag Ausztriában. (Western Hungary in Austria.) By Iván v. Nagy. (Pécs: József Taizs, 1937. pp. 96. Bibliography. Publications of the Institute of International Law of the Royal Hungarian University at Pécs, No. 17.)

Észak, Kelet, Dél és Nyugat. (North, East, South and West.) By M. Miklós, Gy. Zathureczky, I. Prokopy and I. Nagy. (Pécs: József Taizs, 1937. pp. iv, 116. Publication of the Institute for the Study of Minorities of the Royal Hungarian University at Pécs, No. 2.)

The first of these two pamphlets is the second revised edition of a study originally published in 1931. It consists of an analysis of the administrative, political, economic and cultural coördination into post-war Austria of that part of Western Hungary (the so-called Burgenland) which the peace treaties allotted to Austria. A brief historical sketch of this small strip of land,

which in 1919-1921 created so much bitter feeling between Austria and Hungary, is followed by an objective examination of the measures taken by the Austrian Government to consolidate its position in the only territory that country gained as the result of the war—and that from its erstwhile partner in the defunct monarchy. Dr. Nagy's conclusion is that Austria, unlike other states in Southeastern Europe having a minority population, adopted a tolerant and conciliatory attitude toward Hungarians and Croats scattered through Burgenland, and that, consequently, the hope of certain statesmen to drive Austria and Hungary apart forever was frustrated.

The second pamphlet contains four lectures concerning the condition of Hungarian minorities living on territories detached from Hungary by the peace treaties and allotted to Czechoslovakia, Rumania, Yugoslavia and Austria, respectively. The last of these four lectures is merely a reprint of Dr. Nagy's study of Burgenland, reviewed above. The treatment of national, religious and linguistic minorities in post-war Europe has left, as commonly known, much to be desired and constitutes one of the many causes of dissatisfaction and of increasing unrest leading to the present lawlessness prevailing on that continent. Hungary, having no other means at her disposal, has been as vocal in the chorus of complainants as any other nation, and—as unprejudiced observers concede—not without justification. It is therefore not surprising that the tone of three of the four lectures—those describing the lot of Hungarian minorities in Czechoslovakia, Rumania and Yugoslavia—is rather critical. None of these essays may be regarded as profound and erudite studies of the vexatious minority question. They more or less scratch the surface by pointing to obvious grievances and are significant rather as mirroring an atmosphere weighing heavily on peoples living in the Danubian area.

FRANCIS DEÁK

Annuaire de l'Association Yougoslave de Droit International. Vol. III, 1937. (Belgrade-Paris: Les Éditions Internationales, 1937. pp. 506.) The *Association Yougoslave de Droit International*, founded in 1928 and affiliated with the International Law Association, has maintained an active publication program since 1931. Its major publication is the *Annuaire*, preceding issues of which appeared in 1931 and 1934. Approximately one half of the present volume is devoted to fifteen leading articles on various aspects of diplomatic history and of public and private international law, particularly as these have relation to the policies and problems of Yugoslavia. Despite their localized emphasis, these articles maintain a high standard of scholarship. But professional workers in the international law field will probably find the technical data compiled in the second half of the volume of even greater value. Professors Andrassy and Bartos have abstracted 41 decisions of Yugoslav courts on points of international law, handed down between 1928 and 1932. Several collaborators have produced six bibliographies, totaling 126 pages, listing the books, doctoral dissertations, and articles dealing with questions of Yugoslav law published between 1930 and 1936 in Germany, France, England, Italy, Czechoslovakia, and Yugoslavia. These bibliographies, arranged by language, render an indispensable service for students of Balkan questions. The concluding sections of the *Annuaire* enumerate and describe an impressive number of international law associations, peace organizations, private international organizations, commercial organizations, and associations of jurists functioning in Yugoslavia. Included, also, is the customary explanation of the organization and program of the *Association Yougoslave*. The present

Annuaire is eminently worthy of admission into the company of the publications of older and better-known international law associations.

H. ARTHUR STEINER

Recueil de Documents Diplomatiques et Politiques sur la Dénonciation de l'Accord de Locarno par l'Allemagne et la Réoccupation militaire de la Rhénanie démilitarisée. Edited by R. Mennevée. (Paris: Les Documents Politiques, 1936. pp. 184. Fr. 50.) This collection of documents, in French, and in many cases based upon texts originally appearing in *Le Temps*, covers the period from March 7 to July 31, 1936. The occasion for the publication of the collection appears to have been the author's desire to provide documentary support for his thesis that, as the result of M. Laval's foreign policy, France found herself alone when Hitler, taking advantage of her isolation, sent German troops into the demilitarized Rhineland. The collection does not have the scope of that of Berber, not covering the background of the remilitarization of the Rhineland, and adding few documents of more recent date not included in Berber's collection. Apart from its limited and biased character, its value for the serious student is considerably reduced by the fact that English and German texts are given only in French translations.

LELAND M. GOODRICH

Documents on International Affairs, 1936. Edited by Stephen Heald and John W. Wheeler-Bennett. (New York: Oxford University Press; London: Humphrey Milford, 1937. pp. xx, 717. \$14.00.) No greater service can be rendered to persons and institutions interested in world affairs than the publication of this authoritative and comprehensive collection of official documents, following the issue of a similar volume for the year 1935 a year ago. Certainly a basic need for study and grasp of international relations is convenient access to public papers carefully selected and edited, and it is to be regretted that the demand for such valuable compilations is so small as to elevate the price which must be charged to a level beyond the reach of many. The sections devoted to Germany and Austria, Italy and Japan, contain innumerable illuminating passages, which are of great interest and importance in the light of subsequent events in Europe and Asia. Other sections are devoted to the international status of Belgium, proposals for European peace, problems confronting Central and Eastern Europe, developments in Egypt, the Chaco Dispute, the Pan American Conference at Buenos Aires, limitation of naval armaments, world economic affairs, and the Montreux Straits Convention of July 20, 1936.

WILSON LEON GODSHALL

Essai sur la Portée de la Clause de Jugement en Équité en Droit des Gens. By Georges Berlia. (Paris: Recueil Sirey, 1937. pp. 214. Index.) The means whereby rational solutions may be found in international controversies is the broad subject of this inquiry. The author examines the restrained effect given to provisions for the settlement of claims according to the principles of international law and equity, and comes to the proliferation of post-war treaties making a decision *ex aequo et bono* the last resort in various systems of pacific settlement. This introduces a consideration of the so-called political controversy, by which the author means "*tout litige à propos duquel les parties ne se contestent point réciproquement un droit.*" Such conflicts call for a legislative remedy which may more appropriately be given by a political organ such as the League Council than by any judicial body. Talk about an international court of equity Dr. Berlia dismisses effectively

as tending only to confusion. Brief summary reflects inadequately the character of a book whose merit lies, not in any pretentious proposal, but in its hard-headed and lawyer-like analysis. Avoiding hazy discourse about the meaning of equity, Dr. Berlia has made a sagacious report on the conditions essential to its application in the relations between states.

CHARLES FAIRMAN

James Madison: Builder. By Abbot Emerson Smith. (New York: Wilson-Erickson, Inc., 1937. pp. xii, 366. Illustrated. Index. \$4.00.) This volume of fifteen chapters is a scholarly, illuminating and readable interpretation of a great Virginia leader in the formulation of the American Federal Constitution. It fittingly appears coincident with the sesquicentennial commemoration of the Convention of 1787, in which Madison especially sought to increase Federal authority as a remedy for the political evils of a critical period of unsatisfactory government. In addition to its concise and direct treatment of public affairs, it gives considerable attention to social affairs. The author classes Madison with the group of early leaders who did most to inculcate a general feeling of proper veneration for the Constitution. In the field of diplomacy he states that Madison's one success was the direct negotiation of October, 1809, with the arrogant British Minister, Jackson, whom he adroitly led into an untenable position, and that his greatest mistake was his decision to regard the Cadore letter as evidence of the repeal of Napoleon's decrees. The volume is well written, and is equipped with a brief bibliographical note, brief chapter references, and a satisfactory index.

The Influence of Border Troubles on Relations between the United States and Mexico, 1876-1910. By Robert D. Gregg. (Baltimore: Johns Hopkins Press, 1937. pp. 200. Index. \$2.00.) This volume, on a subject recently treated by two other writers as parts of volumes on American policy in Mexican relations, is well written and well documented. After a brief introductory chapter on the border problem before 1896, including the question of border crossings in pursuit of marauders fleeing into Mexico, it primarily treats the negotiations relating to the recognition of Diaz, the border lawlessness of 1878-81, in which he presents the disorders resulting from friction between Ord and his immediate superior (Sheridan), and the influence of the coming of railways (and other forms of economic penetration) upon the retreat of disorders of the frontier after 1881. The author has been diligent in the collection and interpretation of his materials, both printed and manuscript. The volume is equipped with footnote references, a special bibliography of sources (manuscript, official published documents and secondary publications), and a satisfactory general index. The narrative is practically free from errors. Two small slips appear on p. 182 and three on p. 184 in references to Blaine's and Hitt's instructions of 1881 (not 1887) to Morgan (in Vol. XX Mexico Instructions).

J. M. CALLAHAN

French Indo-China. By Virginia Thompson. (New York: Macmillan Co., 1937. pp. 517. Index. \$5.00.) French Indo-China, termed by Albert Sarraut the most important of France's colonies, and the subject of a commercial treaty concluded by the United States in May, 1936, has recently attracted considerable attention in this country. Miss Thompson's volume, published under the auspices of the Institute of Pacific Relations, offers a comprehensive, generally authoritative treatment of the contacts between French and native culture and institutions. The author visited Indo-China as well as France, but bases her book mainly on unofficial French sources,

rather than on personal knowledge or inadequate official documents. She deals topically with native institutions, economic enterprise, cultural developments, administration and law, foreign relations, and the reactions to French colonization. On the whole, the facts are well presented and the interpretations judicious. In some cases, as in dealing with international relations, a topic which is sketchily treated, the author is somewhat misled by her French authorities and would have done better to consult the available documents. She concludes that nationalism and economic developments constitute France's most significant contributions to Indo-China and that, except in the economic realm, the changes brought about by French rule have been more destructive than constructive. There are few footnotes, but the bibliography, while omitting some important references, is extensive. A clear, simple map and a fair index are useful auxiliaries of the text. G. LEIGHTON LAFUZE

War Finance and Its Consequences. By F. Fairer Smith. (London: Faber & Faber, Ltd., 1936. pp. 320. Index. 12s. 6d.) If war is a totalitarian enterprise in which a nation embarks as a unity, should it not be financed from the resources of the country without regard to the profits of individuals? Such is a rough statement of the question that is raised in this timely and provocative book. Mr. Smith traces much of the inequality in wealth in Great Britain to the injustices of British finance during the World War. Some investors increased their wealth enormously while their fellow citizens fought in the trenches. The author contends that the costs of the war should have been met from taxation. He roundly criticizes British financiers for borrowing the money which the government had itself created through the expansion of the currency. Interest paid on borrowings was too high. The government, being practically the only borrower, should have controlled the money market to its own advantage. We need not agree entirely with this condemnation of the financiers who, at a desperate time, could hardly have been expected to oppose the deeply established habits of a profit-motive economy. The tendency of the argument as respects future action, however, appears to be distinctly on the right side of the question. Legislators everywhere can learn a great deal from reading this account of British war finance and its unequal effects. BENJAMIN H. WILLIAMS

Norway and the Nobel Peace Prize. By Oscar J. Falnes. (New York: Columbia University Press, 1938. pp. xii, 332. Index. \$3.50.) This interesting work relates the final establishment of the Nobel Peace Prize to the development of the peace movement in Norway—that movement being closely akin to other humanitarian causes such as slavery, alcoholism, etc. This movement, stronger after 1860, was adorned by a group of illustrious men and women from all walks of Norwegian life. The author traces the relation of this peace movement to the long, irritating dispute with Sweden over her inadequate representation of expanding Norwegian commercial interests abroad. He reviews the position of Björnsterne Björnson, who fought devotedly for peaceful settlement because one half of Norway, he thought, would in war be arrayed against the other half and all Sweden. It is clear though that the movement was not based entirely on immediate reasons but was broadly scientific and philosophical. The fact that Alfred Nobel (1833-96), a Swede who had made his fortune in armaments, designated the Norwegian Storting to appoint his committee of award was a fine stimulus to peace efforts. Nobel's will (1895) was so loosely drawn as to make serious difficulty for the committee, which had to supply large details by regulation.

The author explores the effect the award had in stimulating peace activities—a purpose apparently not served when the prize was awarded to men at the end of their active years. The fruitful work of the Nobel Institute at Oslo is described and appraised over a term of years marked by quiet, vigorous work. After reading this book one understands better the psychological contribution of the Norwegian people to the search for world peace. The bibliography, chiefly of Norwegian works, is full and good.

BESSIE C. RANDOLPH

Prelude to Peace. By Henry A. Atkinson. (New York and London: Harper & Bros., 1937. pp. x, 222. Index. \$2.00.) Dr. Atkinson, General Secretary of the Church Peace Union and of the World Alliance for International Friendship, takes unto himself here the task of setting forth a "realistic view of international relations." Struggling to be "realistic" in dealing with such matters as "preparedness", "the world community", "sanctions", "raw materials", "nationalism", "education", "religion", he comes to the arresting conclusion that "we know how peace can be secured." It is quite simple. All that is necessary is that nations "do away with the instruments of war and establish the means for carrying out methods of a peaceful solution of their difficulties." Frankly, this compilation of very positive views, not altogether judicially balanced, raises as many questions "realistically" as it answers. It disturbs more than it convinces. The author, for example, has tried Italy, Japan, Germany, in the privacy of his own study, and regretted, apparently, that the League of Nations has not executed them. He curiously finds the word "sanctions," clearly defined in all our dictionaries, used familiarly and frequently by Alexander Hamilton, and others throughout the centuries, to be "new among English speaking people", and proceeds to call this "new" word "really the definition of security." Then, contrary to his own views as to "how peace can be secured", he goes on to hold that "the world community must have at its command a force that will demand respect," which means "some effective world police". Again, convinced that he knows how "peace can be secured", the author leaves one wondering why he leaves out so unrealistically the daily achievements of foreign offices, the rise of the principles of international law, the growth of arbitral and judicial procedures. The book, written in our most modern mood, illustrates to this reviewer why George Fort Milton, Special Assistant to the Secretary of State, has recently "come to feel less and less assured of the merit of simple statements, fetching formulae, magniloquent maxims for controlling the conduct of the group, race, or nation." This "Prelude to Peace", not without values, includes, we fear, too much of the whole cacophonous phantasia itself. ARTHUR DEERIN CALL

Is It Peace? A Study in Foreign Affairs. By Graham Hutton. (New York: Macmillan Co., 1937. pp. 364. Index. \$2.50.) Among the innumerable volumes bearing titles similar to the present one, Mr. Hutton's is outstanding for the wide range of its information and for the constructive character of its criticisms of British foreign policy. The Associate Editor of *The Economist* is far from being a cynic or an alarmist, in spite of the grim picture that he paints of the outlook for peace in Europe. He is one of the school of true British Liberals who believe in the application of principle to foreign policy and who are willing to pay the economic price of peace. While he castigates unmercifully the policy of expediency, the policy of refusing to make commitments, of playing one side against another, which has characterized British foreign policy for the past seven years, he does so always with

an accompanying statement of the alternatives that might have been pursued; and those who know the record of *The Economist* will recognize that his advice is not mere wisdom after the event. Through eight chapters he surveys the problems of European and Far Eastern politics and shows the interest of Great Britain in the issues involved. Then, in three closing chapters, he analyzes the failure of the British Government to take a consistent position in favor of collective security, the refusal to enforce sanctions against Japan in 1931, and the vacillating policy in regard to the Italo-Ethiopian crisis, which he calls "the greatest British defeat within living memory." Instead of forestalling the dictatorships, British policy backed and filled, until it is now too late to make concessions that would satisfy them and remove the standing threat of war.

C. G. FENWICK

Collectivism: A False Utopia. By William Henry Chamberlin. (New York: Macmillan Co., 1937. pp. x, 265. Index. \$2.00.) This is a clear and convincing discussion of the shortcomings of collectivism as shown in the actual experiences of Russians, Germans, and Italians in their respective countries. There are eight chapters in all. In discussing the "Revolt Against Liberty" the author reminds us that the Russian, Italian, and German dictatorships are legacies from the World War. Under the caption, "The New Technique of Tyranny" he describes the similarities in the crimes against popular government which have been committed in each of the three countries. The chapter on "Collectivist Utopia: Reality and Mirage," shows that democracy has an overwhelming advantage over dictatorships, so far as the economic, social, and cultural benefits to the people are concerned. In a chapter entitled "Can Democracy Survive?" the reply is made that it can. But it cannot survive as a "museum piece, a fetish, a theoretically desirable abstract ideal. It must vindicate itself as a superior means of insuring to the widest possible number a better material standard of living, a wider educational and cultural benefit and greater leisure." As to "Democracy and Peace" (Chapter V), high-sounding phrases like "collective security" and "indivisibility of peace" do harm rather than good. Peace can best be served in the democracies by preparedness for defense, and by localizing war rather than by trying to make it universal. The attack on democracy by dictators has failed. Liberty and democracy go hand in hand. In regard to Socialism, it cannot be a road to plenty because it cannot be a road to freedom. The concluding chapter is entitled, "The Choice before Civilization." This choice is between communism or fascism, on the one hand, and liberty on the other. The choice of course is with the latter. Patrick Henry's "flaming phrase 'Liberty or Death' is a sober statement of the alternative that confronts civilization in the twentieth century." The book is readable and instructive. The treatment is fair, and gives one an assurance that he is not being imposed upon by an author who is a super-salesman.

EARL WILLIS CRECRAFT

Must We Go to War? By Kirby Page. (New York and Toronto: Farrar & Rinehart, Inc., 1937. pp. xii, 278. Index. \$1.00.) This is a skilful, simplified, and, for the most part, realistic analysis of the problem of war and peace from the point of view of a Christian socialist and pacifist. It is Mr. Page's seventeenth book since 1920 and his eighth on the general subject. Naturally he has repeated much of the analysis and argument in his former works and has had to rely upon materials already quite familiar to the pro-

fessional students of the subject. The book is replete with long quotations, chiefly from secondary sources. Tested by the needs of the readers for whom it is intended, *i.e.*, the citizenry at large, it is a contribution to the clarification of their attitudes. The headings of the foreword and each of the ten chapters are in the form of questions and for each of these Mr. Page has an answer. War is defined in terms of its horrendous manifestations. The many familiar recognized causes of war are explored. Collective security supported by armed force or economic boycotts is eschewed. The author advocates the principle of "effective non-violent coercion" (Ch. VII), but does not demonstrate precisely how it could be made to operate in the present-day international community. Programs of attitudes and action for the individual, groups, the United States, and the international community are outlined, particularly in the last four chapters. Many less confident students of the subject, though agreeing with much of Mr. Page's analysis of the problem and sharing his aversion to war, will question the wisdom or practicability of some of his proposed solutions.

HENRY REIFF

The Final Choice. America between Europe and Asia. By Stephen and Joan Raushenbush. (New York: Reynal & Hitchcock, 1937. pp. xii, 331. Index. \$2.50.) The unanswered question, the authors of this volume say, which is always asked when field guns begin to bark anywhere is, What should America do? "For years we have not thought about peace; we have prayed about it. We have wished for it as farmers in the Dust-bowl wish for rain. . . . We have hardly begun to consider peace, either for the nation or for the world, as a job to be done and paid for." Exactly how the job is to be done and what the price is to be may be learned from a chapter which is called, "A Contract for Peace or War." The proposal for such a contract is introduced with the statement that England, France and Russia are faced with three choices: and that the United States, if interested in preventing war, must face the same alternatives. As these authors present the three choices they are as follows: These Powers can unite to destroy the dictatorships of Italy, Germany and Japan. Or they can yield to them still further until they no longer have the power to stop yielding. Or, they can come to some agreement with them which will end definitely their threat to the peace of the world. The full text of the agreement here proposed is set forth in eleven articles which are to become effective when ratified by the seven Great Powers. Here are some of the proposals: Tariff barriers between the participating nations are to be reduced gradually to half the present rates; colonies are to be placed under international control, under boards which are to secure equal economic opportunities for all; all construction of naval vessels and manufacture of artillery and munitions shall cease immediately; all armies are to be reduced by one half, and such portions of the demobilized forces are to be turned over to an International Control Board as will give the Board an army twice the size of any other standing army. The Control Board is to be authorized to use this force against any nation that goes to war or to use it in general to prevent or punish any violation of the contract. Such are some of the provisions of the proposed contract for peace or war. It is hardly to be supposed that the authors of this book expect this proposal to be considered seriously by responsible statesmen or by the mass of the people in any country. Is it not rather the expression of a sardonic pessimism? It seems to be with tongue in cheek that the authors challenge the critics by demanding that for every clause they cast aside as impractical they substitute another of their own which will actually accomplish the same purpose. H. W. TEMPLE

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ELEANOR H. FINCH

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QUESTIONS OF STATE SUCCESSION RAISED BY THE GERMAN ANNEXATION OF AUSTRIA

BY JAMES WILFORD GARNER

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(The recent annexation of Austria to the German Reich (the terms "incorporation" or "absorption" are preferred by some) has raised certain questions of international law or practice with which other states have already had, or will have, to deal and upon some of which Germany also will be called upon to take a position. Among the questions already raised or which may be raised are the following: (1) Assuming that the annexation was brought about by the use of armed force against Austria without her consent and in violation of treaties or international law, should those states which have bound themselves by treaties not to recognize the validity of territorial annexations made under such circumstances, accord *de jure* recognition to the German annexation of Austria? (2) What effect did the annexation have on the status and obligations of Austria as a member of the League of Nations? (3) What effect did it have on the status of the treaties between Austria and other countries which were in force at the time of the annexation? (4) Did the application of Germany's treaties with other states extend automatically, following the annexation, to the territory of Austria? (5) Is Germany bound by the generally recognized rules of international law to assume the payment of the debts of the former Austrian state, including those of the local governments of Austria?)

I (Regarding the first of these questions it may be remarked that among the conventions by which various states have bound themselves not to recognize any territorial arrangements not accomplished by pacific means or the acquisition of territories brought about by force of arms, may be mentioned the following: The Treaty of Non-Aggression and Conciliation signed at Rio de Janeiro October 10, 1933, reaffirmed by the convention adopted by the Inter-American Conference to coördinate, extend and assure the fulfillment of the existing treaties between the American States, concluded at Buenos Aires in December, 1936, and the Convention on Rights and Duties of States adopted by the Seventh International Conference of American States, signed on December 26, 1933, at Montevideo. The United States has ratified all of these conventions and would seem, therefore, to be bound by the obligation of non-recognition which they create.¹

The note of Secretary Stimson of January 7, 1932, following the Japanese invasion of Manchuria, declaring that the American Government did not intend to recognize any situation, treaty or agreement which might be

¹ The Anti-War Treaty of 1933 appears to have been ratified or adhered to by 24 other states, of which several are European, among them Italy.

brought about by means contrary to the covenants and obligations of the Pact of Paris of August 27, 1928, is well known and so is the resolution of the Assembly of the League of Nations of March 11, 1932, to the same effect.

The policy of non-recognition declared by Secretary Stimson in the note referred to is, of course, not legally binding upon his successors even if it could be construed as being applicable to territorial acquisitions in Europe.

It might also be contended that the annexation of Austria by Germany was not a case of territorial acquisition by force of arms in violation of existing covenants or treaties. As to this latter point it is of course true that Austria made no resistance to the German invasion but its Government protested and the German Reich's Chancellor refused to permit it to hold a plebiscite to determine the question whether the Austrian people desired to be annexed to Germany, after which a German army occupied the country and the Government of Austria was forcibly replaced by a Nazi régime set up by the German authorities. The Austrian Government so established, thereupon promulgated on March 13 a "constitutional law" proclaiming the union of Austria with Germany.² It is submitted that to hold under these circumstances that the annexation thus brought about was not the result of force directed from Germany would be to ignore the actual procedure for forms the hollowness of which is as clear as daylight. Nevertheless, while this was the opinion of the outside world, the governments of various states with little delay recognized the fact that Austria had ceased to exist as a sovereign and independent state, and accordingly withdrew their legations from Vienna and replaced them with consulates.³

On April 6, the Ambassador of the United States at Berlin delivered to the German Minister of Foreign Affairs two notes, in the first of which the Secretary of State, after referring to a notification which he had received from the Minister of Austria at Washington to the effect that his country "had ceased to exist as an independent nation and had been incorporated in the German Reich," that the Austrian mission to the United States of which he had been the head had been abolished and that the affairs of the mission had been taken over by the Embassy of Germany, informed the German Government that "the Government of the United States finds itself under the necessity as a practical measure" of closing its legation at Vienna and of establishing a consulate-general in its place. In the other note the Secretary of State, again referring to the notification received from the Minister of Austria regarding the cessation of his country's existence as an independent state, informed the German Government that the Government of the United States was "under the necessity for all practical purposes of accepting what he [the Austrian Minister] says is a fact."⁴ Already on March 15 the Secretary of State had been informed by the German Ambassador at Wash-

² Text in the New York Times of March 14, 1938.

³ See, for example, the announcement of the British Government, New York Times, April 3.

⁴ Texts of both notes in New York Times, April 7, 1938.

ington that Austria had been "incorporated" into the German Reich and had therefore ceased to be an independent state. (For a time the Secretary of State, who had in his address before the National Press Club strongly disapproved the Nazi policy of intervention and disregard of treaty obligations, appears to have given consideration to the question as to whether the Government of the United States should not adopt the policy of non-recognition as set out in the Stimson note and whether, indeed, it was not bound by the declaration of the Treaty of Non-Aggression of October 10, 1933 to withhold recognition, since the United States had ratified this treaty in June, 1934.

✓ On March 19, however, the Secretary of State issued a statement accepting as a "fact" the disappearance of Austria as an independent state, which was tantamount to a *de facto* recognition of the German annexation and, as stated above, this was followed by a formal *de jure* recognition on April 6. ✓

Whether the Secretary's decision to accord recognition was based on the view that the United States was not bound by the Anti-War Pact of 1933 or other treaties, to withhold it in the case of Austria, or whether the annexation of Austria was not considered by him to be a case of territorial acquisition by force such as is envisaged by those treaties, or whether in view of the action of the British, French and other governments in according recognition, it was felt that the policy of non-recognition by the United States alone without the coöperation of other great Powers would not be productive of any substantial practical results, as it has not been in the cases of the non-recognition of Manchukuo and Ethiopia, is not clear to the author of this article.

2 (Turning now to the effect of the annexation upon Austria's status as a member of the League of Nations, we are forced to admit that there is no place in the League for an entity having the status of a German *Land*, as Austria is now declared to be by the so-called "constitutional law" of March 13 for the reunion of Austria with the German Reich.) By a communication of the German Foreign Office of March 21 addressed to the Secretary-General of the League and referring to the above-mentioned law, the Secretary-General was informed that from the date of the promulgation of that law "the federal state of Austria ceased to be a League member."

(The annexation by Italy of Ethiopia when it was a member of the League affords a similar precedent. The League appears to have continued to regard Ethiopia as still a member, notwithstanding its extinction in fact as a state, and even now it has not yet recognized the annexation, nor have a good many members of the League done so, including a majority of those represented on the Council, although they have recognized the annexation of Austria.⁵) Whatever may be the theoretical views of the League or its mem-

⁵ The former Emperor contends that his country is still a member of the League, and he recently tendered payment of its membership dues. The Secretary-General recently referred to the status of the Ethiopian delegation to the League as having been "provisional" since 1936. It is understood that the Assembly at its meeting in September next will reach a definitive decision as to the status of Ethiopia in its relation to the League.

ber states regarding Ethiopia's *de jure* relation to the League, (the general recognition by states of the annexation of Austria to Germany and its consequent extinction as a state would seem to remove any possible basis for the contention that Austria any longer sustains even a *de jure* relation to the League.⁶ The Covenant (Art. I) recognizes the right of members to withdraw voluntarily from the League after two years' notice, provided their obligations under the Covenant have been fulfilled, but apparently its authors did not envisage the situation created by the extinction of a member state resulting from conquest or other causes, and the Covenant does not deal with such a situation.)

Whether Austria was in arrears in the payment of her membership dues at the time she ceased to be a member of the League is not known to the author of this article. If it was, it is not likely that Germany can be induced to assume payment of the balance due, and it is doubtful whether the law of state succession includes the duty of a successor state to assume an obligation of this kind. No case in which such a claim was ever made is known to the author. (Austria was, however, at the time of her annexation to Germany under an obligation to the League, or at least to certain of its members, of a very different character and to which the law of state succession would seem to apply. This is Austria's debt for large sums advanced to her by members of the League and floated under the auspices of the League. These advances embrace the Austrian Guaranteed Reconstruction Loan of 1923 (popularly known as the League Loan) for a sum approximately equivalent to \$126,000,000 bearing an interest rate of 7 per cent. and due in 1943.⁷ The loan was guaranteed in certain specified proportions by Great Britain, France, Czechoslovakia, Italy, Belgium, Sweden, The Netherlands and Denmark, and the sums necessary for the service of the loan were made a first charge on the gross receipts of the Austrian customs and the tobacco monopoly.) How much of the loan had been taken up by Austria at the time of her annexation to Germany is not known to the author. It appears, however, that the larger part is still outstanding. By the Lausanne

⁶ The permanent delegate of Mexico to the League laid before the Secretariat at the time of Germany's notification on March 20 that Austria had ceased to be a member of the League, a statement declaring that the League should not accept the annexation of Austria as a *fait accompli* without a vigorous protest and without taking the action provided for by the Covenant. He added that his own government refused to recognize the conquest of Austria: "The Mexican Government, in accordance with its consistent international policy," said the note, "refuses to recognize any conquest made forcibly," and it informs world public opinion that, in its view, "the only means of securing peace and preventing further international outrages such as those committed against Ethiopia, Spain, China and Austria is for nations to carry out the obligations laid on them by the covenant, the treaties they have concluded and the principles of international law." Dispatch from Geneva, New York Times, March 22, 1938.

⁷ Of this amount \$25,000,000 was floated in the United States by a syndicate headed by J. P. Morgan & Co. See "Austria: The Paralysis of a Nation," Foreign Policy Reports, Vol. VIII, No. 22 (Jan. 4, 1933), p. 262.

protocol approved by the Council of the League on July 15, 1932, Great Britain, France, Italy, Czechoslovakia, Belgium, The Netherlands and Switzerland guaranteed a new foreign loan not exceeding 300,000,000 Austrian schillings to be secured by Austrian customs receipts and the tobacco monopoly. This loan was intended less to rehabilitate Austria's economic condition than to enable her to meet her more pressing financial obligations. Among the conditions on which the loan was made were that Austria should undertake to introduce certain budgetary economies and reforms into its financial administration and to refrain from any negotiations or economic engagement which might impair its independence. A third loan to Austria was one of approximately \$102,000,000 made in 1930 by the Bank for International Settlements.⁸

(e) (At the time of the annexation Austria was in debt to various other countries, among them the United States, to whom it was indebted first of all in the sum of \$24,055,708 for flour sold by the United States Grain Corporation in pursuance of an Act of Congress approved March 30, 1920, to relieve the food wants of the Austrian people.⁹ The debt was secured by a first charge on all the assets and revenues of the Austrian state. Debts to other states for the same purpose were incurred about the same time.)

(e) In addition to these inter-governmental debts, various obligations of the Austrian Government are held by private individuals in foreign countries, all of which appear to be secured by the Austrian customs and the state tobacco monopoly. Finally, obligations of a substantial amount (said to exceed \$34,000,000) issued by local governments (provincial and municipal) and corporations (power companies) in Austria are held by American nationals.) Austrian obligations of these several kinds are due also to the governments or nationals of other countries, mainly Great Britain, France, Switzerland and The Netherlands. (The total foreign debt of Austria at the end of 1937 was estimated by the Austrian National Bank at 1,890,000,000 schillings, by far the larger part being owed by the Federal Government, the remainder by the local governments and public utility companies.¹⁰)

The Austrian Government had for some time been in default to the United States on the payment of the debt of 1920 for the sale of foodstuffs, but as regards the other debts, both Federal and local, the Federal Government and the local bodies had continued to make regular payments in accordance with the terms of their agreements. In the note of April 6, referred to above, to the American Ambassador at Berlin for delivery to the German Minister of Foreign Affairs, the Secretary of State notified the

⁸ Of this amount \$25,000,000 was marketed in the United States through a syndicate headed by J. P. Morgan & Co.

⁹ Note of the Secretary of State, April 6, 1938, to the American Ambassador at Berlin, New York Times, April 7, 1938. This debt was evidenced by the agreement of May 8, 1930, between the United States and Austria and the moratorium agreement of Sept. 14, 1932.

¹⁰ Statement of Wallace R. Deuel, Berlin correspondent of the Chicago Daily News, March 21, 1938.



German Government that "the government of the United States will look to it for the discharge of the relief indebtedness of the government of Austria" under the agreements of 1930 and 1932 (concerning the debt of 1920 for the sale of foodstuffs to Austria), and that it would expect that the other obligations of Austria and its local governments upon which payments had been regularly made "will continue to be freely recognized and that the service [of payment] will be continued by the German authorities which have succeeded in control of the means and machinery of payment in Austria."

It was added that "prompt assurances" on the part of the German Government as to this would be appreciated. (In short, Germany as the successor to the now defunct Austrian state was expected to assume responsibility for the discharge of the debt obligations of the latter, including those of its local governments.) No reference was made to Germany's duty under the international law of state succession and no argument was put forward in support of the right of the United States to look to Germany to take over and discharge those obligations. Apparently it was assumed by the Secretary of State that Germany's obligation under international law was so clear and well established that she would not contest it and therefore all that was necessary was for the Government of the United States to call the attention of the German Government to the nature and extent of the obligations.)

(Turning now to a consideration first of the opinions of writers on international law regarding the responsibility of a state for the payment of the debts of another state, which through conquest or voluntary merger becomes a part of it and whose existence as an independent state is thereby terminated, we are fortunate in having at hand two exhaustive treatises on this subject: one by Dr. Ernst H. Feilchenfeld,¹¹ the other by Professor Alexander N. Sack.¹² Dr. Feilchenfeld, who discusses the development of the law and practice by periods, concludes that "practically all" writers of the era from 1830 to 1878 are agreed that the debts of annexed states must be assumed by the annexing states. In fact, he says this rule had become so well established as a principle of international law by 1830 and had been so frequently confirmed by state practice that most writers of that time did not consider it necessary to adduce evidence to prove the existence of the rule.¹³ While during the period following 1878 a small group of writers challenged the doctrine of state succession as applied to all debts of annexed states, their opinions were not sufficiently numerous or convincing to change the existing rule of law.¹⁴ Professor Sack reaches the same conclu-

¹¹ Public Debts and State Succession, New York, 1931.

¹² *Les Effets des Transformations des États sur leurs Dettes Publiques et Autres Obligations Financières*, Paris, 1927.

¹³ *Op. cit.*, pp. 302 and 311.

¹⁴ *Ibid.*, p. 397 ff. Among them was Sir Erle Richards, who agreed with the Transvaal Concessions Commission and the decision of the English High Court in the case of the West Rand Gold Mining Company that a conqueror is not obliged by any rule of international law to assume the "war" debts of a conquered state ("The Liabilities of a Conqueror," 28 Law Magazine & Review (1903), p. 129), and who even denied the existence of any definite

sion regarding the obligation of the annexing state, although he considers that the basis of the obligation is not so much international public law as financial law and general public law.¹⁵

(When we turn from the doctrine of the jurists to the practice we find that in fact annexing states have generally assumed the payment of the debts of the states which they have annexed.) Where the act of annexation took the form of the conclusion of a treaty, the treaty usually provided for the taking over of the debt. When there was no treaty of annexation the debt was nevertheless generally assumed by the annexing state. Among the examples which may be cited were: the assumption by France of the debts of various territories annexed by her during the Napoleonic wars; treaties of Campo-Formio with Austria 1797, of Fontainebleau with Holland 1807, annexation of the states of the Church 1809, treaty with Westphalia, 1810, relative to the annexation by Westphalia of Hanover); the annexation of Genoa to Sardinia, 1815; the annexation of Turin to Sardinia in 1816; the assumption by Wurtemberg in 1806 of the debts of certain territories annexed by it; the assumption by the United States of Colombia in 1819 of the debts of Venezuela and New Grenada which were merged in a single state; the taking over by Italy in 1859 of the debts charged against Lombardy and in 1866 those charged against Venetia upon their annexation to Italy; the assumption by Greece in 1864 of all the engagements of the Ionian Islands; an agreement by Italy in 1864 to assume certain portions of the debts of the states of the Church and in 1871 the assumption of the portions remaining; the assumption by Prussia in 1866 of the debts of Hanover, Hesse, Nassau and Frankfort upon their annexation to Prussia; the assumption by Prussia in 1868 of the debts of Schleswig-Holstein; the assumption by the

international rules of state succession. Another writer of this group was A. B. Keith, who rejected the whole theory of state succession and denied that states are legally bound to assume any (apparently) debts of states which they annex (*The Theory of State Succession, with Special Reference to English and Colonial Law*, London, 1907). His views appear to have been adopted by Sir F. E. Smith, *International Law*, 5th ed., p. 291. But this view was criticized by Westlake, Sir Frederick Pollock, Sir Thomas Barclay, Professor Oppenheim and other English writers who, sometimes with reservations, to be sure, accepted the general rule that an annexing state should take over the debts of the annexed state. Even the Transvaal Commission admitted that "the best modern opinion favours the view that as a general rule, the obligations of the annexed state towards private persons should be respected" (Report [South Africa, 1901, CMD 623], p. 7). Two continental writers who likewise rejected the theory of state succession and denied the existence of any rule of international law which requires one state to assume the debts of another state which it annexes were Albert Zorn (*Grundzüge des Völkerrechts*, 1903, p. 150 ff.), and W. Schönborn (*Staatensukzession*, 1913, pt. 2). Strupp and P. Guggenheim adopted the same view, cited by Sack, p. 62. Gidel, while rejecting the theories of state succession and denying the obligation of an annexing state to take over the debts of an annexed state, nevertheless admitted its liability to the extent to which it has been unjustly enriched in consequence of the annexation (*Des Effets de l'Annexion Sur les Concessions*, 1904).

¹⁵ *Op. cit.*, p. 87.

Dominion of Canada, when it was formed in 1867, of liability for the debts of the Provinces, and the assumption by the Union of South Africa in 1909 of the debts of the colonies which formed it; the assumption by Great Britain in 1877 of the debt of the Transvaal, of that portion of the debt of Upper Burma in 1886 which had been incurred for public purposes, and the assumption in 1902 of all the debts of the former South African Republic and the Orange Free State,) including a deficit amounting to £1,500,000¹⁶—this, notwithstanding the report of the Transvaal Commission and the opinion of the High Court of Justice in the West Rand Gold Mining Company Case that she was not bound by any rule of international law to do so.¹⁷ France in 1880, upon the annexation of Tahiti, assumed various debts left by its former rulers. Upon the establishment of a protectorate over Tunis in 1881, France, while not assuming direct responsibility for the debts of Tunis, took appropriate steps to protect foreign creditors of the protectorate. A similar policy was adopted by France in 1884 and 1886 in regard to the debts of Annam, Tonkin and Cambodia when protectorates were established over them. The debts of Madagascar were also in effect assumed by France upon the annexation of that country.¹⁸ Upon the annexation of Korea in 1910 the Government of Japan assumed the national debt of that country. By the unratified treaty of 1844 for the annexation of Texas to the United States (Act 5), the United States agreed to assume the payment of the debts of Texas (which were estimated to be not in excess of \$10,000,000), to be paid with the exception of a sum falling short of \$400,000, exclusively out of the proceeds from the sales of its public lands which were to become the property of the United States. By the terms of the Joint Resolution (1845) under which Texas was finally annexed to the United States, Texas retained its fiscal autonomy and also its vacant and unappropriated lands from the sale of which Texas was to pay its own debts, no portion of which was to be assumed by the United States. Subsequently, however, by an Act of Congress passed in 1850, the United States, in consideration of the modification of the Texas boundary and of the relinquishment by Texas of "all claim upon the United States for liability of the debts of Texas" and for compensation for the surrender of forts and other public property, agreed to pay Texas the sum of \$10,000,000 subject to certain conditions, but \$5,000,000 of which was to be withheld until the creditors of Texas had been paid. Difficulties having arisen in the execution of the law, Congress finally passed an Act in 1855 by which it was provided that in lieu of the \$5,000,000 payable to Texas under the Act of 1850, the United States should pay to the creditors

¹⁶ Phillipson, *Termination of War and Treaties of Peace*, p. 42.

¹⁷ The details of the above and other cases in which annexing states took over the debts of states annexed by them may be found in Feilchenfeld, *op. cit.*, p. 263 ff., and in Sack, *op. cit.*, p. 264 ff. See also Appleton, *Des Effets des Annexions de Territoires sur les Dettes*, sec. 9 ff.

¹⁸ As to French practice regarding the debts of colonial territories and protectorates, see Feilchenfeld, *op. cit.*, p. 369 ff.

of the late Republic of Texas the sum of \$7,750,000 to be apportioned among them pro rata.¹⁹

The Joint Resolution of July 7, 1898, for the annexation of Hawaii, provided that its public debt "lawfully existing" at the date of its passage, including the amounts due to depositors in the Hawaiian Postal Savings Bank, should be assumed by the Government of the United States to an amount not exceeding \$4,000,000, but that until the United States customs laws and regulations should be extended to the islands, the Hawaiian Government should pay interest on the debt.²⁰

Finally, it may be remarked that when Serbia and Montenegro were merged in the new state of Yugoslavia at the close of the World War, the new state assumed the debts of both Serbia and Montenegro.

in the same way as This is an impressive list of cases in which annexing states have assumed directly or indirectly some or all of the debts of the states or territories annexed by them, since the beginning of the nineteenth century. *(The instances in which this was not done are quite exceptional and in most of these instances reasons were given by the annexing state as a sufficient justification in its own eyes for its refusal to do so. Thus while the Belgian treaty of 1907 for the annexation of the Congo Free State provided that Belgium was to assume all financial liabilities of the Congo State, its debts were not in fact taken over, the treaty being interpreted as not requiring it.)* There were cases also—for example, the annexation of the Fiji Islands by Great Britain in 1874—where the annexing state justified its refusal to assume the debts of the annexed territory on the ground that, but for the annexation, the debts would have been valueless and therefore creditors could not justly complain at the refusal of the annexing state to take them over.²²

In some cases also—*e.g.*, the annexation of Hawaii—only a portion of the debt was assumed, the remainder being left as a charge against the territory annexed. In other cases the fiscal autonomy, assets and revenues of the annexed state being left wholly or largely intact, its debt was not assumed but remained as a charge against it. This was done, for example, in the case of the Swiss cantons when they united in 1848 to form the Confederation, and in the case of the German states when they were merged into the North German Confederation and later into the German Empire.))

Some of the early writers on the subject defended the distinction between complete incorporation and partial incorporation, i.e., where the annexed state retained its fiscal autonomy, holding that in the latter case there was no duty on the annexing state to assume the debt. But this distinction was

¹⁹ Details of the whole procedure in I Moore, *Digest of International Law*, p. 343 ff., and in Feilchenfeld, *op. cit.*, p. 271 ff.

²⁰ I Moore, *op. cit.*, p. 351.

²¹ Feilchenfeld, *op. cit.*, p. 376, who cites Buell, *The Native Problem in Africa*, Vol. II, p. 447, as authority for the opinion that the interpretation adopted was due to the widespread opposition in Belgium to the annexation.

²² As to the reasons given by Great Britain for refusing to assume the debts of the Fiji Islands, see Feilchenfeld, *op. cit.*, p. 290 ff.

never generally accepted. However, it would seem that where the annexing state leaves the annexed state with sufficient financial autonomy and revenues out of which it is able to meet its financial obligations, creditors cannot justly complain if the annexing state declines to assume those obligations, provided of course they are allowed what Appleton calls a *droit de poursuite* against the annexed territory.) If, therefore, Germany should decline to assume the debts of Austria but should leave Austria with adequate means for discharging its own financial obligations and allow Austria's creditors an effective remedy to enforce the collection, it might make no difference to the creditors whether Germany assumed payment of the debts or whether they were left to collect from Austria.) This solution for the discharge of the debts of the local governments of Austria might be particularly appropriate. Nevertheless, if creditors should find it necessary to proceed against those governments, a difficult and embarrassing situation might be created. It is perhaps for this reason that writers have generally made no distinction between the duty to assume the national debts of a state and the duty to assume provincial, communal, municipal or other local debts. Most of them appear to have acted on the theory that the duty of assumption applies equally to both classes of debts without distinction. In practice they have generally been assumed along with the general or national debts, or their payment guaranteed by the annexing state.

(It may be remarked in passing that the distinction which British writers and courts insisted upon, especially after 1900, between the duty of the annexing state in the case of territory acquired by conquest and in the case of territory acquired by voluntary annexation, was not generally approved by writers or followed in practice.) This distinction was definitely rejected by the American-British Claims Arbitration Tribunal under the agreement of August 10, 1910, which said on this point: "Nor do we see any valid reason for distinguishing termination of a legal unit of international law through conquest, from termination by any other mode of merging in, or swallowing up by, some other legal unit." ²³ (In any case, even if the distinction had any legal or moral foundation, it could not be invoked by Germany as a reason for refusing to assume the debts of Austria, since she maintains that the annexation of Austria was the result not of conquest but of the consent of Austria.)

(The conclusion of the whole matter is that should Germany refuse to assume responsibility for the payment of the debts of Austria, it would be in the face of an overwhelming body of practice, including her own, and contrary to the vast preponderance of the best juridical opinion, both of which taken together are evidence enough that the duty of assumption may now be regarded as required by international law. The United States might therefore feel justified in applying the Johnson debt defaulters Act to Germany. Even if it be admitted that there is no positive and definite rule

²³ Award in the case of the Hawaiian Claims, Nielsen's Report, p. 160.

of international law which imposes on the annexing state such an obligation, as a few writers still so contend, there is a moral obligation founded on considerations of comity, equity, and justice, which is admitted by these same writers to be so strong that it cannot be expected that any civilized state would ignore it. It is upon such considerations that states, e.g., Great Britain, have sometimes assumed the payment of the debts of annexed territories when at the same time they denied the existence of any obligation under international law to do so.))

((Turning now to the effect of the annexation upon the treaties of Austria and even upon those of Germany herself, we may note that among the treaties to which Austria was a party at the time her juridical existence as a state came to an end were at least six with the United States.²⁴)) Austria was also a party to a Concordat with the Vatican. Most of the countries which had treaties with Austria also had treaties with Germany dealing with the same matters, but in some cases there were important differences between the German and Austrian treaties.)) This was notably the case, for example, as regards the German and Austrian Concordats of 1933 with the Vatican, to be discussed later on.

((It may be stated at the outset that the annexation of Austria to the German Reich appears to have produced what writers on international law speak of as a case of "total extinction"; that is, a case in which a formerly independent and sovereign state ceases entirely to be such and becomes a province or district of the annexing state without retaining any of its former international juridical capacity.)) The so-called Federal Constitutional Law of March 13 "decided upon" by the Austrian Federal Government regarding the reunion of Austria with the German Reich (Art. I), declared that Austria was to be a *Land* of the German Reich.)) this being the name which the Weimar Constitution bestowed on the component members of the German Federal Republic, which by the Imperial Constitution of 1871 had been designated as States (*Staaten*).)) In short, Austria is to have the same constitutional status in the German Reich which Bavaria, Baden and the other *Länder* have. Under the Weimar Constitution (Art. 78), the *Länder* had a limited international juridical capacity, including the power to conclude certain kinds of treaties.²⁵)) A somewhat similar treaty-making power

²⁴ They were: the Treaty of Aug. 24, 1921, Establishing Friendly Relations; that of Jan. 12, 1926, for the Reduction of Passport Fees for Non-Immigrants; that of Aug. 16, 1928, relative to Arbitration, and one of the same date relative to Conciliation; that of Jan. 31, 1930, relating to Extradition (to which there was a supplementary agreement of 1934); and the Treaty of Jan. 20, 1931, on Friendship, Commerce and Consular Rights (to which there was a supplementary agreement).

²⁵ See Strupp, II *Jahrbuch des Völkerrechts*, p. 566, where a list of the treaties entered into by the German *Länder* may be found. See also Elben, *Die Staatsverträge Württembergs mit nicht Deutschen Staaten*. Article 78 of the Weimar Constitution declares that "in those matters which the diets of the *Länder* have power to regulate, the *Länder* may conclude treaties with foreign states, subject however to the consent of the Federal Republic."

is conferred on the Swiss cantons by Article 9 of the Swiss Federal Constitution.²⁶ Some commentators on the German Constitution have interpreted Art. 78, however, to confer upon the *Länder* little more treaty-making power than what is involved in the regulation of frontier traffic and police.²⁷ In any case, the *Länder* appear to have been deprived of any international capacity which they may have formerly possessed, by the Nazi measures of 1934 and 1935 for the virtual abolition of their local autonomy and the transformation of the Federal Reich into a unitary state. Consequently Austria's relegation to the position of a German *Land* would seem to leave it without either the competence or power to perform the obligations of its former treaties or to enter into any sort of diplomatic relations with other states. What, therefore, is the status of the treaties to which Austria was a party at the time of its disappearance as a state?))

(The vast majority of writers on international law who have discussed the subject maintain that treaties in such cases, subject to some possible exceptions to be discussed later, are automatically terminated by the act of annexation, or at least are terminable at the option of the annexing state. A small minority of writers, however, hold otherwise and maintain that the annexing state generally succeeds or may succeed to the treaties or at least to the obligations which they have created.) Among such writers may be mentioned Martens,²⁸ Despagnet,²⁹ apparently Carmazza-Amari,³⁰ Chrétien,³¹ Bluntschli³² (subject to exceptions), Fiore,³³ and others, most of whom are among the older writers.

Most writers, including even those who reject the doctrine of succession, such as Liszt and Schönborn, admit as an exception to the general principle of non-succession, treaties which create what on the continent of Europe are called *real obligations* or which in Anglo-Saxon countries are said to be in the nature of covenants running with the land. Such are treaties creating obligations which in some way are connected with the territory annexed. Among them are treaties relating to boundaries, rivers, dikes, embankments, neutralization, demilitarization, and in general all treaties which create international servitudes.³⁴ The obligations which they create are said to

²⁶ As to the treaty-making power of the Swiss Cantons see His, in 10 *Revue de Droit Int. et de Lég. Comparée* (1929), p. 454, and Huber in this JOURNAL, Vol. 3 (1909), p. 62 ff.

²⁷ Oppenheimer, *The Constitution of the German Republic* (1923), p. 29; see also Schiffer and Wilcox, "Treaty-Making in Post-War Germany," this JOURNAL, Vol. 30 (1936), p. 216.

²⁸ I *Traité de Droit Int.*, p. 368.

²⁹ *Cours de Droit Int. Pub.*, p. 103.

³⁰ II *Traité de Droit Int.*, p. 518.

³¹ *Principes de Droit Int. Pub.*, sec. 353.

³² *Droit Int. Cod.*, Art. 50.

³³ *Droit Int. Cod.*, Art. 143 n.

³⁴ See in addition to the authors cited above: Crandall, *Treaties: Their Making and Enforcement*, 2nd ed., p. 430; Huber, *Die Staatensuccession*, p. 151; Fauchille, I *Droit Int. Pub.*, pt. I, p. 345 ff.; Otérelécano, *De la Valeur Obligatoire des Traités Int.*, p. 80; Kiatibian, *Conséquences Juridiques des Transformations des États sur les Traités*, p. 22; Larivière, *Des Conséquences des Transformations Territoriales des États sur les Traités Antérieurs*, p. 119 ff.; Crusen, *Les Servitudes Internationales*, 22 *Acad. de Droit Int.*, *Rec. des Cours*, p. 64 ff.; Reid, *International Servitudes in Law and Practice* (1932).

survive the extinction of the state and pass by succession to the annexing state.) The principle on which the rule is based is said to be derived by analogy from the Roman private law according to which property passes to a purchaser such as it was in the hands of the vendor and subject to the burdens and encumbrances that it was under at the time of transfer—*res transit cum onere suo; nemo plus juris ad alium transferre potest quam ipse habet*. Cases in which annexing states have admitted the survival of such obligations and have continued to respect them are not lacking.³⁵

chic. (When we turn to the practice of states we shall find that it has generally been in accord with the principle stated above, namely, that bilateral treaties, with the possible exceptions mentioned, are terminated or are terminable at the option of the annexing state as a consequence of the juridical extinction of the other party.) Among the instances in which this result was admitted sooner or later, either with or without contest, may be mentioned the annexations of Algiers to France, of Texas and Hawaii to the United States, of Hanover, Frankfurt and Nassau to Prussia, of the various Italian states to Italy, of the South African Republics to Great Britain, of Korea to Japan and of Madagascar to France. In some cases, as in the annexation of Texas, Hawaii and Madagascar, there were protests by third states which had treaties with the annexed state. Occasionally the position taken by states regarding the effect of annexation on the treaties between them and the annexed state has not always been consistent, their attitude depending on whether they were themselves annexing states or whether they were third states and parties to treaties with the annexed state. Thus while the United States maintained in the face of objections raised by certain third states that its annexation of Texas and Hawaii terminated all treaties between the latter states and other states, it declined to admit that its own treaties with the two Sicilies were terminated by their annexation to Sardinia in 1860, that its treaty with Sardinia of 1838 was terminated by the

³⁵ For example the Elbe toll exemption provision in the treaty of Nov. 6, 1861, between the United States and Hanover which was annexed to Prussia in 1861. Crandall, *op. cit.*, p. 431. Also the servitude of non-fortification of the Alsatian town of Huningen established in favor of Switzerland by the Treaty of Paris of 1815, which was admitted by Germany and France in turn to have survived the annexation of Alsace-Lorraine to Germany in 1871 and its re-annexation to France in 1919. I Oppenheim, *Int. Law* (4th ed.), p. 207, and Crusen, *op. cit.*, p. 65. See also the Case of the Aaland Islands, the demilitarization of which by the Convention of 1856 between Great Britain, France and Russia was held to have survived the transfer of the Islands from Russia to Finland in 1919. McNair, *British Year Book of International Law*, 1925, p. 125, and De Visscher, "*La Question des Îles d'Aaland*," *Rev. de Droit Int. et de Lég. Comparée*, Vol. II, 3rd ser. (1921), p. 35 ff. As to the contention of the United States regarding its rights under Art. 24 of the Convention of Nov. 18, 1903, with Panama, which are said to be in the nature of "a covenant which runs with the land," see Reid, *International Servitudes in Law and Practice*, p. 134. Liszt, *Das Völkerrecht*, p. 192, asserts that when the Congo State was annexed to Belgium the latter state succeeded to the obligations relative to the neutralization of the Congo territory which had been imposed upon that state by the Act of Berlin of 1885 (Art. 10).

establishment of the Kingdom of Italy, and that its treaty of 1805 with Tripoli was terminated by the establishment of Turkish sovereignty over that country. It appears that it was not until after the annexation of Tripoli to Italy in 1912 that the United States finally admitted that the latter treaty was no longer in existence.³⁶ (The fact remains, however, that in spite of the protests or objections of third states, in apparently every case of total annexation, the termination of the bilateral treaties of the annexed state, subject to the exceptions mentioned above in respect to treaty obligations in the nature of covenants running with the land, was ultimately admitted or acquiesced in by third states which were parties to such treaties.)

((In the light of this practice and doctrine we venture the conclusion that all bilateral treaties between Austria and other states in force at the time of its annexation to the German Reich, unless there be some which establish obligations inseparable from the territory, will have to be recognized as terminated in case Germany elects to so regard them.))

The question remains, do Germany's treaties with other states extend *ex proprio vigore* or *de plein droit* to the Austrian Land, insofar as they are locally applicable, and if not, may Germany so extend them at her will?

(A good many authors support the doctrine of automatic extension to the annexed territory, or at least the right of extension on the part of the annexing state. It is believed, however, that this doctrine, if admitted, must be recognized as being subject to exceptions or qualifications. For example, a treaty between Germany and the United States might contain an express stipulation that the treaty should apply only to the territory possessed by the parties at the time of its conclusion and could not be extended to territory subsequently acquired. Or it might be shown to have been clearly the intention of the non-German party that the obligations which it assumed or the concessions which it granted should be limited to the territory or population which Germany then possessed, even though the intention was not expressed in the treaty.) It is conceivable that the conditions which were the basis of the treaty might be radically changed as a consequence of the annexation by one party of additional territory. Thus the annexed state might be preponderantly an agricultural country, whereas the annexing state might be largely industrial, so that the other party to a commercial treaty with the annexing state might be quite unwilling to extend tariff concessions which it has made to the annexing state equally to the territory of the annexed state.) It is believed therefore that in such a case the annexing state would have no right to extend such a treaty to the territory annexed, against the objection of the other party.³⁷ The proposition is, therefore,

³⁶ See 5 Moore, Digest, p. 345 ff.; Hyde, "The Termination of Treaties of a State in Consequence of Its Absorption by Another," this JOURNAL, Vol. 26 (1932), p. 133; and Foreign Relations of the United States, 1912, p. 632.

³⁷ Compare the opinion of a writer in 17 *Rev. de Droit Int. Privé* (1921), p. 311 ff., who, after reviewing the jurisprudence of the French courts relative to the extension of the

here submitted that in the present case any country having treaties with Germany would be entirely within its right in objecting to the extension by Germany of such treaties to the territory of Austria.

(In case no objection should be raised by the other parties, Germany will probably extend the application of her treaties to Austrian territory insofar as they are applicable thereto, or will proceed on the assumption that they extended automatically thereto in consequence of, and at the time of, the annexation. This is what has actually been done in the great majority of cases of annexation, although sometimes with reservations and exceptions.)) It may be remarked in this connection that after the formation of the Kingdom of Yugoslavia, various neutral states which had treaties with Serbia, gave their consent to the extension of those treaties to the entire state of Yugoslavia of which Serbia became a part.³⁸

(Might Germany, instead of regarding Austria's treaties with other states as terminated in consequence of the annexation, take them over and assume the duty of executing the obligations which they imposed upon Austria,) somewhat as the German Empire upon its formation took over the treaties which had been entered into by the various German states prior to their absorption into the German Empire? Both Germany and the United States regarded such of those treaties as the United States had concluded with the German states as continuing in force after the formation of the Empire, apparently on the theory that the international capacity of the German states, including the power of execution, had not been extinguished by their merger into the Empire.³⁹ (The fact that the juridical personality of Austria as a state has, unlike that of the German states which were merged into the Empire, been completely extinguished, would not necessarily prevent the Reich from taking over Austria's treaties and continuing them in force as its own and extending their application to the whole territory of the Reich if it wished to do so; but aside from conceivable practical difficulties, the other parties to the Austrian treaties would have a right to object, for the reasons mentioned above, and especially if Germany should

treaties of France to Alsace-Lorraine following the return of these provinces in 1918, maintains that treaties in such cases extend to territory annexed *unless it was the intention of the parties to limit their application to the territories which they possessed at the time the treaties were concluded*. He cites Chrétien, Piédelièvre, Bry, Despagnet, Merignac and Fauchille in support of this proposition.

Compare in the same sense Hyde, *op. cit.*, II, p. 85, and Kiatibian, *op. cit.*, p. 79. In fact, both Great Britain and the United States considered the reciprocity provisions of Art. 21 of the Treaty of May 8, 1871, relative to the Free Entry of Fish Products of Canada and the United States into the territory of the other, inapplicable to British Colombia after the admission of that Province into the Dominion of Canada. 5 Moore, Digest, p. 353.

³⁸ Péritsch, 28 *Acad. de Droit Int., Rec. des Cours*, p. 402.

³⁹ As to this, see Crandall, *op. cit.*, p. 432; 5 Moore, Digest, p. 355; Terlinden v. Ames, 184 U. S. 270; Flensburger Dampfercompagnie v. U. S., this JOURNAL, Vol. 26 (1932), p. 618 (U. S. Court of Claims); Rickmers Lederer Aktiengesellschaft v. U. S., 45 Fed. (2nd), p. 418; note by Borchard, this JOURNAL, Vol. 26 (1932), p. 582; and Liszt, *op. cit.*, p. 193.

claim for herself the benefits of any favors or concessions which those treaties granted to Austria but which have not been granted to Germany by any existing treaties with her.) It appears that upon the formation of the Empire in 1871, when Germany extended the Prussian Treaty of Commerce and Amity of May 1, 1828, with the United States to the territory of the whole Empire, she claimed the benefit of the most-favored-nation clause (Art. IX) of that treaty in behalf of German products, without regard to whether they were the produce of Prussia or of the other states of the Empire. The United States might very well have objected to this claim, and in fact the Attorney General (Olney) in 1896 gave an opinion in which he appears to have assumed that while the treaty was to be taken as "operative as respects so much of the German Empire as constituted the Kingdom of Prussia", it was "not to be taken as effective as regards other portions of the Empire."⁴⁰

✓ In fact a somewhat similar question has been raised between the United States and Germany by the annexation of Austria. By Article VII of the Treaty of Friendship, Commerce and Consular Rights between the United States and Austria, signed June 19, 1928, each of the parties binds itself unconditionally not to impose any higher duties or other restrictions on goods exported to the territory of the other than are imposed on goods exported to any other foreign country. The treaty of December 8, 1923, between the United States and Germany (Art. VII), contains an identical provision. But Germany in fact later adopted the policy of levying discriminating duties against goods imported from the United States, in consequence of which the Government of the United States put Germany on a "black list"; that is, German goods imported into the United States are not accorded the benefit of lower rates provided in reciprocal trade agreements between the United States and other countries. ✓ Austria, however, at the time of the annexation not having resorted to discriminating duties against goods imported from the United States, was in virtue of its treaty with the United States in full enjoyment of those benefits. Might Germany regard the Austro-American treaty as continuing in force notwithstanding the annexation, and therefore claim for goods exported from Austrian territory to the United States the benefit of the lower tariff rates which Austrian goods enjoyed prior to her annexation to Germany? If so, the produce of other German territories (Bavaria, for example) would need only to be shipped to the United States from Austrian territory in order to be entitled to the benefit of the lower rates. In this way the effect of the American "black list" of Germany might be largely avoided by the device of routing the goods via Austria.

The Government of the United States promptly answered this question in the negative and with entire legal justification, when on April 6 the President directed the Secretary of the Treasury that the lower tariff rates to

⁴⁰ 21 Op. Atty. Gen. 81, quoted by Crandall, *op. cit.*, p. 432, n. 25.

which Austrian goods have heretofore been entitled under the treaty of 1928 should no longer be applicable. In short, Austrian goods were put on the "black list" along with the produce of other German territory.⁴¹ (The principle of this decision is that when one state annexes another state whose juridical existence is thereby terminated, the annexing state cannot by its own unilateral decision continue in force the treaties of the extinct state with third states, for the purpose of enabling the annexing state to claim for itself the benefits of treaty arrangements between the annexed state and other states when it is not entitled to them under its own treaties with the latter states.)

(A somewhat different question has been raised by the annexation, regarding the status of the German and Austrian Concordats with the Vatican, both concluded in 1933. If both Concordats were identical or substantially so, as regards the rights and obligations which they create for the parties, the problem would be simple enough. In that case Germany would need only to treat the Austrian Concordat as terminated and replaced by the German Concordat, the application of which would be extended to Austrian territory. To this solution of the problem the Vatican presumably would have no ground for objection. But it happens that the Concordat with Austria is much more favorable to the Vatican as regards the rights and privileges which it concedes to the Roman Catholic Church than is the Concordat with Germany. If, therefore, the former is terminated and the latter extended to Austria it will mean the loss of important advantages which the Catholic Church has heretofore enjoyed in Austria and as to which the Vatican is said to be deeply concerned. In these circumstances, might the Vatican argue that Germany is bound to treat the Austrian Concordat as being still in force and to accord to the Catholic Church in Austrian territory the rights which Austria gave it?) This question is quite different from that raised in connection with the American commercial treaty with Austria discussed above, which was whether the annexing state is entitled to claim for itself rights and privileges conceded to the annexed state by a treaty between it and a third state. (The answer to that question was that Germany is not entitled without the consent of the United States to consider the treaty as being still in force and to claim rights and privileges under it. Our answer to the present question is that Germany would not be bound to take over the obligations in respect to the Catholic Church which Austria had assumed by its Concordat with the Vatican, and to execute them in the territory of Austria.) The Austrian Concordat clearly does not belong to the class of treaties the obligations of which run with the land. In the light of the doctrine and practice reviewed above it must be concluded that the obligations assumed by Austria under the Concordat are terminable by Germany at her will ✓

May Germany without the consent of the Vatican extend the German

⁴¹ Text of President's letter to Secretary of Treasury, New York Times, April 8, 1938.

Concordat to Austria? The conclusion was expressed in an earlier part of this note that an annexing state has no right to extend its treaties to the territory of an annexed state if the other parties to those treaties object to the extension. Assuming that the Vatican should refuse to give its consent to the extension of the German Concordat to Austrian territory, but that Germany nevertheless made the extension without its consent, the Vatican could do nothing but protest and the protest would probably be ineffectual. Germany might, even after having declared the Austrian Concordat terminated in consequence of the annexation, refuse to extend the German Concordat to Austrian territory, in which case the Catholic Church would have no treaty rights or privileges at all in Austria. It would therefore be in a worse situation than it would be if the German Concordat were extended to Austria. Germany undoubtedly has the right to refuse to extend the Concordat to Austrian territory just as she could have refused in the first instance to enter into a Concordat with the Vatican. (Whatever is done, the extinction of the Austrian state is likely to create an embarrassing situation for the Vatican. If the Austrian Concordat is terminated without being replaced by the German Concordat, the Catholic Church in Austria will, as stated above, be left without any concordat rights or privileges whatever. On the other hand, if the somewhat illiberal German Concordat is extended to Austria and its obligations there flouted by the Nazi Government as they have been in the rest of Germany, the situation will be hardly less favorable for the Vatican.

FOREIGN BONDHOLDINGS IN THE UNITED STATES

By J. REUBEN CLARK, JR.

*Of the Board of Editors **

The Foreign Bondholders Protective Council, Inc., has issued its fourth Annual Report for the year 1937 in a volume containing some 790 pages.

The Report shows that during 1937 the Council was concerned with twenty-six situations in twenty different countries involving 254 bond issues of an approximate face value of \$1,800,000,000. During the year two temporary adjustments were announced with Poland, two permanent adjustments with China, also permanent adjustments covering Uruguayan national and municipal bonds.

It appears from the Report that further discussions were had concerning the bonds of Colombia, Cuba, Mendoza, Cordoba (City), Brazil, Bolivia, Chile, Costa Rica, El Salvador, Carlsbad, Danzig, Ecuador, Germany, Guatemala, Hungary, Panama, Peru, Bolivia, and Yugoslavia.

The Report includes statistical tables covering the budgets and public debts of each country for a period of at least ten years and the foreign trade of each country with the world and with the United States for a like period. The tables give available figures on immigrant remittances to, and tourist expenditures in, the same countries.

Of the 42 countries having dollar bonds outstanding, 15 are making full service as to both interest and sinking fund payments, and 27 are in default. Two of these, Argentina and Canada, are making a full service on their national obligations but each has defaulted provincial and municipal bonds.

However, all dollar bonds having gold clauses are in default in that none, in so far as the Council is informed, is being served in gold or its equivalent, but rather in present day currency.

Of the \$5,557,600,752 dollar bonds outstanding at the end of 1937, \$2,203,819,360 were in default, or approximately 39.7%. Latin America, with 85.1% of its outstanding dollar bonds in default, leads the list.

Prior to the World War, America had done little in the way of long-term lending to foreign governments. Among the loans made, the following may be mentioned: In Theodore Roosevelt's time a refinancing operation (\$20,000,000) was carried out in the Dominican Republic under the supervision of the Department of State. This was a loan made *in extremis* to prevent both chaos in the Republic and threatened intervention and possible occupation of the Republic's territory by European Powers, with resulting potential complications under the Monroe Doctrine. This refinancing was entirely in dollar obligations. During this same period the Morgan firm made a loan (\$2,500,000) to Bolivia for railway developments; there were dollar loans

* Until recently Mr. Clark was President of the Foreign Bondholders Protective Council, Inc., and is now Chairman of its Executive Committee.

made to Cuba (\$51,500,000) by the Speyer firm to set up the Cuban Government and make it a going concern, as likewise for development purposes.

During the Taft Administration, Brown Brothers and Seligman made a small dollar loan (\$1,500,000) to Nicaragua, also made *in extremis*, for development purposes, the paying off of claims, and for governmental uses. Effort which failed was made by the Taft Administration to arrange a dollar loan for Liberia which was in dire need of help. This loan was later made by the Wilson Administration (\$2,250,000).

During the Roosevelt-Taft era Americans also began participating in what might be called multi-creditor loans, that is, loans to a government by the financial institutions of several countries, *e.g.*, England, France, Belgium, Holland, Switzerland, Germany, and others. These loans were practically always made in foreign currencies—sterling, franc, guilder, Swiss franc, mark, etc. In some cases an actual *tranche* of such loans was assigned to the participating American institutions, but in others there was merely a turning over of bonds to the American participant to be marketed by him in America. Operations of this sort were, during this era, carried on in connection with Mexican refinancing and conversion, and particularly with China where the American interest was taken as the result of the urgent desire of the Department of State which wished, for China's protection, a position and voice in any operations which foreign Powers might later take for the protection of their financial interests. Then there were also about this time some dollar loans (\$72,500,000) made both in Mexico and China that were for industrial and railway purposes but with government guarantees. The total of all this pre-War financing was somewhere about \$150,250,000.

This was roughly the situation when the World War broke. The financing of the Allies then rapidly developed and America became bond-conscious in the field of international finance.

During the War period the Allies borrowed from the American public approximately \$2,707,283,000 and they and other Governments borrowed from the Government of the United States some \$10,350,479,000. Thus the total foreign long-term obligations held in the United States at the end of the War period, including the \$150,250,000 of pre-War loans, was *approximately* \$13,208,012,000.

The Allied and inter-governmental debts went into default almost immediately after the War. Adjustments of the original obligations were made under the Congressional authorization of February 9, 1922. These adjustments were greatly to the advantage of the debtors. But new defaults came almost at once on the adjusted debt. This great debt remains still in default, with the honorable exception of Finland which has made full service, and Greece which has made partial service. This fact of default has had more to do with defaults on privately-owned long-term obligations than any other one factor, including the world-wide depression. This matter will be again referred to.

In the post-War period (1919-1930), foreign governments made increasingly large borrowings here by selling their bonds to the public. The following figures are approximately accurate:

1919.. \$	391,787,400	1923.. \$	420,597,350	1927.. \$	1,336,760,260
1920..	497,437,986	1924..	969,224,437	1928..	1,250,951,267
1921..	623,307,880	1925..	1,076,466,150	1929..	671,230,806
1922..	763,626,984	1926..	1,125,481,182	1930..	905,333,214
					Total \$10,032,204,916

Of this huge sum, approximately \$2,403,800,015 went to Latin America; \$2,287,779,361 to Canada; \$4,141,684,220 to Europe; \$859,245,380 to the Far East; and \$339,695,940 to other countries outside the foregoing classifications.

Approximately one-third of the total sum outstanding in 1934, as given above, went into default in 1931-1932 as follows:

In Latin America.....	\$1,524,302,400
In Europe	1,263,223,300
In Asia	5,500,000
In Canada	137,396,900

Appreciating that there was in America no organization charged with protecting the interests of the holders of these great sums of privately owned defaulted bonds (every considerable foreign bondholding country in Europe has a bondholders' protective association), President Hoover's Administration sought to set up an American organization for that purpose. The Administration went out of office, however, before the organization could be made. When the Securities Act was passed, it contained provisions (Title II) for the establishment of a governmental organization to look after defaulted bondholders' interests. President Roosevelt's Administration decided (wisely, as it is believed) not to set up the body provided for in Title II, but instead to set up a private corporate entity similar to the Council of Foreign Bondholders of Great Britain, and other European bondholders' associations. To this end, invitations were issued (in the Fall of 1933) by Secretaries Hull and Woodin, and Chairman March of the Federal Trade Commission, to a number of gentlemen who were asked to organize such a corporate body. The result was that on December 18, 1933, the Foreign Bondholders Protective Council, Inc., was incorporated under the laws of Maryland as a non-stock, non-profit organization. It is not organized for, and may not under its certificate of incorporation engage in, any business or undertaking for the pecuniary profit of its members, and no funds or property of the corporation may be paid or transferred to its members by way of any dividend distribution or otherwise, except as compensation for services rendered, expenditures incurred, and as interest for advances made. In case of dissolution of the corporation, its assets are to be applied first to the discharge of its liabilities, the balance of its assets thereafter remaining are to

be devoted to the object and purpose for which the corporation is organized. In keeping with the character of the Council as a non-profit semi-public organization, the Executive Committee and Board of Directors, as also the officers and others serving on standing committees (with the exceptions noted below) serve without compensation, though reimbursement may be made of expenses incurred by directors and members of the Executive Committee in attending meetings of the Board, or of any committee thereof, or in connection with the business and affairs of the corporation. The President, the Chairman of the Executive Committee, one Vice-President, the Secretary and Assistant Treasurer (one person), and the Assistant Secretary, receive salaries fixed at moderate sums. But no separate or additional compensation shall be paid to any officer on account of his services in connection with negotiations on defaulted bonds, except actual expenses. The other officers do not receive any compensations.

The best available information indicates, as already stated, that in December 1933, there were outstanding \$8,193,000,000 of bonds issued and publicly offered to American investors by central governments, their states, provinces, and municipalities (plus a few industrial issues governmentally guaranteed). These are usually spoken of as our privately held long-term obligations. Of the foregoing amount, there was (as already stated) still outstanding on January 1, 1938, \$5,557,600,752.

This vast sum does not include the \$12,493,087,660 owed as of January 31, 1938 to the Government by the debtor allies and other governments; nor does it include a sum—running into some more billions of dollars (estimated as of December 31, 1936, at about \$6,700,000,000)—invested by American companies and institutions (and in the last analysis, through stock ownership in such companies and institutions, by the investing American public) in the mining, timber, agricultural, ranching, railroad, telegraph, telephone, electric light and power, manufacturing, and other industries in foreign countries.

Of the publicly offered and privately held long-term obligations totaling \$8,193,000,000 as stated above, approximately \$2,930,000,000 of bonds were in default when the Council was formed in December 1933.

The problems then facing the Council were almost wholly novel in so far as American experience went. No American organization of this kind had ever before carried on this sort of work. Furthermore, in certain respects these problems were novel so far as world experience went. For example: In European countries foreign bondholdings are in the main in the hands of relatively few persons and institutions, who live within a relatively small area, and are rather easily accessible to the bondholders' associations when representations become necessary. In America the bonds are widely spread among the great American bond-buying public (it has been estimated that the average bondholding is but \$3,000—the bonds in actual default in December 1933 being held by some 600,000 persons), and these bondholders are scattered from Maine to California, from the Dakotas to Texas, as also in

many foreign countries in Europe, Asia, Australasia, and Africa, so making any effective coöperation among the dollar bondholders almost impossible as a practical matter.

In another respect the situation in Europe is different from that in America. There large groups of holders of long-term obligations are more or less identical, actually or in business association, with those who own the short-term obligations and the current commercial credits. These three groups of credits are thus able to work harmoniously to get the utmost possible return from the foreign government, now on one kind of obligation, now on another. In America, these three kinds of creditors are not only not identical but frequently they are at more or less open warfare among themselves to secure the available exchange—a situation that frequently operates against all these warring American foreign investments and in favor of like investments by the nationals of other countries.

A third respect in which the situation of the European bondholders' associations differs from that of the Council is found in the fact that since the War the European countries have abandoned the international principle of conduct obtaining among nations before the War—namely, that governments would not normally interpose, even their good offices, in behalf of their nationals holding foreign government bonds, so that, in violation of that principle, they now not only make representations upon behalf of such interests, but even impose coercive measures—such as compulsory clearings—against debtor governments to compel the adequate service by these debtors of their long-term obligations held by the nationals of the coercing state.

The American Government still adheres to the old rule, though rendering to the Council within that rule, the maximum assistance it considers proper.

Thus, because of the lack of American experience, the novel problems presented, and the handicaps upon its operations as compared with similar European associations, the Council not only has been obliged to move forward slowly, but not always have its efforts been attended with that success which the European coercive policy would have brought to it.

The record of its four and one-half years of operation may be stated, in summary, as follows:

Temporary Plans covering service (interest and, in some instances, amortization) upon:

- \$1,000,000,000 Germany—two negotiations
- 350,000,000 Brazil
- 10,500,000 Costa Rica
- *126,000,000 Poland—two negotiations
- 50,000,000 Hungary—non-State bonds
- 8,000,000 Haiti
- 30,000,000 Yugoslavia

* Both temporary and permanent adjustments have been made on Polish bonds.

Permanent Plans of service (interest and amortization) upon:

\$	16,000,000	Dominican Republic
	70,000,000	Province of Buenos Aires
	11,000,000	China—Hukuang and Treasury Notes
	58,500,000	Uruguay and Montevideo
	4,300,000	Mendoza
	40,000,000	Cuba
	*72,632,000	Poland

Recurring to the effect on all long-term obligations, of the default on the inter-allied debt, the following further observations may be made:

The Council has had almost no negotiations with any defaulting debtor in which sooner or later reference has not been made to the inter-allied default and, in connection with the reference, the argument advanced, either openly or covertly, that if these big debtors—the great Powers—do not pay, why should any one else.

With these defaulters, it has been this lack of will to pay, as they themselves have thus made clear, rather than the lack of ability to pay which has led to default. This is shown by the fact that, almost without exception, defaulting debtors plead insufficient dollar exchange to serve their bonds, either partially or in full, yet many of these very debtors have been able to find dollar exchange to purchase their own bonds—sometimes in large proportionate amounts—in the American market at the very low prices to which their own wilful default has forced the price of their bonds.

Again it is known that in some cases where rigid exchange control has been exercised in a foreign country, and lack of dollar exchange has been pleaded as the reason for not serving their dollar long-term obligations, nevertheless permission has been granted by that country to its provincial or municipal debtors to use dollar exchange for the very purpose of buying up their defaulted bonds on the American market.

In other cases also, it is credibly reported that the defaulting debtors themselves have, continuously over extended periods, speculated in our market on their own bonds, buying at low prices, selling when the bonds went higher, rebuying at low prices, and reselling at higher prices, to their considerable enrichment, notwithstanding they were pleading poverty in dollar exchange.

In still other cases, the nationals of the defaulting debtors, instead of the debtor himself, have been able to find dollar exchange—though the debtor himself pleaded no dollar exchange available for debt service—to buy quantities of the defaulted bonds of his country.

Still another variation of these bootlegging operations is this:

Responsible sources affirm that defaulting governments have not only repatriated their bonds at defaulted prices, but that, having so secured their bonds, they then by market manipulations secure a favorable moment to re-

* Both temporary and permanent adjustments have been made on Polish bonds.

sell these same bonds at advanced prices to the American public, even where (it is said) the bonds have been stamped to show their repatriation, the stamp being eradicated before resale.

The Council is understood to feel sure it is not yet fully advised of the total permutations, combinations, and peregrinations used by defaulting debtors to retire their bonds at prices resulting from defaults that too often seem wilful, if not planned.

It may be roughly estimated that this repatriation of bonds largely at defaulted prices, has, since 1931 (the year of the bulk of the defaults), amounted to as much as \$3,275,000,000. Of course, a considerable part of this immense sum is accounted for by the due operation of the amortization clauses of the bonds being regularly served.

These practises shout so loudly on their own account, that they need no other characterization.

There are certain misconceptions (some already referred to) about our long-term foreign obligation holdings that should be corrected, among which the following (among the more important) may be mentioned:

Foreign dollar bonds issued in this country are not primarily held by "Wall Street," which, in fact, owns relatively very few; these foreign bonds are held by hundreds of thousands of people (which may well run up into millions of people) of moderate circumstances;

These bonds have not been purchased from illicit profits or surplus funds which have been illicitly extorted from the people. The funds are not what used to be called "tainted moneys." They have been largely purchased by the scanty savings of great multitudes of people who invested in these bonds the money which, during a lifetime of toil, they had saved against the meagre days of declining years; and, next, they have been purchased in considerable amounts from trust funds in the hands of charitable, religious, and educational institutions, dependent, to a greater or less extent, upon the income of these bonds for their existence.

The funds used to purchase these obligations were not idle moneys having no direct connection with our national economic life; they were not funds that, if lost, would not appreciably affect the financial and commercial welfare of the country. On the contrary, these funds were and are a large and intimate part of our working national wealth, and are just as valuable and important to our national economic welfare as if they had been used in any other international trading undertaking, financial or commercial, in which our citizens might engage. If these bond obligations are not paid, just that much of our national wealth is lost.

The idea that a debtor may disregard or ignore without vigorous complaint or rebuke, one sort of debt just because it is that sort of debt, and without being called officially to book for his delinquency, and yet that, in spite of these facts, this same debtor may be confidently relied upon to pay his other debts of all sorts without default, is not sound in any view. The fact is that such default (sometimes amounting to virtual repudiation) of

one debt inevitably leads to the same attitude and action upon other debts, to the consequent destruction not only of all confidence, but of all safety, in every sort of international financial operation. Nor does the evil stop there, for promise-repudiation is an easily acquired habit, and the principle "false in one, false in all" soon finds its full expression and operation in the whole gamut of international relations.

Thus the foreign long-term investments of the United States merit fullest consideration from our statesmen, because the future economic welfare of our people depends in great part upon what we can invest, or sell, and it is impossible to continue selling unless we can realize on the investment and currently collect the selling price.

No accurate reliable figures are available as to the situation of our short-term credits outstanding at the beginning of 1934, but they are believed to be well on now to complete liquidation; so it is with our frozen commercial credits of that date; and, so far as is known, our current commercial credits are not now generally in straits, though some are reported to be in trouble.

As to our long-term credits (the other great credit item in our international finances), as already indicated, these are of two sorts: (1) Foreign dollar bonds privately held, which the Council has undertaken to represent, and (2) the inter-allied and other inter-governmental debts which the Government owns and controls in representation of the taxpayers, and with which the Council has nothing to do. The situation as to these credits during the last four years is as follows:

	Privately issued and owned	Inter-allied and Inter-governmental debt (funded)
Bonds outstanding Jan. 1, 1934....	\$8,193,000,000	\$11,704,487,483.44
Bonds in default Jan. 1, 1934.....	2,930,000,000	11,695,487,463.44
Interest payments on defaulted and non-defaulted bonds since Jan. 1 1934, to Dec. 31, 1937, incl.....	940,176,693 ^a	1,666,266.00 ^b

^a Includes Canada for which actual payments for 1936 and 1937 total \$199,365,505, and estimated payments for 1934 and 1935 total \$206,000,000.

^b Made up of \$1,166,000 paid by Finland, which was full service, and \$501,266 paid by Greece, which was partial service. (Hungary deposited nearly \$10,000 worth of pengoes on December 15, 1937.)

TWELVE CASEBOOKS ON INTERNATIONAL LAW

BY MANLEY O. HUDSON

Twelve casebooks on international law have been published in the United States, England and Canada¹ during a period of slightly more than fifty years, and six of them have appeared during the last ten years.

Pitt Cobbett led the procession in 1885 with a work which has passed through several revisions² and has not yet lost its usefulness. Stirred by a "tendency on the part of English lawyers to regard that body of custom and convention which is known as International Law as fanciful and unreal," Pitt Cobbett sought to emphasize that "a very large portion of International Law rests on authority as trustworthy as that which commands the homage of the English lawyer";³ to this end he prepared "a selection of illustrative cases which may serve as a useful companion volume to existing text-books."⁴ The first American casebook was published by Freeman Snow in 1893,⁵ under the inspiration of "the 'case system' introduced into the Harvard Law School a score of years ago by Professor Langdell."⁶ Dr. James Brown Scott had intended his casebook, published in 1902,⁷ to be a revision of Snow's *Cases and Opinions*, but it was issued "as an independent work";⁸ with a new

¹ Analogous publications do not exist in languages other than English. In the preface to his *Cases on International Law* (1922), p. xvi, Dr. James Brown Scott invited "our friends in other countries" to "prepare collections of cases of an international character," but apparently the invitation has brought no response except from Professors MacKenzie and Laing.

² Pitt Cobbett, *Leading Cases and Opinions on International Law, Collected and Digested from English and Foreign Reports, Official Documents, Parliamentary Papers, and Other Sources, With Notes and Excursus, Containing the Views of the Text-Writers on the Topics Referred to, together with Supplementary Cases, Treaties, and Statutes*, London: Stevens and Haynes, 1885, pp. xxi, 280; 2nd ed., 1892, pp. xxiv, 385; 3rd ed.—*Cases and Opinions on International Law, and Various Points of English Law Connected Therewith, Collected and Digested from English and Foreign Reports, Official Documents, and Other Sources, With Notes Containing the Views of the Text-Writers on the Topics Referred to, Supplementary Cases, Treaties, and Statutes*, in two volumes: I, 1909, pp. xxiv, 385; II, 1913, pp. xxxii, 547; 4th ed. by Hugh H. L. Bellot, *Leading Cases on International Law with Notes Containing the Views of the Text-Writers on the Topics Referred to, Supplementary Cases, Treaties, and Statutes*, London: Sweet & Maxwell, in two volumes: I, 1922, pp. xxiv, 374; II, 1924, pp. xxxvii, 690; 5th ed. by Francis Temple Grey, *Cases on International Law*, in two volumes: I, 1931, pp. xx, 372; II, 1937, pp. xxxix, 398.

³ Preface, p. v.

⁴ *Ibid.*, p. vi.

⁵ Freeman Snow, *Cases and Opinions on International Law with Notes and a Syllabus*. Boston: Boston Book Company, 1893. pp. xl, 586.

⁶ Preface, p. iii. Langdell's first casebook, which was on Contracts, was published in 1870.

⁷ James Brown Scott, *Cases on International Law Selected from Decisions of English and American Courts, with Syllabus and Annotations*, Boston: Boston Book Company, 1902. pp. lxvii, 961; 2nd printing, St. Paul: West Publishing Company, 1906.

⁸ Preface, p. v.

edition in 1922,⁹ it held the field in North America for more than twenty-five years, and its influence can be seen in all of the subsequent collections. The "idea underlying this volume" was "that international law is part of the English common law; that as such it passed with the English colonists to America; that when, in consequence of a successful rebellion, they were admitted to the family of nations, the new republic recognized international law as completely as international law recognized the new republic."¹⁰ Aside from any possible question of its historical accuracy, the statement raises a very controversial problem as to the relation between international law and national law, which has a distinct bearing on the evaluation to be placed on decisions of national courts on topics of international law. In 1913 Norman Bentwich published a modest collection of some 69 cases, chiefly British cases.¹¹ The two-volume collection published by Stowell and Munro in 1916¹² was more comprehensive than any of those which preceded it, and it is to be regretted that it has not had wider use. In 1917 Evans published a small collection, enlarged in a second edition in 1922 to include "148 cases, of which 83 were decided in British courts and 65 in American courts."¹³

The war of 1914-1918 and the developments of the decade which followed its close, brought many changes of emphasis into the work of students of international law, and these changes have been reflected in the casebooks published during the past decade. Both Dickinson's¹⁴ and Hudson's¹⁵ collections of cases appeared in 1929. The former was given an enthusiastic reception and the frequency with which it has been cited is an indication of its general merit. Six years later, in 1935, a collection by Professor Fenwick of Bryn Mawr College was published.¹⁶ In 1937, Professors Scott and

⁹ Scott, *Cases on International Law Principally Selected from Decisions of English and American Courts*. St. Paul: West Publishing Company, 1922. pp. xxxvi, 1196. The 1922 collection was not stated to be a second edition of the earlier work, but it is now so denominated in the preface to the Cases by Scott and Jaeger, p. v. However, the volume of Scott and Jaeger's Cases before the writer is indicated in the back-title as a "Second Edition." [This denotation is erroneous and has since been corrected by the publishers.—Ed.]

¹⁰ Preface to the 1902 volume, p. v. This statement was repeated in 1922, preface, p. xi.

¹¹ Norman Bentwich, *Students' Leading Cases and Statutes on International Law*, with Notes. London: Sweet and Maxwell, 1913. pp. xix, 247.

¹² Ellery C. Stowell and Henry F. Munro, *International Cases, Arbitrations and Incidents Illustrative of International Law as Practised by Independent States*. Boston, New York, Chicago: Houghton Mifflin Company, 1916. In two volumes: I, pp. xxxvi, 496; II, pp. xvii, 662.

¹³ Lawrence B. Evans, *Leading Cases on International Law*. Chicago: Callaghan and Company, 1917. pp. xix, 477; 2nd ed., 1922, pp. xxv, 852.

¹⁴ Edwin DeWitt Dickinson, *A Selection of Cases and Other Readings on the Law of Nations, Chiefly as It Is Interpreted and Applied by British and American Courts*. New York: McGraw Book Company, 1929. pp. xxii, 1133.

¹⁵ Manley O. Hudson, *Cases and Other Materials on International Law*. St. Paul: West Publishing Company, 1929, pp. xxxv, 1538; 2nd ed., 1936, pp. xl, 1440; 2nd ed., Shorter Selection, 1937, pp. xxxix, 622.

¹⁶ Charles G. Fenwick, *Cases on International Law*. Chicago: Callaghan and Company 1935. pp. xxiii, 815.

Jaeger of Georgetown University published a new collection, quite different from the earlier works of Dr. Scott.¹⁷ The series is completed, up to the present time, by the publication in 1938 of two casebooks: one by Professor Briggs of Cornell University,¹⁸ the other a special collection on *Canada and the Law of Nations* by Professor MacKenzie of the University of Toronto and Professor Laing of the College of William and Mary.¹⁹

This galaxy has not only lightened the task of teachers and students of international law; it has also furnished the legal practitioner with valuable aids for investigating problems in the field.²⁰ For the basic materials of international law are not assembled in any system of reports or of statutes; they are scattered among a variety of sources, and few are the digests to which an investigator may turn for his leads.²¹ Most, if not all, of the twelve collections therefore deserve a place in any well-equipped law library.

The recent additions to the series tempt one to undertake an appraisal of both the purposes of the editors and the methods which they have followed. All of the twelve collections are primarily intended for the teaching of students. Yet no casebook will teach itself. Every live teacher must be engaged in a constant assembling of his own "apparatus," and hence he will seldom be wholly content with a collation prepared by another; moreover, affections cluster around familiar standby cases, and each new casebook brings a chorus of groans evoked by its omissions. Even when libraries are available to teachers, however, the number of casebooks will be limited by the cost of publication. The satisfactoriness of a collection will also depend upon the advancement of the students who are to use it, and upon the intellectual equipment with which they approach international law. Advanced law students may need a casebook which is not adapted for third- or fourth-year

¹⁷ James Brown Scott and Walter H. E. Jaeger, *Cases on International Law*. St. Paul: West Publishing Company, 1937, pp. lxi, 1062. Dr. Scott is also Director of the Division of International Law of the Carnegie Endowment for International Peace.

¹⁸ Herbert W. Briggs, *The Law of Nations: Cases, Documents, and Notes*. New York: F. S. Crofts and Company, 1938. pp. xxix, 984.

¹⁹ Norman MacKenzie and Lionel H. Laing, *Canada and the Law of Nations. A Selection of Cases in International Law, affecting Canada or Canadians, decided by Canadian Courts, by Certain of the Higher Courts in the United States and Great Britain and by International Tribunals*. Foreword by the Rt. Hon. Sir Robert Borden. Introduction by James Brown Scott. Toronto: Ryerson Press; New Haven: Yale University Press, 1938. pp. xxvii, 567.

²⁰ See Lester H. Woolsey, in this *JOURNAL*, Vol. 24 (1930), p. 834.

²¹ The principal digests are: John Bassett Moore, *A Digest of International Law as Embodied in Diplomatic Discussions, Treaties and Other International Agreements, International Awards, The Decisions of Municipal Courts, and The Writings of Jurists, and Especially in Documents, Published and Unpublished, Issued by Presidents and Secretaries of State of the United States, The Opinions of the Attorneys-General, and The Decisions of Courts, Federal and State*, 8 vols., 1906; *Annual Digest of Public International Law Cases*, 5 vols., covering the years 1919-1930; and *Fontes Juris Gentium*, Ser. A, Sec. 1, Vols. 1, 2, 3, Sec. 2, Vol. 1, and Ser. B, Sec. 1, Vol. 1. A continuation of Moore's Digest is now being prepared under the direction of Green H. Hackworth, Legal Adviser to the Department of State.

students in an American college; yet the one group as well as the other must command a store of information concerning the basic facts underlying the political system in which international law is applied. Without a considerable knowledge of the state system, of the communities which compose it and of those which are outside or on the periphery of its orbit, a student will find it difficult to think of international legal relations in concrete terms; nor has he the basis for estimating the sway of international law without a knowledge of the international organization of the past three quarters of a century. In material on both of these points—on the nature of the state system and the extent of international organization—none of the more recent casebooks is altogether satisfactory.

While there is some variety in the collections as to the subjects covered, all of them are chiefly concerned with public international law. The line between public and private international law is difficult to draw, however, and each of the collections includes material on private international law, and some of them material on constitutional law. Dickinson pointed out this threefold character of his collection.²² To some extent, questions of national maritime law are covered also, and in spite of its confusion of ideas, *The Scotia*²³ remains a favorite of most of the editors. Earlier casebooks generally consisted of two parts: I, *Peace*, and II, *War*, or *War and Neutrality*; in some of them the greater space was given to the second part. Of the more recent collections, Dickinson's goes furthest in omitting the latter topic entirely. Fenwick devotes three chapters to "Procedure by War"; Scott and Jaeger deal with war and neutrality under the strange title of "Procedural Law," which is the more misleading because the same title is made to cover claims and procedure in international tribunals. All the twelve casebooks cover the subject of nationality, a subject which in Europe is usually excluded from public international law. Some of the more recent casebooks devote a good deal of space to international claims. On the pacific settlement of disputes, including the role of the Permanent Court of International Justice, Fenwick's material is sparse; Briggs' chapter is more adequate, but the treatment by Scott and Jaeger leaves much to be desired; while MacKenzie and Laing omit all reference to the subject. Fenwick and MacKenzie and Laing seem to ignore the Covenant of the League of Nations and the Treaty for the Renunciation of War, and Scott and Jaeger are not more useful, though they include the text of the Covenant in an appendix; Briggs devotes much attention to both instruments.

This raises a big question as to the nature of the materials to which a student may best devote his time. In recent American casebooks on private law, there has been a pronounced tendency to place before students not only court decisions but also statutes and various other kinds of materials.²⁴ In

²² Preface, p. v.

²³ 14 Wallace 170 (1872).

²⁴ See, for example, Chafee and Simpson, *Cases on Equity*, 2 vols. (1934); Jacobs, *Cases and Other Materials on Domestic Relations* (1933).

international law, this course seems even more essential, in view of the difficulty experienced by experts as well as by students in finding relevant materials. The role of courts in international law is by no means as significant as it is in national law, and legislation is quite as important in the former as in the latter. Just as the attitude of many law teachers toward statutes was formerly one of disdain, international legislation was all but ignored by treatise-writers as late as a generation ago. The existence today of literally hundreds of international legislative instruments²⁵ cannot be neglected by anyone whose law is related to actuality. Acts of international congresses, reports of international commissions, and diplomatic correspondence must also find a place in any scheme of study of international law, as well as the unofficial formulations by such bodies as the *Institut de Droit International*. What would Moore's *Digest* have been if it had been confined to cases decided by courts? Valuable as the case system may be, an editor ought to recognize the limitations on its use in international law, a field in which some of the most interesting problems never come before courts, national or international. All of this was appreciated by Pitt Cobbett, who used the word *case* "in its widest sense," without "limiting it to disputes that have been the subject of forensic litigation";²⁶ and both he and Snow were careful to entitle their works *Cases and Opinions*. The work of Stowell and Munro made frequent use of extracts from diplomatic documents. This makes it the more difficult to understand why Fenwick, Scott and Jaeger, MacKenzie and Laing should have confined themselves largely, if not wholly, to the output of tribunals, to the neglect of both national and international legislation. A student using their collections may not only fail to be aware of the existence of essential international instruments, but he may also remain ignorant of where to find them. Briggs, on the other hand, has brought his collection into closer touch with the prevailing law, as may be seen by a glance at his interesting "Table of Documents."²⁷ Many are the exciting current problems in which none of the more recent works is calculated to arouse a student's interest; for example, problems as to the acquisition of territory in Arctic and Antarctic regions.

In the selection of decisions of tribunals, the editor of a casebook has the problem of deciding which are the tribunals from whose jurisprudence decisions are to be taken. It would seem that preference would naturally be given to international tribunals. Yet the decisions of such tribunals are not too numerous, frequently they are not collected into convenient series, questions of language arise, and many of the decisions are too long to be conveniently reproduced. The inclusion of important decisions of national courts seems desirable, on the assumption always that students will be warned that at best they can reflect but national views of international law; the Conference of American Teachers of International Law, which met at Wash-

²⁵ The texts of more than 500 multipartite instruments, from 1919 to 1934, are reproduced in the six volumes of Hudson's *International Legislation*.

²⁶ Preface to first edition, p. vii.

²⁷ On p. xxvii.

ington in 1914, expressed a timely admonition that "in a general course on international law the experience of no one country should be allowed to assume a consequence out of proportion to the strictly international principles it may illustrate."²⁸ Difficulties of translation arise in the use of decisions of the national courts of any considerable number of countries;²⁹ great libraries are needed; and until the appearance of the *Annual Digest of Public International Law Cases*, which began with the year 1919, no guide to such decisions was available.

The twelve casebooks published in America, England and Canada naturally emphasize decisions of American and British courts; several of them were expressly limited, or chiefly limited, to such decisions. To some extent, the same cases have tended to appear in all the American casebooks of subsequent date,³⁰ except in that of Scott and Jaeger. Dickinson included some 25 international cases, and a few cases selected from national tribunals outside of American and English jurisdictions. About a third of the cases in Hudson's second edition are decisions of international tribunals, and a number of decisions of tribunals in twelve non-English-speaking countries are included, for some of which use was made of the summaries in the *Annual Digest*. Fenwick includes about 30 international cases, and only a few cases from non-English-speaking jurisdictions. With Briggs, "decisions of international tribunals . . . were preferred to decisions by national courts";³¹ he includes 46 international cases, as well as national cases, from French, German and Swiss courts. MacKenzie and Laing, whose purpose was somewhat special, limited themselves chiefly to American, Canadian and British decisions, with less than ten international cases.

The greatest departure in this connection is made by Scott and Jaeger, whose preface states that "the American cases constitute slightly less than twenty per cent of this collection, the cases of arbitration somewhat over twenty per cent and the balance . . . are decisions of municipal courts of [some sixty] foreign nations"³² (British decisions being placed in this last category). To this is added a somewhat questionable statement that "courts of justice, wherever found, are frequently called upon to apply and enforce international law";³³ and in their design of an "international" casebook of international law,³⁴ no distinction seems to have been drawn by the editors between decisions of international and national tribunals. Such an attitude may lead to serious difficulties. For example, the vague rule of "liberal" construction of treaty provisions followed by the Supreme Court of the United States³⁵ may be useless if not improper for application by an international

²⁸ Proceedings of the Conference of American Teachers of International Law, 1914, p. 71.

²⁹ A few cases in French were reproduced in the Snow, and MacKenzie and Laing casebooks, without translation.

³⁰ See Lawrence Preuss, in this JOURNAL, Vol. 30 (1936), p. 345.

³¹ Preface, p. v.

³² *Ibid.*, p. v.

³³ *Ibid.*, p. vi.

³⁴ *Ibid.*, p. v.

³⁵ *E.g.*, in *Nielsen v. Johnson*, 279 U.S. 47 (1929).

tribunal; even in interstate cases the Supreme Court of the United States has applied a *mélange* of "federal law, state law, and international law, as the exigencies of the particular case may demand,"³⁶ and usually with slight indication as to which is conceived to be which. Scott and Jaeger made full use of the *Annual Digest* in their reproduction of decisions not handed down in the English language; and the result is more of an "international mosaic"³⁷ than any other work in the series. Their generous use of such cases—it is strange that in connection with international law they should be called "foreign"³⁸ cases—may be puzzling to a student unfamiliar with the positions of the particular courts in their national judicial hierarchies, as, for example, in the seven cases on pp. 422–427, selected from the Civil Tribunal of Saint Malo, the Court of Lucca, the Tribunal of Marseille, the District Court of Dordrecht, the Court of Ghent, the Civil Tribunal of Florence, and the Tribunal of Commerce of Ilfov; but this difficulty is in part offset by the table of "national courts."³⁹

In the presentation of reported cases, Pitt Cobbett's style of presenting merely summaries of facts and decisions has not been followed in any of the recent casebooks, except where dependence has been placed upon the summaries in the *Annual Digest*. Unfortunately Scott and Jaeger note some of their cases as decided in the Permanent Court of Arbitration, with no indication to the student of the *ad hoc* character of tribunals formed out of that panel. A tendency is notable, however, to return to Pitt Cobbett's example in the presentation of elaborate editorial notes relating to topics,⁴⁰ in addition to notes relating to cases. Snow's *Cases and Opinions* included headnotes, some footnotes, and a Syllabus which was intended to "make available the opinions of a number of the most eminent writers, of different countries, by grouping references to their works under specific heads";⁴¹ this last feature, continued by Scott in 1902, was dropped in 1922. Evans' second edition included numerous editor's notes. Dickinson's footnotes were admittedly employed "for annotation exclusively."⁴² Fenwick included some introductory notes, as well as notes of supplementary cases. Briggs has included a large number of editor's notes, excellent in form and substance, containing valuable bibliographical aids, in which he has made abundant use—and to good effect—of the materials published by the Research in International Law under the auspices of the Faculty of the Harvard Law School. Scott and Jaeger have concluded each chapter with problem notes, devoting each of numerous paragraphs to the statement of cited cases, and ending with some such question as, "How did the court decide?" Beyond brief headnotes, MacKenzie and

³⁶ Fuller, C. J., in *Kansas v. Colorado*, 185 U.S. 125, 147 (1902). See also *Connecticut v. Massachusetts*, 282 U.S. 660, 670 (1931).

³⁷ Scott, in Introduction to MacKenzie and Laing, *Cases*, p. x.

³⁸ Preface, p. vi.

³⁹ On p. lviii.

⁴⁰ The *excursus* given by Pitt Cobbett in his first edition was merely an extended editor's note.

⁴¹ Preface, p. iv.

⁴² *Ibid.*, p. vi.

Laing have not attempted to furnish to students many guides beyond the cases themselves; they even omit citations of statutes in some places where they would seem to be imperative.

The maintenance of a certain symmetry, to justify the amount of space given to each particular topic, is one of the chief problems of the casebook editor. Fenwick devoted but ten pages to recognition, while Scott and Jaeger gave the topic almost thirty, and Briggs more than fifty. Briggs, and Scott and Jaeger devoted about eighty pages to the law of treaties, while Fenwick gave it barely more than half as much space. Briggs and Fenwick gave about forty pages to diplomats and consuls, while Scott and Jaeger deal with these topics more summarily in a chapter on "Immunity from Jurisdiction." Fenwick reports a single case, *In re Ross*,⁴³ on extraterritorial consular jurisdiction, but without indication as to the extent to which such jurisdiction now exists; Briggs' treatment of the topic is similar, and in this instance his note is not sufficiently informing; Scott and Jaeger seem to ignore the topic almost completely. On extradition, Briggs includes one case, Fenwick six cases, Scott and Jaeger nine, and MacKenzie and Laing nineteen ("an embarrassing wealth of material"⁴⁴ exists on this subject in the Canadian reports). None of the more recent American casebooks attempt to outline in detail the United States procedure in extradition. The subject of international claims, admirably developed by Briggs (140 pages), is treated somewhat incidentally by Fenwick (20 pages) in a chapter on "Jurisdiction over Persons: Aliens"; it is dealt with by Scott and Jaeger (in 88 pages) under "Settlement of Disputes in Time of Peace," almost entirely in international cases; but it is almost ignored by MacKenzie and Laing. The status of Indians, to which MacKenzie and Laing devote five cases (40 pages), is omitted by Fenwick, and treated summarily by Briggs and by Scott and Jaeger. Briggs devotes some 135 pages to neutrality (with useful editor's notes), Scott and Jaeger 120 pages, Fenwick 60 pages, and MacKenzie and Laing 25 pages.

The four volumes published since 1935 are characterized by such differences of approach that any comparative estimate of their value may prove to be misleading. Fenwick's casebook possesses some merits for the introductory work of college students, and its physical presentation (superior to that of any other casebook in the series) enhances its usefulness; but the omission of materials other than judicial decisions seems to the writer to be a serious defect. Briggs' work should prove extremely useful to college students, both because of the variety of materials presented and the editorial notes—in a sense it is a teacher's rather than a student's book. The Scott and Jaeger volume has value both for law school and college courses, and it should prove useful to practitioners because of its introduction of many interesting cases not found in other casebooks; but the editors' statement that "it is essentially *the law* with which the present volume is concerned"⁴⁵

⁴³ 140 U.S. 453 (1891).

⁴⁴ Preface to MacKenzie and Laing, p. xii.

⁴⁵ Preface, p. vi. The italics are the writer's.

fails of realization because of the omission of materials other than decided cases.

The work of MacKenzie and Laing is in a somewhat different category from the others. It is not clear why students of international law in Canada should need a casebook so radically different from those used by students in other English-speaking lands, and it is assuring to know that this collection is not intended "to take the place of standard collections at present in use."⁴⁶ The editors have done a job which is useful both to scholars and to practitioners in their presentation of so many little-known Canadian cases. In fact, the extent of the materials found in the Canadian reports will be surprising to many people, and it may have surprised Professor MacKenzie himself.⁴⁷ Yet it may be thought something of an overstatement to say that the editors were "traversing an uncharted route without any guide posts," in "a pioneer venture."⁴⁸ The special purposes to "reveal the nature and content of the Canadian contribution to the law of nations," and to suggest "to Canadian students the vital fact that international law . . . is rooted in the experience of their own country as expressed through courts familiar to them,"⁴⁹ are entirely laudable, and to some extent they have been realized in an admirable way. If it was true, prior to a few years ago, that "the problems of Canada in international law are largely the problems of Canada in her relations with the United States,"⁵⁰ the numerous volumes of the *Canadian Treaty Series* suggest a doubt as to whether this statement ought to be made today. Canada's "true nationhood, not nominal, but spiritual"⁵¹ and (if one may be so bold as to attempt to complete Sir Robert Borden's phrase) actual, has placed the Dominion in a zodiac which has more than a southern exposure, and a broader conception of the law of nations, not limited to the output of courts, might have led this welcome volume to give an ampler picture of "Canada and the Law of Nations."

An urgent need of international law today is for a collection of the decisions of international courts which will do for other tribunals the service performed for the Permanent Court of International Justice by the five series of its publications;⁵² the latter is probably the best documented court in the whole world. Such a collection ought to include, also, the decisions of national courts which relate to international law. The *Recueil général périodique et critique des décisions, conventions et lois relatives au droit international public et privé*, the publication of which was begun in Paris in 1934, responds to a real need, but perhaps it is too ambitious; it is difficult to obtain, and one

⁴⁶ Preface, p. xii.

⁴⁷ See his statement that "Canadian Courts have not been productive of many decisions affecting international law," in 7 *Canadian Bar Review* (1929), p. 740.

⁴⁸ Preface, p. xii.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*, p. xi.

⁵¹ Foreword to MacKenzie and Laing, p. v.

⁵² Cases before tribunals of the Permanent Court of Arbitration have been reported in *Scott, Hague Court Reports* (1916), 2nd Ser. (1932); also in *George Grafton Wilson, Hague Arbitration Cases* (1915).

wonders whether it presents a secure prospect for permanence. The *Annual Digest of Public International Law Cases*, begun by McNair and Lauterpacht in 1929 (now in five volumes), has served to reveal the wealth of material which may lie buried, and it has proved most useful to the editors of some of the recent casebooks. More valuable still would be a general, global collection of cases on international law. If and when it comes to exist, it will mean an enrichment of teaching materials which will revolutionize the teaching and study of international law.

The law schools of America should not await such a publication before extending their instruction in international law, however. It does not reflect to their credit that, at most, only three or four men in American universities are devoting all of their time to international law, that only 22 of 84 members of the Association of American Law Schools devote any attention to the subject⁵³ (in most of these 22 the work is probably little emphasized). A century ago, when the subject was much less developed than now, it was in the forefront of law school curricula in America;⁵⁴ so it is today in some countries of Europe. Even the trade-school traditions which dominate so many American schools preparing for the learned profession of the law, do not warrant the present lack of emphasis on the subject; and certainly those schools which take pride in their training for public service cannot justify this course. If there was a time when an excuse might have been found in the dearth of materials to be used for teaching international law, the appearance of the recent casebooks proclaims the passing of that day.

⁵³ See the West Publishing Company's Directory of Teachers in Member Schools, 1937-1938, p. 190.

⁵⁴ See Story's Inaugural Discourse as Dane Professor of Law in Harvard University, Aug. 25, 1829, in his Miscellaneous Writings (1835), p. 440.

SPECIAL MEXICAN CLAIMS

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The Special Mexican Claims Commission has just completed its task of deciding 2,833 claims of American citizens against Mexico arising out of the revolutionary disturbances in Mexico during the period from 1910 to 1920. The Commission commenced its work in September, 1935. The decision of this large number of claims marks an important chapter in the development of international reclamation, not only because of the disposition of such a large number of cases in a comparatively short period of time, but also because of new departures made in the case of this commission in procedure and rules of decision.

THE HISTORICAL BACKGROUND

The period of the claims, from November 20, 1910, to May 31, 1920, was one of revolution and counter-revolution following the downfall of the Diaz régime. A short résumé of the events of the period indicates the nature of the claims. The period began with the Madero revolution in 1910. There was also an apparently independent insurrectionary movement at about the same time headed by the so-called Liberal Party, which operated chiefly in Lower California and along the international border, but that was of minor importance. The triumph of the Madero revolution, and the ouster of Porfirio Diaz, ushered in a new period in Mexican affairs in which the attitude of the Mexican Government toward foreign residents and investors underwent a radical change resulting in many international claims; but the special claims which have just been adjudicated are only one group of the resulting claims against Mexico as they are limited to losses of life or property suffered by American citizens as the result of acts of military forces of the various *de facto* or *de jure* governments of the period in Mexico, or of various revolutionary or insurrectionary forces specified in the Claims Convention of September 10, 1923, or of mobs or bandits or general insurrectionary forces, as to which the Mexican authorities showed lenity, or were otherwise at fault.¹ The jurisdiction of the Special Mexican Claims Commission did not include claims based upon losses of American citizens suffered as the result of other causes, such as the acts of civil authorities of Mexico, some of which have been designated as General Claims and Agrarian Claims, and have been separately dealt with.

In February, 1913, Madero was murdered and his party ousted by the Huertista revolution. The revolution of Huerta brought loss of life and

¹See footnote ¹ on page 458.

property to American citizens, notably during the so-called "tragic ten days" during which the contending factions bombarded Mexico City. Similar losses resulted from the rebellions of Zapata, Orozco, and others who fought Madero prior to his overthrow. Huerta remained in power until July, 1914. His régime was not recognized by the United States and he was constantly engaged in the suppression of rebellion. With his accession in March, 1913, the armed forces in opposition united under the Plan of Guadalupe, with designation as Constitutionalistas and under Carranza as "First Chief." During Huerta's term in office, the Tampico and Vera Cruz incidents occurred in April, 1914, involving the bombardment and occupation of Vera Cruz by forces of the United States. Coincident with these events, large numbers of American citizens left Mexico because of fear of the outcome of revolutionary conditions and warnings by the State Department, and heavy property losses were sustained.

Carranza's Constitutionalist Government was recognized as the *de facto* Government of Mexico in October, 1915. The period between the retirement of Huerta in July, 1914, and the recognition of Carranza in October, 1915, was a period of chaotic civil war in Mexico, which involved heavy losses to American citizens. Villa and Carranza, after the Aguascalientes Convention of October, 1914, fought each other for the mastery of Mexico. The revolution soon reached the stage where the revolutionists, particularly Villa, from military necessity commandeered American-owned mines, smelters, and factories for the making of ammunition, American ranches for cattle, horses, and other livestock, seized arms everywhere, and sometimes destroyed American property for purposes of intimidation or revenge. As the ranches in Mexico became depleted of cattle, the so-called border raids became more frequent and serious. These were raids made from Mexico across the border upon ranches located on the American side, usually with the purpose of obtaining cattle for use in Mexico. One of these raids across the border, the Columbus raid of March 9, 1916, was of even more serious character, and, with the Santa Isabel massacre which preceded it, led to the Pershing punitive expedition into Mexico in pursuit of the perpetrator of the outrages, Pancho Villa. The expedition was withdrawn in February, 1917.

Carranza's government became the *de jure* Government of Mexico to all intents and purposes in October, 1917, under a presidential term which was to end in November, 1920. Carranza, however, was always opposed by insurrectionists, and on May 9, 1920, revolutionary forces under Obregon, who had revolted in 1919, entered Mexico City. On May 21, 1920, Carranza was killed in flight. On May 24, 1920, Adolfo de la Huerta became Provisional President of Mexico and on May 31, 1920, the revolutionary period of the Special Claims came to an end.¹

¹ The jurisdictional definition of Special Mexican Claims according to the Convention of Sept. 10, 1923, is as follows:

"Article III. The claims which the Commission shall examine and decide are those which

INTERNATIONAL ARBITRATION VERSUS LUMP SUM SETTLEMENT AND ADJUDICATION
BY A DOMESTIC COMMISSION

The 2,833 claims of American citizens against Mexico arising during the revolutionary period, in their face amount, total \$219,001,809.45. It must be apparent at once that claims of this number and amount must be adjudicated in a way different from a single international controversy, such as the Trail Smelter case recently under arbitration between United States and Canada, by an international commission.

Such a large number of claims demands a certain speed of adjudication which is impossible if the claims are to be decided by commissioners of different nationalities, and language, and who are educated in different legal systems. Speed is also impracticable if oral hearings are to be had in each case. The problem is: How to obtain a certain amount of speed of adjudication without sacrificing much in the way of thoroughness of inquiry and the protection of individual rights. It is in a way the same problem which faces our domestic courts today in a lesser degree, and it is also an important problem facing our administrative tribunals.

There are, generally speaking, two ways of adjudicating international claims which have been used in the past. One is to submit the claims to an international arbitral tribunal, composed of a representative of each country, with a third member chosen by mutual consent, or in some other way calculated to insure impartiality between the litigants. The second method is for the country preferring the claims to obtain from the respondent country a lump sum payment in full of all liability on the claims, and then to set up its own commission to adjudicate the claims of its own citizens. This latter method avoids the delays and friction due to the natural conflict of interest

arose during the revolutions and disturbed conditions which existed in Mexico covering the period from November 20, 1910, to May 31, 1920, inclusive, and were due to any act by the following forces:

"(1) By forces of a Government *de jure* or *de facto*.

"(2) By revolutionary forces as a result of the triumph of whose cause governments *de facto* or *de jure* have been established, or by revolutionary forces opposed to them.

"(3) By forces arising from the disjunction of the forces mentioned in the next preceding paragraph up to the time when the government *de jure* established itself as a result of a particular revolution.

"(4) By federal forces that were disbanded; and

"(5) By mutinies or mobs, or insurrectionary forces other than those referred to under subdivisions (2), (3), and (4) above, or by bandits, provided in any case it be established that the appropriate authorities omitted to take reasonable measures to suppress insurrectionists, mobs, or bandits, or treated them with lenity or were in fault in other particulars."

The word "forces," used seven times in Article III, has been construed by the Commission to mean bodies of men in military units and bodies of men participating in mutinies, mob action, or banditry. It was considered broad enough to embrace isolated individuals belonging to military units or to bandit groups, provided that such individuals were acting in the course of operations of their units or groups. (Decision No. 1, page 4, Decisions of Special Mexican Claims Commission, 1938.)

on the part of the national commissioner of an international commission, and the difference in language, general outlook, and legal education of the national commissioner. This conflict varies, of course, with the individuals and nationalities involved but is in the nature of things always present. American commissioners adjudicating on American claims, on the other hand, all speak the same language, and are educated under the same legal system. Moreover, in the case of a lump sum settlement, where there has been a payment in full satisfaction of the claims by the respondent government, there is no representative of the respondent government who may attempt to force reduction of awards, or delay adjudication, or terminate the life of the commission before its work is completed with a view to the later negotiation of a lump sum settlement at a reduced rate. In case of the lump sum settlement and adjudication by a domestic commission, it is possible to obtain a quicker adjudication of the claims by cutting legal red tape, which seems to be unavoidable when one country is claimant and the other is respondent in an international law suit.

The Special Mexican Claims have been the subject of both international adjudication and a lump sum settlement. As is usual with international claims, these claims were first filed with the Department of State. The State Department sponsored them as international claims against Mexico, if convinced that the claims were the claims of American citizens in origin, had always been held by American citizens, and were valid under international law.

As a result of diplomatic negotiations, Mexico and the United States entered into a convention on September 10, 1923, providing for the adjudication of these so-called special or revolutionary claims by an international commission composed of three members, one appointed by Mexico, one appointed by the United States, and the third by mutual agreement of the two Governments. No fund was set aside or appropriation made for the payment of the awards made by this commission.

This may be considered to be the international arbitral type of commission, concerned only with international claims between two governments. Although this commission was in existence seven years, it adjudicated only 18 cases, 17 of which were included in a group decision known as the Santa Isabel Cases.² In the remaining case, the Naomi Russell case, the Mexican and the American Commissioners disagreed so thoroughly that their opinions and dissenting opinions take up 160 printed pages. The case was a test case, on which many other cases would turn, and the inherent tendencies of the international commission tended to assert themselves.

In April, 1934, however, an *en bloc* settlement, or lump sum settlement, of the special claims was made by convention between the two countries.³

² Decision printed in this JOURNAL, Vol. 26 (1932), p. 172.

³ This JOURNAL, Supp., Vol. 30 (1936), p. 106. The Convention of Sept. 10, 1923, was printed, *ibid.*, Vol. 18 (1924), p. 143.

Under this convention, Mexico agreed to pay to the United States a sum of approximately *five and one-half million dollars* in full discharge of these claims as international claims. This sum, which is paid in annual instalments of \$500,000 each, beginning January 1, 1935, is held in the United States Treasury for the payment of such of the claims as have been held valid. Four instalments have already been paid by Mexico under this settlement.

This figure of approximately five and one-half million dollars was arrived at by a joint committee under the Convention of April 24, 1934, as the basis of settlement of these claims, by taking the average ratio of award by the various commissions of European countries adjudicating Mexican revolutionary claims. This ratio was 2.6362%. In other words, that percentage of the claims of Belgian, French, German, British, Italian and Spanish nationals which was found to be valid by the commissions set up by Mexico and those countries was taken as the percentage of the American claims to be paid in a lump sum settlement to the United States by Mexico. This was thought to be a fair basis of settlement, and was adopted as a formula in the Convention of September 10, 1934.

This lump sum settlement made the special claims no longer international claims, technically speaking, and no longer claims against Mexico. Mexico is thereafter, so to speak, out of the picture except as to the payments.

In April, 1935, the Act of Congress was passed which set up the recent Special Mexican Claims Commission, which was purely a domestic commission appointed by the President of the United States.⁴ According to this statute, the claims were to be adjudicated in accordance with the terms of the Convention of September 10, 1923, the best judgment of the members of the Commission, and in accordance with justice and equity. International law, generally speaking, did not apply, except so far as it set up general standards which the Commissioners, in the nature of things, must adopt. The Commission was a new deal, so to speak, in the adjudication of international claims, in its standards of decision. It was also given authority to decide the cases on the record as it stood, and such additional evidence and written legal contentions as might be filed by the claimants, pursuant to rule of the Commission. It had also by statute the power to take testimony and make independent investigations, but it availed itself of this power only to a limited degree because of the limitations of time.

EVIDENCE AND PROOF

The adjudication of 2,833 claims of this character of a face amount of \$219,001,809.45 in a short space of a little over two and one-half years, on a budget of something less than \$90,000 a year, necessarily imposes limitations on procedure.

⁴ The Act of Congress approved April 10, 1935 (49 Stat. 149) as amended by Joint Resolution approved Aug. 25, 1937 (Public Resolution No. 70, 75th Congress), are printed in Supplement to this JOURNAL, pp. 107, 111.

International claims are usually not proved by oral testimony. The procedure of the Special Mexican Claims Commission in adjudicating almost wholly on a written record was, therefore, not exceptional.⁵ This necessarily affects the applicability of rules of evidence excluding certain sorts of evidence, such as those we have in the common law. The exclusion of hearsay evidence, and all the rules of evidence creating exceptions to the hearsay rule have no application so far as they affect the admissibility of evidence, though they are material to the weight of the evidence where received. It should be borne in mind in this connection that those rules of evidence are not now strictly applied in the courts of most of our states in trials before a court *without a jury*. The tendency is for courts everywhere, when trying a case without a jury, to accept all pertinent evidence, leaving the weight to be attached to evidence to be decided by the court. The procedure of the Commission on the admissibility of evidence is, therefore, not very different from the liberal practice of municipal courts trying a case without a jury.

As for cross-examination, it is out of question if there is no oral testimony. This is undoubtedly a loss, for a few minutes of cross-examination of witnesses would probably clear up many a doubtful point in international claims. But how could oral examination and cross-examination of witnesses be provided for? Many witnesses are outside the country and not subject to process, even if suitable process were provided for by statute. Many witnesses are dead or their whereabouts are unknown. A partial solution of the problem would be to require that every claimant present himself to the Department of State, or to some local legal representative of the Department, for oral examination before his claim should be accepted as an international claim; and, further to provide by statute and treaty for the subpoenaing and examination of witnesses in international claims here and abroad. Even such a solution would be subject to obvious objections as to expense and other practical difficulties.⁶ On the other hand, the Department of State could,

⁵ This sort of procedure on affidavits, depositions and documentary evidence, and the submission of briefs without oral testimony or oral argument, has been considered due process of law under the Federal Constitution in the case of both courts and quasi-judicial commissions. Cf. *Consolidated Edison Co. of New York, Inc. et al. v. National Labor Relations Board*, 22 P.U.R. (N.S.) 478, 484.

⁶ The Act approved April 10, 1935 (49 Stat. 149) did, it is true, give the Commission power to subpoena witnesses and require the production of such documentary evidence as might be required from any place in the United States at any designated place of hearing. To compel obedience to such subpoena, the Commission was empowered to invoke the aid of any district or territorial court of the United States and of the Supreme Court of the District of Columbia, and any failure to obey a subpoena was made punishable by such court as contempt of court. There was no provision for taking the testimony of witnesses in Mexico, or elsewhere outside the United States, and limitations of time and pressure for completion of the work of the Commission prevented general application of this interesting provision for the taking of testimony in the United States. This power to take testimony was vested only in the Commission and could be exercised only on the Commission's own motion. It was not a procedural remedy available to claimants which could be invoked by them. Nor

if it had the means at hand, greatly strengthen the proof of claims by the taking of testimony by deposition shortly after the loss is sustained. Today in many claims there is little or no contemporary evidence, and affidavits drawn up by the claimant's attorneys ten or even twenty years after the loss produce evidence of questionable credibility.

The absence of cross-examination of witnesses is, however, not an unmixed evil. Cross-examination as practiced in the courts today is, in the opinion of many lawyers, used as a means of obscuring the truth and creating false impressions in the minds of the jury rather than as an instrument for reaching the truth. In international claims, there are other ways of checking the truthfulness of witnesses' statements which are often as effective as cross-examination.

For instance, in 1911 and 1912 many inventories were filed by American citizens in Mexico with our consuls, giving lists of their property and their value at times when they had filed no claims for losses. Later, when they had sustained losses, they often again filed inventories, giving lists of properties and values. At various times during the revolutionary period, the consuls made general reports of all losses sustained within their districts. They, of course, made innumerable reports in individual cases. The Mexican Government also made investigation of claims, and these reports it was agreed would be made accessible to this Government by Mexico for use in connection with the adjudication of claims. Moreover, the statute creating the Special Mexican Claims Commission placed the investigation forces of other government departments at the disposal of the Commission. Lastly, the claimants themselves often unconsciously furnished invaluable checks on their evidence in statements made to the former American Agency when it was engaged in preparing the claims on behalf of claimants for presentation to the former international commission. Again, on the subject of Mexican forces, the Commission had at its disposal a veritable mine of information on the subject of forces and military activities in Mexico during the revolutionary period which is the result of researches made by military and historical experts for the former American Agency. Further, the Commission was given by statute the right to conduct investigations both here and in Mexico, and to take testimony, which it has availed itself of, so far as it seemed necessary and practicable. Further, the factual data and jurisprudence developed by the British-Mexican, French-Mexican, Italian-Mexican, German-Mexican, Belgian-Mexican, and Spanish-Mexican Commissions was far from negligible, as it often concerned identical situations and neighboring properties to those involved in American claims. Besides, the admitted facts in a case often

was it available to the former American Agency which prepared the records in the claims' as the Agency had ceased to exist before the Act of April 10, 1935, was enacted. The remedy was of doubtful practical value, even if availed of by the Commission, as it would involve examining witnesses as to events which happened from fifteen to twenty-seven years previously.

negative some exaggeration in the proof and afford a check on other facts in dispute. There are, accordingly, checks available, which on many points more than offset the absence of cross-examination.

As to the method of decision by the Commission, while it may appear novel to some, it was really strictly analogous to the decisions of a court without a jury. The Convention lays down the elements of a valid claim, which are four in number:

1. American citizenship of the claimant must be proved;
2. Acts of forces specified in the Convention must be proved to be the cause of the claimant's loss;
3. The causation must be proximate; and
4. The loss must be proved, which includes proof of the claimant's ownership in the case of property, and the proof of damage.

These four requirements have innumerable variations, many of which present extremely difficult questions of law. But the decision of the questions of fact by the Commission was essentially the same as the decision of questions of fact by a court without a jury. The triers of the fact must decide whether they believe the evidence; they must determine the weight to be attached to each item of evidence; they must decide in accordance with their best judgment and principles of justice and equity. This is exactly what a court trying a case without a jury is supposed to do, and, therefore, it cannot be said that the shortened procedure provided for the Special Mexican Claims Commission makes radical changes in the fundamentals of decision.

It is not enough, moreover, for the claimant to present evidence to the fact-finding body; the evidence must also be believed. If it is not believed, that, of course, may be the fault of the claimant, or it may be the fault of the fact-finding body, or it may be the fault of the evidence. At any rate, the element of belief is important.

The Commission introduced two innovations in practice which, it is believed, are unprecedented. After making a tentative decision in all claims, it conducted a review of all cases on its own motion, for the correction of errors and insuring uniformity of decision in similar cases. Secondly, it gave each claimant an opportunity to file a petition for review after being advised of the Commission's findings and tentative award in each claim. It is believed that the petition for review is a development in accordance with modern ideas of due process in a situation of this kind, and both innovations were found to be of considerable practical value.

There has recently developed a great interest in the procedure of quasi-judicial bodies because of the recent great growth of administrative bodies. The Supreme Court of the United States has within the past year handed down several epoch-making decisions on this subject. An indication of the general interest in this subject is shown by the fact that the American Bar Association has in the past year chosen as the subject for its annual prize award

the related subject of the extent to which fact-finding bodies are or should be governed by rules of evidence. The 2,833 cases recently decided by the Special Mexican Claims Commission afford a laboratory record for such a study in the international field (which, it should be borne in mind, presents different practical and constitutional problems from the requirements of due process before the ordinary administrative tribunal).⁷ In fact, the work of the Commission involved many more than 2,833 cases, as it had the duty not only of deciding the claims, but also the fees of the attorneys who represented the claimants, a field which offers a jurisprudence of its own, and cannot here be more than mentioned.

PRINCIPLES OF DECISION

So far as substantive principles are concerned, the Commission adopted a number of rules of decision which should be noted.

In the first place, it allowed the Santa Isabel claims which had been dismissed by the former Special Claims Commission, thereby establishing liability for acts of Villa's forces. Second, it allowed the Naomi Russell claim which had been dismissed by the former Commission, thus establishing liability on ground of lenity and ratification for acts of Orozquistas and extending the definition of forces under the Convention to cover the acts of isolated members acting for the purposes of the whole force.

It applied the general principles of tort law to claims to be classified as torts, by requiring that the causal connection between acts of forces and the claimant's loss be established as an essential element of each claim, that the cause must be proximate in the legal sense, and not remote, and by holding that losses which were a repercussion of general revolutionary conditions were not awardable losses.

The Commission did not exclude from consideration anything in the nature of evidence, no matter how small its probative value might be. It did not, as a general rule, make awards in cases where the proof consisted solely of unsworn evidence, or on uncorroborated, though sworn, testimony of interested parties.

In accordance with recognized principles, the Commission made awards for general damage though specific proof of specific items of loss were lacking. It was necessary in such cases for the Commission, however, to find satisfactory proof of loss to the extent of the award made.

The Commission was inclined to disallow claims for prospective profits

⁷ "All decisions by the Commission . . . shall constitute a full and final disposition of the cases decided." Act approved, April 10, 1935 (49 Stat. 149). In view of this provision making the Commission's decisions final, and in view of the further fact that the action of Congress in making provision for the payment of claimants is *ex gratia* and not a matter of right so far as the claimants are concerned, the decisions of the Commission are probably not subject to attack on allegations of denial of due process. Cf. *Matter of Cummings v. Deutsche Bank*, 300 U. S. 115; this JOURNAL, Vol. 31 (1937), p. 532.

alleged to have been lost during periods of shut-down or abandonment, on the general ground that they were on the record too speculative, or on the particular ground that they were not established by the evidence. The same rulings were applied in the case of similar claims for loss of increase of the herd in case of cattle and other livestock. This did not mean, however, that no awards were made for business losses sustained during periods of shut-down or abandonment. Various shut-down expenses were allowed if shown to be the result of acts of forces involving Mexican liability under the Convention, and awards were made for the value of use and occupation in case of actual occupancy by armed forces or forced abandonment of subsistence homesteads.

The Commission has also advanced the definition and increased the application of equity and equitable principles in international claims. The application of equity is required by the express provisions of the governing Convention, which provides that the claims shall be decided according to principles of "justice and equity." There are four principal ways in which equity is referred to in the Commission's decisions:

(1) In the case of the awards for general damage above referred to, where the Commission found general damage, but no specific proof of specific items of damage, the awards are referred to as awards in equity. This term has been used in the same sense by tribunals of other nations adjudicating similar Mexican claims. Really such awards involve no principle of equity but are strictly according to ordinary common law principles. The word "equity" is there simply a matter of terminology.

(2) Equitable considerations were taken into account in arriving at amounts of damage and in the decision of other similar "jury" questions. This again is merely a matter of terminology and involves no new principles.

(3) Equitable principles were applied in decisions where a just result involved recognition of the fact that the Commission was engaged in the distribution of a fund which is insufficient to pay all claimants in full. The most important decision of this sort was on the question of whether the Commission should allow interest on claims from the date of the loss to the date of the award. On equitable principles applied in the distribution of an inadequate fund, as well as because the claims were unliquidated and for other reasons, the Commission denied all such claims for interest.

(4) General equitable principles of a non-technical nature which have come to be regarded as essential to legal reasoning were also applied, such as the doctrine that equality is equity, that equity will not aid a wrongdoer, the doctrine of assumption of risk, and others which are now perhaps considered as much a part of the law of torts as doctrines equitable in nature.

Most of the principles of special interest are referred to in Decision Number 1, which has been released to the general public. When the individual decisions have been made similarly available, more detailed and exhaustive study of the contributions made to the law of international claims by the Commission's work will be possible.



TREATY-MAKING PROCEDURE IN THE BRITISH DOMINIONS*

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The British Dominions prior to the World War had already achieved practically unrestricted freedom with respect to technical and commercial treaties. They had not attained any comparable freedom with respect to "political" treaties. They were, with rare exceptions, excluded from participation in the conclusion of such treaties but were, nevertheless, bound automatically by the obligations undertaken by the mother country. The Government of the United Kingdom, subject to its responsibility to the Imperial Parliament at Westminster, exercised sole authority in all matters relating to the conduct of foreign policy, the maintenance of peace, and the declaration of war. That authority, Prime Minister Asquith declared at the Imperial Conference of 1911, could not be shared with the Dominions. Yet at the close of the War the Dominions were given separate representation at the Paris Peace Conference. Dominion representatives—representatives carrying full powers from His Britannic Majesty in respect of the several Dominions—participated in the negotiation and signature of the resulting treaties of peace, to which, however, "the British Empire" was the sole high contracting party for the entire realm. The treaties of peace were submitted to the Dominion Parliaments, and His Majesty's ratification was not effected until the approval of each Dominion Parliament had been secured. In the years since the War the Dominions have assumed an increasingly independent position in treaty-making and have developed distinctive procedures of their own.

Despite the differences of procedure in treaty-making followed by the several British Dominions, certain general observations may be made which are applicable to all of the Dominions. All treaties between heads of states concluded by any Dominion with foreign Powers are made in the name of His Britannic Majesty as the high contracting party in respect of the particular Dominion concerned. The necessary full powers for negotiating such treaties are issued by the King, and ratification is similarly effected by the King under his own signature. His Majesty acts in these matters only upon the advice of the Dominion concerned.

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The negotiation of treaties falls upon the Dominion in respect of which the treaty is to be concluded. In order to carry out the negotiations, the Dominion nominates a plenipotentiary and advises His Majesty to issue full powers to the plenipotentiary so named. The plenipotentiary may be a Dominion Minister already accredited to a foreign court; he may be a special delegate; or he may be a British diplomatic representative in the country with which the treaty is to be concluded, who, for the time being and for the purposes specified, acts as plenipotentiary of the Dominion.¹ The full powers issued by His Majesty indicate the member of the Commonwealth in respect of which a treaty is to be concluded and signed. Also, the preamble and the text of the treaty are so worded as to make the scope of its application clear. Finally, the instrument of ratification indicates the member of the Commonwealth in respect of which the obligations are being undertaken.

The above procedure is confined to treaties purporting to be between heads of states—treaties to which His Majesty is a contracting party in respect of a Dominion. A different procedure is followed in the case of agreements concluded between His Majesty's Government in a Dominion and foreign governments. Here His Majesty is not one of the contracting parties. Credentials for the conclusion and signature of the agreements between governments are issued not by His Majesty but by His Majesty's Government in the Dominion concerned. Ratifications of, or accession to, agreements between governments is similarly by His Majesty's Government in the Dominion and not by His Majesty. Thus the procedure of negotiation, conclusion, and ratification of agreements between Dominion governments and other governments is carried out without any intervention of His Majesty. At the Imperial Conference of 1926 it was agreed that where more than one member of the British Commonwealth is a party to a treaty, the making of the treaty in the name of the King as the symbol of the special relationship between the different members of the Commonwealth would render superfluous the inclusion of any provision that the terms of the treaty do not regulate *inter se* the

¹ The exchange of notes, Oct. 16, 1931, between the Irish Free State and Brazil, which was effected through the British Minister at Rio de Janeiro, may be taken as typical of the procedure followed where the Dominions do not have their own diplomatic representatives. The British Minister addressed the Brazilian Minister of Foreign Affairs as follows: "In order to regulate commercial relations between the Irish Free State and Brazil, I have the honour, at the instance of His Majesty's Government in the Irish Free State, to inform your Excellency that that Government are prepared to enter into an agreement to the following effect." (Irish Free State, Treaty Series, 1931, No. 7, P. No. 589. This exchange of notes is reprinted in United Kingdom, Treaty Series, 1932, No. 2, Cmd. 3998. The Foreign Office emphasizes that the reprinting of Irish Free State treaties in the United Kingdom Treaty Series "is only possible through the courtesy of the Irish Free State Government.") This was an agreement between governments, yet it is also illustrative of the procedure followed in other cases. In a similar exchange of notes between the Government of India and the Brazilian Government, the British Minister at Rio de Janeiro acted "under instructions from His Majesty's Principal Secretary of State for Foreign Affairs, and in accordance with the wishes of the Government of India." *Ibid.*, 1932, No. 29, Cmd. 4168

rights and obligations of the various territories on behalf of which it is concluded in the name of the King. It was recommended at the same time that where international agreements are intended to be applied between the different members of the Commonwealth, the form of a treaty between heads of states should be avoided. With these exceptions there are no rules as to the form in which an engagement between a Dominion and a foreign Power should be concluded. It may take the form of an instrument between heads of states or it may take some form of an agreement between governments. Agreements between governments, it is often stated, usually deal with technical or administrative matters. No rules can be laid down with certainty, however, as to which of the above forms shall be chosen in preference to the other in any given case.

Approximately two thirds of all international engagements to which the United Kingdom becomes a party today are concluded in some form of agreement between governments. An analysis of Dominion treaties shows clearly that this is no less true for the Dominions. Indeed, for most of the Dominions—Canada, the Union of South Africa, and Ireland—the preponderance of agreements between governments is even greater than in the case of the United Kingdom.² In the case of India the reverse is true. For Australia and New Zealand the proportion is about the same as for the United Kingdom. As will be discussed below, His Majesty now very rarely concludes a treaty in respect of Ireland. Here a deliberate effort is made to follow other forms and procedures than those involved in concluding treaties between heads of states.

The negotiations on behalf of the Dominions, for the conclusion of either a heads-of-states treaty or of intergovernmental agreements, are subject to the conditions formulated at the Imperial Conferences of 1923, 1926 and 1930. These conditions, which are binding alike on His Majesty's Government in the United Kingdom and upon His Majesty's Government in each of the Dominions, were summarized by the Imperial Conference of 1930 as follows:

(1) Any of His Majesty's Governments conducting negotiations should inform the other Governments of His Majesty in case they should be interested and give them the opportunity of expressing their views, if they think that their interests may be affected.

(2) Any of His Majesty's Governments on receiving such information should, if it desires to express any views, do so with reasonable promptitude.

(3) None of His Majesty's Governments can take any steps which might involve the other Governments of His Majesty in any active obligations without their definite assent.³

The obligation of informing other governments of negotiations when contemplated or early in the proceedings is regarded as of special importance in order that any government which feels that it is likely to be interested in the

² Exchanges of notes, which record agreements between governments, are of course included in this calculation.

³ Imperial Conference, 1930, Summary of Proceedings, Cmd. 3717, p. 28.

negotiations conducted by another government may have the earliest possible opportunity of expressing its views. It is recognized that a negotiating government cannot fail to be embarrassed in the conduct of negotiations if the observations which the other governments may wish to make are not received at the earliest possible stage of the negotiations. In the absence of comment, the negotiating government is entitled to assume that no objection will be raised to its proposed policy in the negotiations. In order that the third principle summarized above may in all cases be clearly understood by foreign Powers as well as by members of the British Commonwealth, it is now the practice that the full power, the instrument of ratification, and the face of the treaty itself specifically indicate in each case the part of the Commonwealth in respect of which the treaty obligations are assumed. No obligations are assumed for any member of the Commonwealth except at the instance of that member. This follows from the fact, recognized in 1926, that all the members of the Commonwealth—the United Kingdom and each of the Dominions—are equal in status and are in no way subordinate one to the other in any aspect either of their domestic or of their external affairs. As indicated above, however, the common membership of the United Kingdom and of the Dominions in the British Commonwealth association entails certain common duties of consultation in the negotiation and conclusion of treaties with foreign Powers.

When His Majesty is advised by the Government of the United Kingdom to conclude a treaty in respect of the United Kingdom, the form of the full powers, of the instrument of ratification, and of the treaty itself makes it clear that the obligations assumed by His Majesty apply only to the United Kingdom and not to any of the Dominions. In the case of certain treaties the plenipotentiary appointed in respect of the United Kingdom signs "For Great Britain and Northern Ireland and all parts of the British Empire which are not separate Members of the League of Nations."⁴ Often, however, United Kingdom treaties do not apply automatically even to the non-self-governing colonies. This is true particularly with regard to commercial treaties. It is true also of engagements relating to air navigation.⁵ It is usually stipulated in a treaty such as these that it is limited in its application to the United Kingdom and to territories in respect of which notification of accession or application is given under the provisions of the treaty. Provision is made for notice of application to the colonies and for notice of accession by the Dominions.

This practice may be illustrated by the numerous conventions which His Majesty concludes, in respect of the United Kingdom, regarding legal proceedings in civil and commercial matters. The following provisions from the Convention between His Majesty, in respect of the United Kingdom, and the

⁴ International Treaty for the Renunciation of War, Paris, Aug. 27, 1928. United Kingdom, Treaty Series, 1929, No. 29, Cmd. 3410.

⁵ *Ibid.*, 1935, No. 35, Cmd. 5006.

President of the Turkish Republic regarding Legal Proceedings in Civil and Commercial Matters, November 28, 1931,⁶ are typical of those found in such conventions:

Article 17 (a) This Convention shall not apply *ipso facto* to Scotland or Northern Ireland, nor to any of the Colonies or Protectorates of His Majesty, nor to any mandated territories in respect of which the mandate is exercised by his Government in the United Kingdom, but His Majesty may at any time while the Convention is in force under Article 16 extend by a notification given through his Ambassador in Turkey this Convention to any of the above-mentioned territories . . .

Article 18 (a) The High Contracting Parties agree that His Majesty may at any time, while the present Convention is in force, either under Article 16 or by virtue of any accession under this Article, by a notification given through the diplomatic channel, accede to the present Convention in respect of any Member of the British Commonwealth of Nations whose Government may desire that such accession should be effected, provided that no notification of accession may be given at any time when the President of the Turkish Republic has given notice of termination in respect of all the territories of His Majesty to which the Convention applies. The provisions of Article 17(b) shall be applicable to such notification. Any such accession shall take effect one month after the date of its notification.

Notification of extension of this convention to the colonies, it may be observed, is given through His Majesty's Ambassador in Turkey, while notification of accession by the Dominions is given "through the diplomatic channel." With the accrediting of Dominion representatives and with the direct communication of Dominion governments with foreign governments there may be more than one diplomatic channel available.

While the method of accession to instruments of this character varies somewhat among the several Dominions, that employed by Canada in acceding to the above convention (and to several other similar conventions) may be shown here as illustrative of the form and procedure generally followed: On May 17, 1935, the Dominion Secretary of State for External Affairs wrote to the Secretary of State for Dominion Affairs in London:

I have the honour to invite your attention to the Civil Procedure Conventions which have been concluded with Spain, Sweden, Norway, Poland, Italy, Austria, Portugal, Turkey and Germany, all of which have been signed and duly ratified. I have the honour to state that His Majesty's Government in Canada desire that, in accordance with the stipulations therein contained, these Conventions shall be extended to Canada by notification to the representative Governments. Such extension might well come into force from the date of ratification, or from a fixed date. In the latter event, it would be most convenient if the date could be the same in respect to all of the Conventions, and I venture to suggest that the 1st of August of this year would be a satisfactory and, presumably, a practicable date. The question of dates will, of course, depend

⁶ United Kingdom, Treaty Series, 1933, No. 14, Cmd. 4318.

upon the circumstances but, if feasible, a uniform date would be preferable . . .

I shall be obliged, therefore, if steps will be taken to make the necessary notifications to the representative Governments.⁷

The writing of this one letter to the Secretary of State for Dominion Affairs in London was the only step necessary on the part of Canada in order to become a party, by accession, to the nine conventions mentioned in this letter.⁸ The request of the Dominion of Canada was transmitted from the Dominions Office to the Foreign Office. The Foreign Office, in turn, instructed the United Kingdom diplomatic representatives in the several countries concerned to make the necessary notification of Canadian accession to the conventions. Inasmuch as the convention with Turkey was cited above to illustrate the provisions which are made for Dominion accession, the notice of Canadian accession to this convention may also be chosen here to show the form of such notices, although any of the other eight might just as well be presented, since they are all similar. Upon receipt of instructions from the Foreign Office in London the British Chargé d'Affaires at Constantinople notified the Turkish Minister for Foreign Affairs as follows:

At the instance of His Majesty's Government in Canada I have the honour to notify to Your Excellency, in accordance with Article 18 (a) of the Convention regarding legal proceedings in civil and commercial matters, which was signed at Angora on the 28th November, 1931, the accession of His Majesty to that convention in respect of the Dominion of Canada . . .

In accordance with Article 18 (a) of the Convention, the accession now notified will come into force one month from the date of this note, that is to say, on the 1st August next . . .⁹

As has already been observed, the form and procedure of Dominion accession to instruments which are in force between the United Kingdom and foreign states and which provide for Dominion accession, may differ somewhat among the several Dominions. The Canadian example here presented, however, is typical of the methods employed. Provision for Dominion accession is made in many treaties, and such entities may accede to such treaties by the simple procedure outlined in the present instance. The extension of United Kingdom treaties to Northern Ireland or to the colonies is effected by a notification similar to the one quoted. The terms "application to" or "extension to" are sometimes used (in the place of "accession") for the Dominions and India as well as for the colonies.¹⁰

⁷ Mr. O. D. Skelton, for the Secretary of State for External Affairs, to the Secretary of State for Dominion Affairs, May 17, 1935. Dominion of Canada, Treaty Series, 1935, No. 19.

⁸ These nine conventions are printed in Dominion of Canada, Treaty Series, 1935, Nos. 11-19.

⁹ From the Chargé d'Affaires at the British Embassy in Turkey to the Minister for Foreign Affairs of the Government of the Turkish Republic, July 1, 1935. The Minister for Foreign Affairs acknowledged receipt of this communication by return note. *Ibid.*, No. 19.

¹⁰ For further examples see Sir Ernest Satow, *A Guide to Diplomatic Practice*, 3rd ed. rev., by H. Ritchie, London, 1932, Chap. 23-26.

In the preceding pages those aspects of the procedure of treaty-making which are, in general, common to all the Dominions have been discussed. Those aspects which are not uniform throughout the Commonwealth but which may differ in the various Dominions will be discussed in the pages which immediately follow.

1. AUSTRALIA, CANADA, AND NEW ZEALAND

A recent publication of the Department of External Affairs of the Commonwealth of Australia states that, "The majority of international agreements which have been entered into by Australia have taken the form of agreements between Heads of States, His Majesty the King being the contracting party in respect of Australia."¹¹ This statement is made with reference to all international engagements which have ever been concluded in respect of Australia, as a part of the British Empire or as a separate unit, and to which the Commonwealth is now a party. The list of international engagements which are now in force between Australia and foreign states, and upon which list the conclusion of the Department of External Affairs is obviously based, includes many instruments dating from the nineteenth century. It includes, for example, the Treaty of Amity, Commerce, and Navigation with the Argentine Republic of 1825.¹² If only the more recent engagements are taken into account, precisely the reverse conclusion is reached. It has already been indicated that in Australia, as is true also with the other Dominions and with the United Kingdom, most international engagements are now concluded in the form of agreements between governments. For the six-year period beginning in 1931 only approximately one third of Australia's international engagements are in the heads-of-states form. Full powers for the negotiation and conclusion of such treaties between heads of states are issued by the King under his own sign manual and under the Great Seal of the Realm. All such treaties are concluded in the name of the King as the contracting party in respect of the Commonwealth of Australia. Ratifications are also effected by, and in the name of, His Majesty the King. Two thirds of Australia's international agreements, however, are now concluded between the Government of the Commonwealth and the governments of foreign countries, in which the Commonwealth Government is the contracting party, without any intervention of His Majesty.

In order to carry out the negotiation of a heads-of-states treaty the Commonwealth Government nominates a plenipotentiary and requests His Majesty to issue the necessary full power. The Governor-General transmits this

¹¹ See the Parliament of the Commonwealth of Australia, 1934-35, No. 149, List of International Agreements (Treaties, Conventions, etc.) to Which Australia is a Party, or Which Affect Australia, Together With Prefatory Note, p. 8.

¹² Treaty of Amity, Commerce, and Navigation between His Majesty and the United Provinces of Rio de La Plata, signed at Buenos Ayres, February 2, 1825. Hertslet's Commercial Treaties, Vol. 3 (1841), p. 44.

request to the Secretary of State for Dominion Affairs in London. The Dominions Office forwards the request to the Foreign Office, where the full power and the warrant authorizing the affixing of the Great Seal of the Realm to the full power are drawn up. These two instruments are submitted to His Majesty and are passed under His Majesty's sign manual. They are then returned to the Foreign Office and thence to the Dominions Office. Here the warrant, but not the full power, is countersigned by the Dominions Secretary, or in his absence by any of the other of His Majesty's Principal Secretaries of State in the United Kingdom, and sealed with the lesser signet. The two documents are then sent to the Office of the Lord Chancellor who, acting under the authority contained in the warrant, causes the Great Seal of the Realm to be affixed to the full power and returns this document to the Dominions Office. The full power is then complete in every detail and is ready to be entrusted to the person named in the instrument as the plenipotentiary to conduct the negotiations and to sign the resulting treaty. Inasmuch as the Commonwealth has no regularly accredited diplomatic representative in foreign capitals,¹³ the plenipotentiary so named may be a British diplomatic representative; the Commonwealth High Commissioner in London may sometimes be appointed; or some other special Commonwealth delegate may be chosen. In either case the plenipotentiary is acting as representative of the Commonwealth and signs the treaty, which is concluded in the name of the King, for His Majesty in respect of the Commonwealth of Australia.

The plenipotentiary signs the treaty subject, if necessary, to ratification by His Majesty. Most treaties require ratification, and a provision may be included in the treaty whereby it shall be ratified and ratifications exchanged or deposited at some future date (or as soon as possible), and at some place specified. Whether or not a treaty requires ratification depends upon its nature and subject-matter and upon the intentions of the parties as expressed in the treaty itself.

The approval of the Commonwealth Parliament is not necessary for all ratifications. It is now the practice, however, for all treaties entered into in respect of the Commonwealth to be brought to the notice of the Parliament. Treaties may be submitted to Parliament either before or after signature, ratification, or accession. The Treaties of Peace of 1919, for example, were approved by resolution of both Houses of the Parliament prior to ratification, and later on an Act carrying the Treaties into effect was passed by Parliament. Legislation may often be necessary in order to give effect to treaties; and where this is true, such legislation is invariably passed before the treaty is brought into force in the Commonwealth. If a treaty in respect of the Commonwealth has not been brought before the Parliament prior to signature,

¹³ In January, 1937, it was announced that four Australians had been attached as diplomatic liaison officers to British embassies in order to give them diplomatic training with the purpose of preparing them for Australian diplomatic service.

ratification, or accession, it is the practice to lay on the Tables of both Houses copies of the treaty immediately after it has been concluded.

The first step in the procedure of ratifying a treaty is ordinarily the adoption by the Commonwealth Parliament of a resolution approving the treaty. Then follows an Order in Council requesting that His Majesty be humbly moved and advised to ratify the treaty in respect of the Commonwealth. Public notice of the Order in Council, of which the following may be cited as typical, is given in *The Commonwealth of Australia Gazette*:¹⁴

It is notified, for general information, that an Order in Council has been made to the effect that His Majesty the King be moved to ratify on behalf of the Commonwealth of Australia, in respect of the Mandated Territory of New Guinea, the Convention for the application to certain Mandated Territories of the provisions of the Extradition Treaty of 1891 between Great Britain and Monaco, signed at Paris on the 27th November, 1930.

(Signed) J. H. SCULLIN,
Prime Minister and Minister
for External Affairs

The Governor-General transmits this request, embodied in the Order in Council, to the Secretary of State for Dominion Affairs. The instrument of ratification is then drawn up and passed under His Majesty's sign manual and under the Great Seal of the Realm in precisely the same manner as that outlined above in connection with the issuance of full powers. The instrument of ratification as thus completed is sent to Canberra or to the foreign capital, as the case may be, where ratifications are to be exchanged or deposited.

Where the form of agreements between governments is employed, full powers are issued by the Governor-General in Council without any intervention of His Majesty and without the use of the Great Seal of the Realm. Ratifications of, and accession to, such agreements are likewise effected by an instrument of ratification passed under the Great Seal of the Commonwealth (which is not a royal Great Seal), signed by the Governor-General, and countersigned by the Minister for External Affairs in the Commonwealth. The instrument of ratification is then exchanged or deposited by the Commonwealth Government in accordance with the terms of the agreement. In summary, the documents necessary for the negotiation, signature, and ratification of treaties between heads of states to which the Commonwealth of Australia is a party are issued by His Majesty at the instance of the Government of the Commonwealth. These treaties are concluded in the name of

¹⁴ *The Commonwealth of Australia Gazette*, 1931, p. 297. The following may be quoted as a further example:

"It is notified, for general information, that an Order in Council has been made to the effect that His Majesty the King be moved to ratify in respect of the Commonwealth of Australia the Geneva Red Cross Convention of 1929, and the Prisoners of War Convention of 1929, which were signed on behalf of the Commonwealth on January 30, 1930." *Ibid.*

His Majesty as the contracting party in respect of Australia. Agreements between governments, on the other hand, are concluded in the name of the Commonwealth Government as the contracting party, and the necessary documents for the negotiation, signature, and ratification of such agreements are issued by the Governor-General in Council without any intervention of His Majesty.

A notification of the ratification of treaties to which Australia is a party, and a notification of treaties which are not subject to ratification but which have been signed or acceded to on behalf of the Commonwealth, are published in the *Commonwealth Gazette*. The Commonwealth does not publish its own treaty series as do Canada, Ireland, and the Union of South Africa. In some cases treaties are ordered to be printed by Parliament and are published as Parliamentary Papers. The texts of certain other treaties are reproduced in full in the *Commonwealth Gazette*. All Commonwealth treaties and all treaties of the other Dominions are, however, "for convenience and by courtesy of the Dominion concerned," printed as British Parliamentary Papers in the United Kingdom *Treaty Series*.¹⁵

The procedure of treaty-making by New Zealand is so similar to that followed by Australia that the procedure just outlined in connection with the Commonwealth may be said to apply also to New Zealand. The same is true also for the Dominion of Canada, except that while New Zealand and Australia have no diplomatic representatives of their own, Canada does have such representatives (envoys extraordinary and ministers plenipotentiary) at Paris, Tokyo and Washington, and an Advisory Officer possessing diplomatic status at Geneva. The services of such representatives are of course employed in many cases where Australia and New Zealand would act through the regularly accredited British diplomatic representatives.

All treaties concluded between any of these three Dominions and foreign Powers and made in the name of the King must be signed by a representative of the Dominion concerned, the full power being issued to such a representative by His Majesty at the instance of the Governor-General in Council. Likewise ratification is effected by His Majesty only after a Dominion Order in Council has been passed advising His Majesty to ratify on behalf of that particular Dominion. Both the full power and the instrument of ratification are passed under His Majesty's sign manual and, upon the authority of a royal warrant countersigned by the Secretary of State for Dominion Affairs, are sealed with the Great Seal of the Realm. While the warrant authorizing the Lord Chancellor in the United Kingdom to affix the Great Seal to these documents is counter-signed by the Dominions Secretary (or by another of His Majesty's Principal Secretaries of State), who is responsible to the Parliament at Westminster, the warrant itself in each case recites that the ratification or the issuance of the full power is at the request of, and upon the advice of, His Majesty's Ministers in the Dominion concerned. Officials in the

¹⁵ Parliament of the Commonwealth of Australia, *op. cit.*

Dominions Office and Foreign Office frequently refer to these respective Offices, insofar as they serve as channels of communication with His Majesty for this purpose, merely as "post offices." This is certainly accurate in the sense that they exercise no substantive control whatsoever over Dominion treaty-making.

2. THE UNION OF SOUTH AFRICA

The treaty-making procedure of the Union of South Africa varies considerably from that of Canada, Australia and New Zealand. This has been true, however, only since the Royal Executive Functions and Seals Act of 1934,¹⁶ which provided for the creation of a Royal Great Seal of the Union and also of a Royal Signet to be kept in the Union by the Prime Minister as Keeper of the Great Seal and Signet. Under the Status of Union Act¹⁷ of the same year, the executive government of the Union in regard to any aspect of its domestic or external affairs continues to be vested in the King, acting on the advice of his Ministers in the Union. All heads-of-states treaties in which the Union participates are concluded, signed, and ratified in the name of His Majesty the King. The King's will and pleasure in treaty-making, as in other matters, are expressed in writing under his sign manual, and every such instrument is countersigned by one of the King's Ministers in the Union. The King's sign manual is confirmed by the Royal Great Seal of the Union, which is affixed by the Keeper of the Seals to any instrument bearing the King's sign manual and the counter-signature of one of his Ministers of State in the Union and required to pass under the Great Seal. Thus since 1934 the Royal Great Seal of the Union has replaced the Great Seal of the Realm in confirming His Majesty's signature to full powers and instruments of ratification in respect of the Union. His Majesty's sign manual itself may be dispensed with whenever for any reason the King's signature to instruments of full powers and of ratification cannot be obtained, or whenever the delay involved in obtaining the King's signature to these instruments would, in the opinion of the Governor-General-in-Council, either frustrate the object of the instruments or unduly retard the dispatch of the treaty proceedings. In such event the Governor-General may execute and sign these instruments on behalf of His Majesty. Any instrument so executed and signed by the Governor-General and countersigned by one of the King's Ministers of the Union is regarded as having the same force and effect as an instrument signed by the King. A resolution of the Governor-General-in-Council is the necessary authority for affixing the Governor-General's signature as it is for affixing the King's signature. The Governor-General's signature to full powers and instruments of ratification is confirmed by the affixing of the Great Seal of the Union, now known as the Governor-General's Seal to distinguish it from the Royal Great Seal of the Union.

¹⁶ Statutes of the Union of South Africa, 1934, No. 70, p. 922.

¹⁷ *Ibid.*, No. 69, p. 914.

It will be noted that full powers and instruments of ratification which His Majesty issues in respect of the Union of South Africa must, according to the Royal Executive Functions and Seals Act of 1934, be countersigned by one of His Majesty's Ministers of the Union. Full powers and instruments of ratification issued by His Majesty in respect of the United Kingdom, Canada, Australia or New Zealand do not, however, bear the counter-signature of the Secretary of State for Foreign Affairs or of the Secretary of State for Dominion Affairs or of any Minister in the Dominions. The only document in connection with the issue of such full powers and instruments of ratification in respect of the United Kingdom and these three Dominions which requires counter-signature is the warrant authorizing the affixing to them of the Great Seal. If His Majesty is acting in respect of the United Kingdom, the warrant is ordinarily countersigned by the Secretary of State for Foreign Affairs. If he is acting in respect of Canada, Australia or New Zealand, the warrant is usually countersigned by the Secretary of State for Dominion Affairs. These full powers and instruments of ratification in respect of these four members of the Commonwealth bear the signature of the King alone, while the full powers and instruments of ratification in respect of the Union of South Africa bear the signature of the King and also the counter-signature of one of His Majesty's Ministers of State in the Union. Similarly, in Ireland these documents must be countersigned by the Minister for External Affairs.

When it is desired that a treaty be entered into in respect of the Union, a resolution of the Governor-General-in-Council (an "Executive Minute") is passed and is signed by the Prime Minister as a submission begging the King to issue the necessary full power. The full power is drawn up by the Department of External Affairs and together with the Executive Minute is transmitted by the Minister of External Affairs (who is in fact the Prime Minister) to the Governor-General. The Governor-General, in turn, communicates these documents *directly* to the King. After signature by His Majesty, the full power is returned by the same route, through the Governor-General, to the Minister of External Affairs, is countersigned by the Minister of External Affairs, and is sealed with the Royal Great Seal of the Union. The full power thus completed is sent to the plenipotentiary therein named to negotiate and conclude the treaty in question. The same procedure is followed in the issuance of instruments of ratification of treaties in respect of the Union. In cases of urgency, however, either of two other variants in procedure may be followed. Full powers which are issued to the High Commissioner in London¹⁸ or to a Union Minister at one of the European capitals, for example, may be both "countersigned" and sealed in the Union before they are sent to London for the signature of His Majesty. Or, in accordance with the pro-

¹⁸ The High Commissioner served as plenipotentiary at every international conference held in Europe in which the Union of South Africa participated during the seven years prior to the Montreux Capitulations Conference of 1937.

visions of the Royal Executive Functions and Seals Act, the Governor-General may execute and sign the full power on behalf of His Majesty. Either of these methods avoids the long delay involved if the instrument is dispatched to London and, after signature by His Majesty, is returned to the Union to be countersigned and sealed and once more sent to London or to the foreign capital where the full power is to be employed. This latter procedure, however, is regarded as the procedure to be followed in all ordinary circumstances. The other procedures are regarded as unusual and are employed only in cases of urgency. With the improvement of air service between the Union and London there will be less necessity for these departures from the usual procedure.

It will be observed that whichever of the above procedures is followed by the Union in concluding heads-of-states treaties, His Majesty is always the high contracting party in respect of the Union. Even where the Governor-General executes and signs full powers and instruments of ratification, he is acting on behalf of His Majesty. The full power is issued in the name of the King; the title and preamble of the treaty clearly show that the treaty is concluded by the King as the contracting party in respect of the Union; and, finally, ratification is effected by His Majesty. Throughout the proceedings His Majesty acts through his representatives. It will be noted further that at no step in the proceedings is there any intervention by His Majesty's Ministers in the United Kingdom. The old practice under which the Dominions Office and Foreign Office served as channels of communication with His Majesty, and the practice of counter-signature of Union treaty documents by one of His Majesty's Principal Secretaries of State in the United Kingdom have, with the substitution of the Royal Great Seal of the Union for the Great Seal of the Realm, now gone into complete desuetude.

Where the treaty is drawn up in the form of an agreement between governments, the procedure described above, as applicable to the Dominions generally, applies to the Union as to the other Dominions. Such agreements are negotiated, signed and ratified without any intervention of British Ministers and without even the formal intervention of His Majesty. His Majesty does not appear as a party to the proceedings at any point.¹⁹ It is His Majesty's Government in the Union of South Africa which concludes such agreements in its own name as the high contracting party.

¹⁹ Exceptions to this rule may be observed. On Oct. 13, 1932, an agreement was entered into between the Government of the Union of South Africa and the Government of the German Reich by means of an exchange of notes (amending the Treaty of Commerce and Navigation of Sept. 1, 1928) between the Union Minister of External Affairs and the German Consul General at Pretoria. The agreement was subject to ratification and was ratified by His Majesty, the instrument of ratification being signed by His Majesty and passing under the Great Seal in the same manner as the ratification of a heads-of-states treaty. United Kingdom, Treaty Series, 1935, No. 25, Cmd. 4961 (Reprint of Union of South Africa Treaty Series, 1932, No. 14).

3. IRELAND

Under the 1922 Constitution²⁰ the executive authority of Ireland was declared to be vested in the King and exercisable by the Governor-General as representative of the Crown. With the Constitution (Amendment No. 27) Act of 1936 the office of Governor-General was abolished, and thereafter the executive government of Ireland, insofar as internal matters are concerned, ceased to be exercised in the name of the King. While the Crown was thus abolished for purposes of internal government, it was at the same time preserved to a limited extent in the sphere of external relations. The Executive Authority (External Relations) Act, 1936, provided that the diplomatic and consular representatives of Ireland in other countries should be appointed by or on the authority of the Executive Council, and that every international agreement concluded on behalf of Ireland should be concluded by or on the authority of the Executive Council. Then follows the provision, relating to treaty procedure, for the exercise by His Majesty of the executive authority of the Irish State in the domain of external affairs.

3. (1) It is hereby declared and enacted that so long as the Saorstát Eireann is associated with the following nations, that is to say, Australia, Canada, Great Britain, New Zealand, and South Africa, and so long as the king recognized by those nations as the symbol of their coöperation continues to act on behalf of each of those nations (on the advice of the several Governments thereof) for the purposes of the appointment of diplomatic and consular representatives and the conclusion of international agreements, the king so recognized may, and is hereby authorized to, act on behalf of Saorstát Eireann for the like purposes as and when advised by the Executive Council so to do.

It is thus specifically declared that so long as Ireland is associated with other members of the British Commonwealth and so long as these other members continue to recognize the King as the symbol of their special relationship and the King acts on their behalf in the sphere of external affairs, His Majesty shall continue to act in the external relations of Ireland. The meaning of this provision is a matter of considerable uncertainty. Indeed it may be doubted whether this section means anything at all, inasmuch as recognition of the Crown is the only method by which Ireland can continue its special association with the other members of the British Commonwealth. The declaration, in other words, may apparently amount to the same thing as saying that Ireland will continue to recognize the Crown in the conduct of its external affairs so long as it continues to recognize the Crown in the conduct of its external affairs. In any case the Act may at any time be repealed by the Irish Parliament. The Act, however, has not been repealed even by the new Irish Constitution, which nowhere directly recognizes the King and which provides that the executive power of Ireland in or in connection with its exter-

²⁰ Irish Free State (Constitution) Act, 1922, 13 Geo. 5, c. 1. This is an Act of the Imperial Parliament at Westminster.

nal relations shall be exercised "by or on the authority of the Government" of Ireland.²¹ The new Constitution studiously avoids any mention of the King or of the membership of Éire in the British Commonwealth. Yet it does provide that for the purpose of the exercise of any executive function of the Irish State in connection with its external affairs, the Government "may, to such extent and subject to such conditions, if any, as may be determined by law, avail of or adopt any organ, instrument, or method of procedure used or adopted for the like purpose by the members of any group or league of nations with which Éire is or becomes associated for the purpose of international co-operation in matters of common concern."²² This provision is of course an obscure and indirect reference to the King and the British Commonwealth. There is a further interesting provision in Article 49:

1. All powers, functions, rights and prerogatives whatsoever exercisable in or in respect of Saorstát Eireann immediately before the 11th day of December, 1936, whether in virtue of the Constitution then in force or otherwise, by the authority in which the executive power of Saorstát Eireann was then vested, are hereby declared to belong to the people.²³

By this provision the power of treaty-making, formerly belonging to the King as the unquestioned prerogative of sovereignty, is apparently taken from the King and vested in the people, to be exercised in respect of Ireland only by or on the authority of the Irish Government. The function of making treaties on behalf of Ireland, therefore, can no longer be legally exercised by His Majesty except upon the authority of the Government of Ireland. The function of the Crown is now to act merely as *agent* for Ireland in treaty-making. In practice Ireland has continued in all essential respects to follow the same procedure in treaty-making as it followed prior to the enactment of the Constitution (Amendment No. 27) Act of 1936. The adoption of the new Constitution of 1937 likewise calls for no change of procedure. His Majesty continues to serve in the case of treaties between heads of states as the contracting party in respect of Ireland. His Majesty also continues to accredit the diplomatic representatives of Ireland to foreign countries, and the letters of credence of foreign Ministers at Dublin are still addressed to His Majesty. Such credentials are presented to the President of the Executive Council but they are addressed to the King.²⁴

Ireland was the first of the Dominions to possess a separate Royal Great

²¹ The "Government" here referred to is the Cabinet composed of the Prime Minister and not less than seven and not more than fifteen members appointed by the President in accordance with the provisions of the Constitution.

²² Draft Constitution as Approved by Dáil Eireann, published by the Stationery Office, Dublin. Art. 29, par. 4 (2). This Draft Constitution was approved by the people at a special general election held for that purpose July 1, 1937, and came into operation Dec. 29, 1937.

²³ *Ibid.*

²⁴ On July 26, 1937, Signor Romano Lodi Fè, first Envoy Extraordinary and Minister Plenipotentiary of Italy to Ireland, presented his credentials to President Eamon de Valera at Dublin Castle. In presenting his credentials the Minister said: "I have the honor of

Seal of its own. The Great Seal of Ireland was struck early in 1932. It is kept and controlled in Ireland and is used on all documents issued by the King on the advice of the Government of Ireland on which the Great Seal of the Realm was previously used. Since 1932, also, the channel of communication hitherto employed between Ireland and His Majesty, namely, the Secretary of State for Dominion Affairs, has not been used. Instead, His Majesty is advised directly.

The form in which an international engagement is to be concluded determines the authority who issues full powers for Ireland. If it is to take the form of an agreement between governments, then the Minister for External Affairs issues the full powers. If, on the other hand, it is to be concluded in the form of a treaty between heads of states, full powers are issued by the King. When the Minister for External Affairs decides that Ireland should conclude a heads-of-states treaty with a foreign state or states, he takes the matter up with the Executive Council and with the approval of the Executive Council prepares a submission to the King asking His Majesty to sign the full power investing a certain person with authority to conduct the negotiations and conclude the treaty on behalf of Ireland. The full power is drawn up in the Department of External Affairs, is sealed with the Great Seal of Éire, and is then dispatched to the Office of the High Commissioner in London. The High Commissioner secures His Majesty's signature to the document and returns it (possibly the following day) to Dublin. The Minister for External Affairs then countersigns the full power, and the completed instrument is sent to the person designated as the Irish plenipotentiary. The full power thus issued by the King explicitly states that His Majesty, in appointing a plenipotentiary to conclude a treaty on behalf of Ireland, is acting on the advice of the Executive Council. A further statement in the full power recognizes the authority of the Executive Council in causing the Great Seal of Ireland to be affixed to the document.

Ratification of heads-of-states treaties is effected by the same procedure as that followed in issuing full powers. Formerly Parliamentary approval was not legally necessary for the ratification of any treaty. As a matter of strict law the Parliament had no function whatsoever in treaty-making. In practice, all treaties—except postal agreements, for example—were laid on the table of Parliament, and the following treaties were usually brought before Parliament for its approval: (1) "political" treaties; (2) treaties requiring appropriations of money; and (3) treaties requiring a change of the law. Postal agreements are never presented to Parliament and are not printed

presenting to your Excellency the Letter of Credence which accredits me as Envoy Extraordinary and Minister Plenipotentiary to the Government of the Irish Free State." In fact the letter of credence did not accredit him to the Government of the Irish Free State but rather to His Majesty. In using the above language the Minister was not, therefore, strictly accurate. He was, however, undoubtedly conforming with the wishes of the Irish Government.

in the *Treaty Series*. The 1937 Constitution attempts, in the main, to preserve this procedure by embedding it in the fundamental law. The relevant provisions of the Constitution are found in Article 29:

5. (1) Every international agreement to which the State becomes a party shall be laid before Dáil Eireann.

(2) The State shall not be bound by any international agreement involving a charge upon public funds unless the terms of the agreement shall have been approved by Dáil Eireann.

(3) This section shall not apply to agreements or conventions of a technical and administrative character.

6. No international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas.²⁵

The phrase "Every international agreement to which the State becomes a party" is apparently intended to include agreements between governments as well as heads-of-states treaties. Thus every international agreement, except those of an administrative or technical character, must be *laid before* the Dáil Eireann—the House of Representatives only—and every agreement involving a charge upon public funds must be *approved* by the Lower House. If an international agreement is to become a part of the domestic law of Ireland, action by both houses of Parliament, the House of Representatives and the Senate, is required.

Agreements between governments to which Ireland is a party are concluded in the name of the Government of Ireland as the high contracting party. The necessary documents for the negotiation, signature, and ratification of such agreements are issued by the Minister for External Affairs under his own signature and seal without any intervention of His Majesty. The Government of Ireland does not recognize any legal distinction between heads-of-states treaties and intergovernmental agreements. Nor does it accept the so-called *inter se* doctrine of the 1926 Imperial Conference, *i.e.*, the doctrine that the making of a treaty in the name of the King as the symbol of the special relationship between the different parts of the Empire renders superfluous the inclusion of any provision that its terms must not be regarded as regulating *inter se* the rights and obligations of the various territories on behalf of which it has been signed in the name of the King.

The form of international engagements to which Ireland is a party does not depend either upon their importance or their subject-matter. It is a policy of the Irish Government to avoid the use of the King in treaty-making wherever possible. Nearly all of Ireland's engagements are, therefore, now concluded in the form of agreements between governments. Bilateral arrangements are usually governmental in form. When the Irish Government takes the initiative in treaty proceedings and can determine the form in which the engagement is to be concluded, such engagement invariably assumes the form of an agreement between governments. At international conferences,

²⁵ Draft Constitution, Art. 29.

however, at which Ireland cannot determine the form of treaty to be concluded, it may become a party to a treaty between heads of states. At the Montreux Capitulations Conference of 1937, for example, such a treaty was concluded and the Irish State is one of the signatories. The full power for concluding the treaty on behalf of Ireland was issued by the King on the advice of the Executive Council and under the Great Seal of Ireland. Ratification was also effected by His Majesty following the procedure described above. In certain instances governmental full powers of Ireland, *i.e.*, full powers issued by the Minister for External Affairs, are exchanged against heads-of-states full powers of other countries and the plenipotentiaries thus appointed conclude an agreement between governments. This practice was followed in the case of the Agreement relating to the Tonnage Measurements of Merchant Ships signed at Dublin, October 19, 1934, between the Government of Ireland and the Government of the Republic of Poland,²⁶ and it has also been followed in many other instances. League of Nations treaties are usually concluded as treaties between heads of states. Ireland, even though desiring to become a party to the treaty, may not sign the treaty thus concluded but may later become a party to the treaty by accession. The Executive Council authorizes accession, which is approved by Parliament when the subject-matter requires it, and which is notified generally by a letter from the Permanent Delegate of Ireland to the League of Nations addressed to the Secretary-General. By waiting a few months, therefore, Ireland becomes a party to heads-of-states treaties concluded under the auspices of the League of Nations by accession and thereby avoids the use of the King. This forms an important exception to the general rule that all heads-of-states treaties to which Ireland is a party are concluded by the King as the high contracting party on behalf of Ireland. By these various procedures, then, Ireland is able to carry out its policy of avoiding the use of the King in treaty-making. Instances in which His Majesty serves as the high contracting party to treaties on behalf of Ireland are now rare indeed.

During the five years 1932-1936 Ireland became a party to thirty-seven international instruments.²⁷ Twenty-nine of these are agreements between governments, twenty of this number being exchanges of notes and nine being more formal instruments. Seven were between heads of states. One was between states—a convention concluded in 1921 with the British Empire as one of the contracting parties.²⁸ In none of these instances, however, did

²⁶ Agreement between the Government of the Irish Free State and the Polish Government regarding the Tonnage Measurement of Merchant Ships, Oct. 19, 1934, Irish Free State, Treaty Series, 1935, No. 5; United Kingdom, Treaty Series, 1935, No. 28, Cmd. 4966. The form of the agreement does not indicate that the full powers of the Polish plenipotentiary were issued by the President of the Republic of Poland.

²⁷ Irish Free State, Treaty Series, 1932-1936. This calculation excludes two agreements with Commonwealth governments—one with the Government of the Dominion of Canada and the other with the Government of the Union of South Africa.

²⁸ *Ibid.*, 1934, No. 6, P. No. 1369.

Ireland employ His Majesty for purposes of issuing full powers and instruments of ratification, because it became a party to all eight instruments which were between states or heads of states, not by signature and ratification, but by accession. His Majesty seldom serves as the high contracting party in Irish treaty-making simply because Ireland avoids, wherever possible, the heads-of-states form. The Treaty of Commerce with Germany, signed May 12, 1930, and ratified December 21, 1931,²⁹ is a heads-of-states instrument—having been concluded between His Majesty, in respect of Ireland, and the President of the German Republic. This is the last instance in which His Majesty became a high contracting party to an international instrument in respect of Ireland for a period of almost exactly seven years. When, however, the Capitulations Conference was convening in Montreux in April, 1937, full powers were issued to the Irish plenipotentiary by His Majesty on April 12, 1937, and the Convention signed on May 8, 1937, for the Abolition of Capitulations in Egypt was concluded by His Majesty as the high contracting party in respect of Ireland.³⁰ Thus the practice of His Majesty's issuing full powers, serving as the high contracting party, and effecting ratifications, in respect of Ireland, though little followed, nevertheless still survives.

4. SUMMARY

The position has now been reached in the procedure of treaty-making by the various members of the British Commonwealth whereby it is clearly recognized that each member takes part in treaty-making according to its own desires and in accordance with the procedure which it chooses. As late as the London Naval Conference of 1935–36 there was considerable confusion in the minds of certain delegations as to the character of the various Commonwealth units represented at that Conference. The Irish plenipotentiary promptly corrected those who referred to these several delegations as a single "British Empire" delegation. He and the South African plenipotentiary made it very clear that in the view of at least two members of the British Commonwealth, the various units were participating on a basis of complete equality with each other and with each of the other states represented at the conference. The refusal of Ireland and the Union of South Africa to become parties to the London Naval Treaty of 1936 is in itself a strong expression of their views upon this point. Their views, moreover, have now gained general acceptance throughout the Commonwealth—if they had not previously been accepted—with the recognition by the 1937 Imperial Conference that "each member [of the Commonwealth] takes part in a multilateral treaty as an individual entity, and, in the absence of express provision in the treaty to the contrary, is in no way responsible for the obligations undertaken by any

²⁹ Irish Free State, Treaty Series, 1931, No. 9, P. No. 223.

³⁰ Final Act, Convention, and other Documents regarding the Abolition of Capitulations in Egypt, Montreux, May 8, 1937, Cmd. 5491 of 1937.

other member.”³¹ The procedure of treaty-making by members of the British Commonwealth in recent years should have made this point clear, but the declaration of the recent Imperial Conference now removes all doubt as to the independent character of the several units of the Commonwealth in all treaty proceedings, whether dealing with technical or administrative matters or with questions of high policy, and whether the proceedings are bilateral or multilateral.

Ireland and the Union of South Africa, insofar as they continue to employ His Majesty in treaty-making, communicate with His Majesty directly without using any Minister of the United Kingdom even as a channel of communication. In the Union, treaty-making authority is still vested in the King, while in the Irish State the King merely acts as agent in treaty-making. Both Ireland and the Union possess their own Royal Great Seals, which are released solely on the authority of their respective governments. With respect to the treaty-making of these two Dominions both the use of the Great Seal of the Realm and the intervention of a British Secretary of State have now been abolished. The last vestige of diplomatic unity throughout the British Commonwealth has thus disappeared for them.

Australia, Canada, and New Zealand continue to employ the Dominions Office and the Foreign Office in their treaty-making. The Great Seal of the Realm is still used to authenticate the King's signature to their treaty documents. The royal warrant authorizing the affixing of the Great Seal to these documents is in every instance countersigned by a United Kingdom Secretary of State who thus bears the legal responsibility for the use of the Great Seal. By this procedure, at least the appearance of diplomatic unity with the United Kingdom is maintained.

Although the procedure of treaty-making (in the case of heads-of-states treaties) by Australia, Canada, and New Zealand involves the formal intervention of certain members of the Government of the United Kingdom, responsible to the Parliament at Westminster, this intervention by such Ministers involves no substantive control over treaty-making by these Dominions. Although the strictly legal responsibility for the release of the Great Seal must be borne by a British Minister, all practical responsibility is borne by a Dominion Minister when the Great Seal is used on the treaty documents of a Dominion. The warrant by which His Majesty commands the Lord Chancellor to cause the Great Seal of the Realm to be affixed to full powers or instruments of ratification issued in respect of these three Dominions plainly recites that these documents are issued by His Majesty at the request of and upon the advice of His Majesty's Ministers in the particular Dominion concerned. Since 1926 the ratification of treaties imposing obligations on one member of the British Commonwealth has been effected by His Majesty at the instance of that part. The advice on which His Majesty acts in ratifying a treaty on behalf of any Dominion is that of the government of that Domin-

³¹ Imperial Conference, 1937, Summary of Proceedings, Cmd. 5482, p. 27.

ion. It would not be in accordance with constitutional practice for advice to be tendered to His Majesty by any United Kingdom Minister, whose intervention is required in Dominion treaty-making, against the views of the Dominion. The appropriate procedure with regard to projected treaties by one member of the Commonwealth which may affect the interests of other members is previous *consultation* between His Majesty's Ministers in the several parts concerned and not *control* by His Majesty's Ministers in the United Kingdom. The fact that certain formal steps are taken, in issuing full powers and instruments of ratification in respect of the Dominions, by two of His Majesty's Ministers in the United Kingdom—the Secretary of State for Foreign Affairs and the Secretary of State for Dominion Affairs—is in no way inconsistent with the governing principle that the advice on which His Majesty acts is solely that of the Dominion government concerned. The function of the United Kingdom Ministers consists only in operating certain constitutional machinery which has been set in motion by the Dominion government. It follows, therefore, that the above formal action of United Kingdom Ministers in connection with a Dominion treaty does not give them any measure of control over the government of that Dominion in making the treaty, nor does it involve any subordination of the Dominion government to the Government of the United Kingdom in this respect. Once a Dominion government has advised His Majesty to issue a full power for the negotiation and conclusion of a particular treaty or to issue an instrument of ratification of the treaty, the Government of the United Kingdom is not at liberty to advise His Majesty to a contrary effect. Legally, it might do so. It is unthinkable, considering present-day constitutional convention, that it would do so in practice. Any inter-imperial question which may arise in connection with the treaty and in which the United Kingdom may have an interest at variance with that of the Dominion concerned, should have been previously disposed of by consultation according to the procedure outlined at the Imperial Conference of 1926.

THE DIVERSION OF WATERS AFFECTING THE UNITED STATES AND CANADA

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The submission by the Government of the United States to the Government of Canada on May 28, 1938, of a rewritten draft of a Great Lakes-St. Lawrence waterway treaty brings to the forefront again the desirability of concluding a comprehensive agreement between the two Governments for a mutually advantageous utilization of the available navigation and power resources along the boundary basin. In view of the heightened interest in both the United States and Canada, a reëxamination of the diplomatic correspondence between the United States and Great Britain and Canada since the end of the nineteenth century regarding the diversion of waters in the United States or in Canada which affected interests in the other country is opportune.¹ It is of significance to note the positions taken by the United States and Great Britain and, later, Canada, in diplomatic negotiations and by significant municipal acts, as to the legal rights of the United States and Canada to the use or diversion of (1) boundary waters, (2) waters which are tributary (and entirely within the territory of one country) to boundary waters, and (3) waters of rivers flowing across the boundary. The distinction between the first situation and the second and third is an important one to observe.

In the early years of the twentieth century, while the British Ambassador presented the protests of Canada to the American Secretary of State regarding the diversions in northern Montana of the headwaters of the St. Mary River, which naturally flows north into Canada, the United States was concerned with the diversions by a Canadian irrigation company of the waters of the Milk River in Canadian territory, thereby depriving Montana farmers and ranchers of needed water for their land. At the same time, the British Ambassador complained of the activities of an American power company in northern Minnesota, which proposed to divert the waters of a tributary of American-Canadian boundary waters for power generation in the United States. Although these and other questions were dealt with simultaneously, it is necessary to separate their consideration for convenience of presentation and a clear appreciation of each situation. The Sanitary District of Chicago diversions from Lake Michigan will also of course be considered.

¹ The author wishes to express his appreciation to Professors Joseph P. Chamberlain, Charles Cheney Hyde, and Philip C. Jessup, of Columbia University, for their constructive criticisms of this paper, and to acknowledge the kind permission accorded by Mrs. Chandler P. Anderson to the author to use the records and letters of Mr. Chandler P. Anderson, which have been invaluable in this study.

The St. Mary River rises in the northwest corner of Montana and flows north to cross the international boundary to join other rivers in Canada. The principal tributary streams of the Milk River flow from Montana northeast to converge on the Canadian side of the boundary; the river continues easterly close to and parallel to the boundary for about 100 miles and then crosses into Montana, where many irrigating canals serve to furnish the needed water to the farming land.

The Reclamation Act passed by the Congress of the United States in 1902² provided for the diversion of the headwaters of the St. Mary River into the channel of the Milk River for conveyance eastward through Canadian territory and back south for the irrigation of land in northern Montana. At that time, the Canadian Northwest Irrigation Company had completed a canal and subsidiary works on the St. Mary River in Canada, which were designed to reclaim for cultivation large areas of land situated in southern Alberta. The British Ambassador at Washington presented the protest of the Canadian Government to the American Secretary of State,³ insisting that the United States should not interfere with the flow of the St. Mary River northward as the entire flow of the river was needed for irrigating Canadian land. The Canadian Minister of the Interior informed the Privy Council that Canada could take out water from the Milk River at a moderate cost and thus stop the flow of the river to the United States. However, the Minister submitted that "action in this matter should not be governed by a consideration of what Canada may or may not do to protect her interests; a question of this kind should be dealt with on its merits as justice and equity may demand."⁴

The Secretary of State, John Hay, informed the British Ambassador that the diversion contemplated by the United States of the waters of the St. Mary River would not interfere with the actual needs of the Canadian canal to the north.⁵ In his reply, the British Ambassador referred to "the consideration which was shown in the analogous case of the complaint of certain inhabitants of Idaho against the action of the Canadian Dyking Company in damming the waters of Boundary Creek in British Columbia in 1897."⁶ In the Idaho case referred to, citizens of the United States claimed remuneration for injuries committed by the flooding of their lands as a result of the construction of a dike on the Canadian side of the international boundary. In reply, Secretary Hay pointed out that there was no denial of the injuries alleged by the citizens of the United States and no reason was advanced by

² June 17, 1902, 32 Stat. 388.

³ The British Ambassador transmitted a copy of the report of the Canadian Privy Council, approved Oct. 27, 1902, to the Sec. of State, John Hay, Nov. 3, 1902, Preliminary Memorandum Prepared by Chandler P. Anderson on the St. Mary and Milk Rivers Irrigation Question for the Secretary of State, Elihu Root, June, 1907, p. 2, in Chandler P. Anderson, Records of the Negotiations Relating to the Use of Boundary Waters Between the United States and Canada, 1905-1908, hereafter cited as Anderson, Records, 1905-1908.

⁴ *Ibid.*, pp. 3 and 18.

⁵ Dated Dec. 29, 1902, *ibid.*, p. 3.

⁶ Dated Jan. 6, 1903, *ibid.*, p. 4.

Canada for a refusal to pay for such injuries to Idaho inhabitants, but the matter was not settled at the date of his note in 1903, although it had been under consideration in Canada since April, 1895.⁷

Secretary Hay commented at length on the contemplated diversion by the United States of the waters of the St. Mary River to the Milk River and through Canadian territory for use in northern Montana. He pointed out that the United States would expect that any prior vested rights that existed in Canada to the waters of the Milk River would be fully protected and allowed by the United States, that is, the Canadians would be permitted to take from the Milk River while it flowed through Canada such waters as they had previously been entitled to divert. The United States would expect to receive the remainder of the waters of the Milk River as it flowed south into Montana, including the amount that was turned from the St. Mary into the Milk River. The United States proposed to act in strict conformity with the laws concerning the rights to the use of water as recognized by the courts of the arid region on both sides of the international boundary.⁸ Secretary Hay reminded the British Ambassador of the "General Report on Irrigation and Canadian Irrigation Surveys, 1897 and 1898, Department of the Interior, Ottawa," in which an account was given of an investigation by the Canadian Irrigation Survey of the feasibility of diverting certain tributaries of the Milk River in Canada. It was proposed to carry such water into the Swift Creek Valley, where considerable bodies of irrigable lands were located, thus, however, depriving the United States of the natural flow of the Milk River. The situation was analogous to that complained of by Canada in the matter of the St. Mary River diversion by the United States. The conclusion reached by the Canadian Irrigation Survey was that "The cost of construction and maintenance would be too great to warrant the undertaking of such a scheme at the present time." Secretary Hay noted that the Survey had not abandoned the project, but had merely postponed it because of the expense involved.⁹

In the latter part of 1903 and the early months of 1904, numerous communications were addressed to the Secretary of State from the people in the Milk River Valley in northern Montana protesting that a large canal was in course of construction in Canadian territory which would divert a large amount of water from the Milk River into the Saskatchewan Basin.¹⁰ The Montana farmers and ranchers claimed that they were then using all the normal flow of the Milk River by means of irrigating canals which they had built at a great expenditure of money for the reclamation of 80,000 acres of

⁷ Sec. Hay to Sir Michael H. Herbert, Br. Amb., Feb. 19, 1903, *ibid.*, p. 5.

⁸ Sec. Hay quoted from the Reclamation Act of 1902 (32 Stat. 388): "That the right to the use of water shall be appurtenant to the lands irrigated and beneficial use shall be the basis, the measure, and the limit of the right." *Ibid.*, p. 6.

⁹ No reply was received to Sec. Hay's note of Feb. 19, 1903, *ibid.*

¹⁰ *Ibid.*, p. 7.

arid lands, and that they would suffer great hardship if the waters of the Milk River did not reach them as usual. In an opinion rendered to the Secretary of State, the Solicitor of the Department of State stated ¹¹ that the question of law involved was embarrassing because of similar complaints made by Mexico of the diversions of the waters of the upper Rio Grande in the United States and because of a similar complaint by the British Government on November 3, 1902. He suggested that the question should be adjusted by conventions between the United States and Mexico and Great Britain. He considered it doubtful whether any solution on "strictly academic principles" could be made satisfactorily to all of the interested governments.

Secretary Hay in May, 1904, brought the proposed diversion of the waters of the Milk River into the Saskatchewan Basin in Canada "respectfully" "to the attention and consideration of His Majesty's government in the hope that appropriate means may be taken to avert the threatened injury." ¹² The British Ambassador responded in July merely with the information that two applicants had already been given authority to divert water from the Milk River for the use of Canadian lands. ¹³ No further response to the note of May 9 was made to the United States. ¹⁴ In October, Secretary Hay declared in another note ¹⁵ that in view of the vital importance of the matter to the citizens of the Milk River Valley and to the property of the United States, he would be very glad if the British Ambassador would, in the exercise of his good offices, revive the question with the Dominion Government, to the end that every possible means might be taken to secure an equitable settlement of the questions involved, and to conserve all the rights in the premises of the United States and of the citizens of Montana. Only an acknowledgment of this note was received from the British Ambassador.

In December, Secretary Hay wrote to him again on the same subject, ¹⁶ contending that under the laws and customs which had grown up in arid regions, and which were in force in Canada, priority of appropriation and use had been recognized in Canada as well as in the United States. The Secretary of State characterized the permission given by the Canadian Government to the proposed diversion of the waters of the Milk River in Canadian territory as "an act lacking in friendliness" in view of the harm that would result to American agricultural land, and proposed that a conference be held by the two Governments for the purpose of reaching an agreement on the disposition of the waters of both the Milk and the St. Mary Rivers. He noted that an engineers' report in the Department of Interior suggested that it might be desirable to divert the headwaters of the St. Mary River by way of a specially constructed channel to the lower end of the Milk River without entering Canadian territory or to divert the St. Mary waters southward to other irrigable areas. Secretary Hay declared that these plans would not

¹¹ W. L. Penfield to Sec. Hay, May 6, 1904, *ibid.*, p. 8.

¹² Dated May 9, 1904, *ibid.*, p. 9.

¹³ Dated July 15, 1904, *ibid.*

¹⁴ *Ibid.*, p. 10.

¹⁵ Oct. 13, 1904, *ibid.*

¹⁶ Dec. 30, 1904, *ibid.*

be followed if the Canadian Government would agree to the diversion by the United States of such waters of the St. Mary River as were not then being utilized by the Canadian irrigation company.

In August, 1905, the British Ambassador agreed with the Secretary of State¹⁷ that it was manifestly in the interests of both countries that the waters of the St. Mary and Milk Rivers should be conserved for the beneficial use of the owners of agricultural and ranch lands through which these rivers flow. The United States was invited to submit a plan for the settlement of this problem. Negotiations continued until June, 1907, when a draft treaty was submitted by the Secretary of State, Elihu Root, to the British Ambassador, James Bryce, which dealt with the subject in great detail.¹⁸ This draft was not satisfactory to Canada. In 1908, representatives were appointed by the two Governments who conferred and visited the regions involved for a careful study of conditions. As a result of these conferences and negotiations, agreement was achieved in a final settlement which was incorporated as Article VI of the treaty signed by the United States and Great Britain on January 11, 1909.¹⁹

The High Contracting Parties agree that the St. Mary and Milk Rivers and their tributaries (in the State of Montana and Province of Alberta and Saskatchewan) are to be treated as one stream for the purposes of irrigation and power, and the waters thereof shall be apportioned equally between the two countries, but in making such equal apportionment more than half may be taken from one river and less than half from the other by either country so as to afford a more beneficial use to each. It is further agreed that in the division of such waters during the irrigation season, between the 1st of April and 31st of October, inclusive, annually, the United States is entitled to a prior appropriation of 500 cubic feet per second of the waters of the Milk River, or so much of such amount as constitutes three-fourths of its natural flow, and that Canada is entitled to a prior appropriation of 500 cubic feet per second of the flow of St. Mary River, or so much of such amount as constitutes three-fourths of its natural flow.

The channel of the Milk River in Canada may be used at the convenience of the United States for the conveyance, while passing through Canadian territory, of waters diverted from the St. Mary River.

While the United States and Great Britain were negotiating for a settlement of the St. Mary and Milk Rivers controversy, the Minnesota Canal and Power Company in 1904 proposed to construct reservoirs in the Birch Lake Basin in Minnesota. The stored waters would be released as needed, and

¹⁷ Aug. 2, 1905, *ibid.*, p. 12.

¹⁸ See Memorandum Concerning the St. Mary and Milk River Irrigation Project, submitted in advance of the hearing of the International Joint Commission by Manton M. Wyvell, May 5, 1915, in Chandler P. Anderson, Records of the Negotiations Relating to the Use of Boundary Waters Between the United States and Canada, 1909-1911, hereafter cited as Anderson, Records, 1909-1911.

¹⁹ Malloy, Treaties, III, 2607 (ratifications exchanged May 5, 1910); this JOURNAL, Supp., Vol. 4 (1910), p. 239.

conducted by artificial and natural channels southward to Duluth, Minnesota, on Lake Superior, where the water would be used for the generation of electrical power. The natural drainage of the Birch Lake Basin is northward into the boundary waters of Rainy River and the Lake of the Woods. In February, 1904, the company applied to the United States²⁰ for permission to use certain public lands for flowage and other purposes associated with the proposed diversion of waters.²¹

The British Ambassador informed the Secretary of State in January, 1905, that Canada objected to the proposed plans of the Minnesota company because they involved "the withdrawal of a certain percentage of the waters forming the Rainy River and the Lake of the Woods to the serious detriment of navigation," and he suggested that before the United States consented to any proceedings by the company for the diversion of the tributary waters, the question should be referred to the International Waterways Commission,²² which had been established by the United States and Great Britain in 1903.²³ The Secretary of State, Elihu Root, in May, 1906, agreed to submit the matter to the Commission for an expression of its views.²⁴

²⁰ Although the company applied only to the Sec. of Interior in Feb., 1904, for permission to use public lands for flowage and other purposes, the company later sought the needed authorization of the Sec. of War before the diversion of waters could be undertaken. For Sec. 10 of Act of March 3, 1899, see note 92.

²¹ International Waterways Commission, Second Progress Report, Dec. 1, 1906 (Washington, 1906), p. 6.

²² See Report prepared by Chandler P. Anderson on the questions presented for the consideration of the Department of State involving international relations in the matter of the application of the Minnesota Canal and Power Company, Sept., 1907, p. 3, in Anderson, Records, 1905-1908.

²³ In accordance with the request of Congress (32 Stat. 373), President Roosevelt in July, 1902, invited the Government of Great Britain to join in the formation of an international commission, to be composed of three members from the United States and three to represent the interests of Canada, "to investigate and report upon the conditions and uses of the waters adjacent to the boundary lines between the United States and Canada, including all of the waters of the lakes and rivers whose natural outlet is by the river St. Lawrence to the Atlantic Ocean; also upon the effect upon the shores of these waters and the structures thereon, and upon the interests of navigation, by reason of the diversion of these waters from or change in their natural flow; and, further, to report upon the necessary measures to regulate such diversion, and to make such recommendations for improvements and regulations as shall best subserve the interests of navigation in said waters." The Government of Great Britain accepted on June 2, 1903, and the International Waterways Commission was set up accordingly. International Waterways Commission, Progress Report, Dec. 1, 1905 (Washington, 1905), p. 10. For the concern in the United States in 1898 and 1900 because of the possible extended lowering of the level of the Great Lakes by diversions in both the United States and Canada, thus diminishing the volume of the Niagara Falls, see the Report of the New York State Reservation at Niagara in 1898, Moore, Digest, I, 657; and the Report of the Senate Committee on Foreign Relations in Feb., 1900, Sen. Rep. 461, 56 Cong., 1 Sess.

²⁴ International Waterways Commission, Second Progress Report, p. 20. Previous to the agreement of the United States, the Commission had considerable doubt about its jurisdiction over the Minnesota Canal and Power Company case because the Rainy River and the Lake of the Woods were not naturally tributary to the Great Lakes system, and the United

The Commission in November recommended to the United States and Canada that the permit applied for by the Minnesota Canal and Power Company to allow it to proceed with its proposed diversion of the tributary waters of the Rainy River and the Lake of the Woods should not be granted by the United States without the concurrence of the Canadian Government.²⁵ The Commission declared that Article II of the Webster-Ashburton Treaty of 1842 between the United States and Great Britain²⁶ secured to Canada free and unobstructed navigation of the boundary waters from which the proposed diversion was to be made. Any interference with the natural flow which would decrease the navigable capacity of the boundary waters, irrespective of the extent of the interference, justified Canadian opposition.

In the opinion of the Commission, certain principles of international law which had a direct bearing upon the question under consideration were sufficient for its solution.²⁷ The Commission contended that it was settled international law, recognized by both the United States and Great Britain, and lucidly stated by Attorney General Harmon in his opinion of December, 1895, to the Secretary of State regarding the Rio Grande,²⁸ that, in the absence of treaty stipulations, a country through which streams had their course or in which lakes existed could, in the exercise of its sovereign powers, rightfully divert or otherwise appropriate the waters within its territory for purposes of irrigation, the improvement of navigation, or for any other purpose which the government might deem proper. The Commission maintained that such an exercise of sovereign power over waters within the jurisdiction of a country could not be questioned even though the exercise of such sovereign power would be injurious to another country through which the same stream or lake passed. However, the Commission maintained that comity would require that a sovereign power should not be exercised to the injury of a friendly nation, or of its citizens or subjects, without the consent of that nation.²⁹ The Commission referred to the correspondence between

States maintained that the jurisdiction of the Commission was limited to cases related to the Great Lakes system only, unless the two countries conferred additional jurisdiction upon it. International Waterways Commission, Progress Report, Dec. 1, 1905, p. 11; *ibid*, Second Progress Report, p. 6.

For the opinions of the Chief of Engineers and the Advocate-General to the Sec. of War in 1905 on the Minnesota case, see Report of Anderson for Department of State, Sept., 1907, pp. 5-8, Anderson, Records, 1905-1908. Cf. dictum in *Minnesota Canal and Power Company v. Pratt*, 101 Minn. 197 (1907).

²⁵ Nov. 15, 1906, International Waterways Commission, Second Progress Report, p. 31.

²⁶ Art. II provides, in part: "It being understood that all the water communications and all the usual portages along the line from Lake Superior to the Lake of the Woods, and also Grand Portage, from the shore of Lake Superior to the Pigeon River, as now actually used, shall be free and open to the use of the citizens and subjects of both countries." Signed Aug. 9, 1842, ratifications exchanged Oct. 13, 1842, Malloy, Treaties, I, 650.

²⁷ International Waterways Commission, Second Progress Report, p. 28.

²⁸ See 21 Opinions of the Attorneys General, 274 (Dec. 12, 1895).

²⁹ International Waterways Commission, Second Progress Report, p. 29.

Secretary of State Evarts and the Mexican Minister to the United States in 1880, requesting the Government of Mexico to terminate the abstraction of water by the Mexican population from the Rio Grande for irrigation purposes to the detriment of American interests.³⁰

Although the International Waterways Commission recommended that the United States should not give the necessary permission to the Minnesota company without the concurrence of the Canadian Government, the Secretary of State, Elihu Root, informed the British Ambassador in January, 1908, that the United States was ready to withdraw its opposition to the granting of a permit to the Minnesota Canal and Power Company for the diversion of water in the United States from the tributaries of the Rainy River and the Lake of the Woods.³¹ Secretary Root pointed out that since the report of the Commission in November, 1906, the Minnesota project had been so modified as to provide for the diversion of only such an amount of water for the company's purposes as would not materially interfere with the navigable capacity or public use of any of the waters to which the diverted waters in their natural course would be tributary. The Minnesota company was required to provide dams and reservoirs to maintain the navigable capacity of the waters that would be affected by the proposed diversion. Secretary Root declared that he dissented from the conclusions of the International Waterways Commission with respect to the effect of Article II of the 1842 treaty upon the diversion of waters tributary to the boundary waters.³² He, however, considered it unnecessary to pass upon the question of treaty obligations or the other international questions raised in the Commission Report of 1906 because the United States was requiring remedial works of the company as a condition for granting its application in order that interests on the Canadian side of the boundary would be safeguarded as fully as required by the interpretation given the treaty by the Commission.

But in deference to the wishes of the Canadian Government, it was ar-

³⁰ See U. S. For. Rel., 1880, p. 783. This controversy between the United States and Mexico involved, however, that portion of the Rio Grande that formed the boundary between the two nations.

³¹ Sec. Root to Ambassador Bryce, Jan. 13, 1908, in draft of letter from the Sec. of State to Sec. of War in the matter of the application of the Minnesota Canal and Power Company, submitted by Chandler P. Anderson to the Sec. of State, P. C. Knox, May 7, 1910, Anderson, Records, 1909-1911.

³² Sec. Root rested his position on a memorandum submitted to him by Mr. Anderson, which he transmitted to the British Ambassador in his note to the latter in Jan., 1908. See Mr. Anderson to Sec. Root, Aug. 26, 1908, Chandler P. Anderson, Letters, VI, 197, 202. In the report prepared by Mr. Anderson for the Sec. of State, Sept., 1907, pp. 14-29, Mr. Anderson maintained that Art. II of the 1842 treaty did not necessarily imply an obligation on the United States and Great Britain to keep the route supplied with water, or to leave tributary waters undisturbed. The article had no other purpose than to define the location of a portion of the international boundary. Anderson, Records, 1905-1908.

Cf. Pigeon River Improvement, Slide and Boom Co. v. Charles W. Cox, Ltd., 291 U. S. 138 (1934); this JOURNAL, Vol. 29 (1935), p. 150.

ranged that negotiations between the United States and Great Britain would be undertaken for the purpose of arriving at some mutually acceptable adjustment of the questions involved before the United States finally allowed the Minnesota Canal and Power Company to have a permit to proceed with its proposed diversion of waters.³³ Article II was inserted into the treaty signed by the United States and Great Britain on January 11, 1909,³⁴ to provide a means in such cases as the Minnesota one for indemnifying private property owners on the Canadian side, if any injury to Canadian interests should result from the diversion of tributary waters on the American side. Injured Canadians would be entitled under Article II to the same legal remedies in the United States as if the injury occurred in the United States. At the time of the signing of the 1909 treaty, Secretary Root informed the British Ambassador that upon the ratification of the treaty, the opposition of the United States to the granting of the permit to the Minnesota company would be withdrawn.³⁵

Under the authorization of a statute passed by the Illinois State Legislature in 1889,³⁶ a sanitary district was created in Chicago to provide for the discharge of sewage. For this purpose, a drainage canal was constructed, and Lake Michigan was tapped by way of the Chicago River for sufficient water to dilute and force the sewage through the Chicago drainage canal into the Des Plaines River and then by way of the Illinois River into the Mississippi River above St. Louis.³⁷ Secretary of War Elihu Root directed³⁸ the Sanitary District in 1901 to regulate the discharge from the Chicago River into the drainage canal so that the maximum flow did not exceed 200,000 cubic

³³ Sec. Root to Amb. Bryce, Jan. 11, 1909, in Anderson, Letters, VI, 380.

³⁴ See p. 504.

³⁵ See Sec. Knox to Amb. Bryce, Jan. 3, 1910, in Anderson, Letters, VII, 451; and draft of letter from Sec. Knox to Sec. of War, submitted by Mr. Anderson to Sec. Knox, May 7, 1910, following the exchange of ratifications on May 5, 1910, stating that the Sec. of State withdrew his opposition to the granting of the application of the Minnesota company, so far as any international questions were concerned, in Anderson, Records, 1909-1911.

³⁶ Act of May 29, 1889, Annotated Statutes of Illinois (W. C. Jones and K. H. Addington, eds., Chicago, 1913), III, Ch. 42, par. 4284.

³⁷ When the Chicago drainage canal was opened in January, 1900, the State of Missouri brought suit in the Supreme Court of the United States against the State of Illinois and the Sanitary District of Chicago to subject the district to judicial supervision upon the allegation that the method of sewage disposal being employed was a continuing nuisance and dangerous to the health of the inhabitants of Missouri who lived along the Mississippi River below the point where the Illinois River emptied into the Mississippi, above St. Louis. The court, however, dismissed the complaint of Missouri because, as Mr. Justice Holmes noted in his opinion, Missouri did not prove her allegations, the evidence submitted to the court indicating that the waters of the Illinois River had actually been improved by the great volume of pure water which was diverted into it from Lake Michigan to dilute the sewage. *Missouri v. Illinois and the Sanitary District of Chicago*, 180 U. S. 208 (1901) and 200 U. S. 496 (1906).

³⁸ The Sec. of War acted under the authority of Sec. 10 of the Act of March 3, 1899. See note 92.

feet per minute, except that a flow of 300,000 c.f.m. was allowed between 4 p.m. and 12 midnight.³⁹ In 1903 the maximum flow through the Chicago River was cut down to 250,000 c.f.m. or 4,167 c.f.s.⁴⁰

When in response to a request of Congress,⁴¹ the members of the American Section of the International Waterways Commission reported in March, 1906, on the preservation of Niagara Falls,⁴² they recommended that the Sanitary District of Chicago should be allowed 10,000 c.f.s. The American Commissioners declared that the 10,000 c.f.s. was part of the 28,500 c.f.s. which might be diverted from the American side of the waters naturally tributary to Niagara Falls without serious interference with the latter. The maximum fixed for the Canadian side was 36,000 c.f.s. The Commissioners declared that the excess of 7,500 c.f.s. for the Canadian side was an advantage more apparent than real since the power generated on the Canadian side would, to a large extent, be transmitted to and used in the United States.

Soon after this report of March, 1906, was submitted to Congress, Congressman Burton of Ohio introduced⁴³ a bill in the House of Representatives which provided in Section 1 that the diversion of water from the Niagara River or its tributaries in the State of New York was prohibited, except with the consent of the Secretary of War.⁴⁴ Section 1 specifically provided that the prohibition was not to be interpreted as forbidding the diversion of the waters of the Great Lakes or of Niagara River for sanitary or domestic purposes or for navigation. In Section 4, the bill requested the President to

³⁹ See permits of April 9, 1901, and July 22, 1901, Hearings before House Committee on Rivers and Harbors, on improvement of Illinois River, Illinois, and abstraction of water from Lake Michigan, 69 Cong., 1 Sess., p. 202. On May 8, 1899, Sec. of War R. A. Alger granted permission to the district to open the drainage canal. *Ibid.*, p. 201.

⁴⁰ Permit of Jan. 17, 1903, signed by Asst. Sec. of War, W. C. Sanger, *ibid.*, p. 203. From Jan. 17, 1903, to March 31, 1903, the district was permitted to increase the flow from the Chicago River to 350,000 c.f.m., but thereafter the flow reverted to the maximum of 250,000 c.f.m. *Ibid.*

An application made by the Sanitary District for permission to divert an additional 4,000 c.f.s. from Lake Michigan through the Calumet River to the Chicago canal to drain the southern part of Chicago was denied on March 4, 1907, by Sec. of War Taft. Canada, Sessional Papers, 1928, Sess. Paper No. 227, Correspondence relating to diversion of the waters of the Great Lakes by the Sanitary District of Chicago, March 27, 1912, to Oct. 17, 1927 (Ottawa, 1928), p. 7.

But permission was granted in 1910 to the Sanitary District to use the Calumet River as well as the Chicago River for the diversion of water from Lake Michigan to the drainage canal, provided that the district did not increase its total diversion from the lake over the already allotted 4,167 c.f.s. Permit of June 30, 1910, signed by Acting Sec. of War, R. S. Oliver, in Hearings before House Committee on Rivers and Harbors, on improvement of Illinois River, Illinois, and the abstraction of water from Lake Michigan, 69 Cong., 1 Sess., p. 204.

⁴¹ March 15, 1906, 34 Stat. 824.

⁴² Report of March 19, 1906, transmitted by President Roosevelt to Congress on March 27, 1906, 59 Cong., 1 Sess., Sen. Doc. 242, p. 2.

⁴³ April 11, 1906, Cong. Rec., XL, 5108.

⁴⁴ For the Act as approved on June 29, 1906, see 34 Stat. 626.

open negotiations with the Government of Great Britain for the regulation and control of the waters of the Niagara River and its tributaries to preserve the scenic grandeur of Niagara Falls and of the rapids in Niagara River. When the bill was considered in the Senate, an amendment was accepted to provide that nothing contained in the bill was to be construed to hold or concede that the waters of Lake Michigan or other lakes or rivers wholly within the territory of the United States were "subject to international negotiation."⁴⁵ However, this amendment was not accepted by the House of Representatives and the conference committee of the two Houses, and was omitted from the enacted statute. The Senate conferees explained in the Senate that they did not insist on the amendment because the bill without the amendment would not in any way endanger the rights of Chicago to have water from Lake Michigan, as Section 1 sufficiently protected the rights of Chicago.⁴⁶

In a report on conditions existing at Niagara Falls, submitted to the United States and Canada in May, 1906, the International Waterways Commission recommended⁴⁷ that diversions be limited on the Canadian side to 36,000 c.f.s. and on the American side to 18,500 c.f.s., and in addition to the latter maximum, a diversion for sanitary purposes of 10,000 c.f.s. for the Chicago drainage canal. The Commission suggested that a treaty between the United States and Great Britain should be negotiated or legislation enacted by the United States and Canada to limit the diversions to the maximum amounts recommended. In the proceedings of the Commission in October, 1906, the chairman of the Canadian Section urged that the Chicago Sanitary District restrain its demand for water from Lake Michigan to 10,000 c.f.s., and declared that the Commission had already assented to the work which had been done by the district and work which would be done for some years up to the 10,000 c.f.s. allotted to the district.⁴⁸

The members of the American Section in a report to Secretary of War Taft in November, 1906,⁴⁹ declared that the International Waterways Commission in recommending 10,000 c.f.s. to the Chicago drainage canal in its Niagara Falls report, believed that it was accepting a general tacit agreement that some such amount was required to protect the health of Chicago inhabit-

⁴⁵ This amendment was aimed particularly against the suggestion of the International Waterways Commission in May, 1906, that a treaty between the United States and Great Britain should be negotiated or legislation enacted by the United States and Canada to limit the Chicago diversions to 10,000 c.f.s., the other American diversions to 18,500 c.f.s., and the Canadian diversions to 36,000 c.f.s. See note 47.

⁴⁶ Cong. Rec., XL, 9097-9098.

⁴⁷ May 3, 1906, Canada, Sessional Papers, XLII, 1907-1908, No. 9, Sess. Paper No. 19b, p. 13.

⁴⁸ George C. Gibbons, Oct. 17, 1906, quoted in Hearings before House Committee on Rivers and Harbors, on improvement of Illinois and Mississippi Rivers, and the diversion of water from Lake Michigan into the Illinois River, 68 Cong., 1 Sess., Pt. 2, p. 1274.

⁴⁹ Nov. 27, 1906, International Waterways Commission, Second Progress Report, p. 3.

ants, and that that city should have it without further question, whatever the effect upon navigation might be. In a report on the Chicago drainage canal in January, 1907, the International Waterways Commission recommended⁵⁰ that the Government of the United States prohibit the diversion of more than 10,000 c.f.s., and that that amount would be sufficient for all time. Though the Commission maintained that the preservation of the levels of the Great Lakes was imperative, and that the interest of navigation was paramount, it considered these matters subject to the right of use for domestic purposes, in which term it included necessary sanitary purposes. The Canadian members of the Commission in a report to the Minister of Public Works in March, 1908,⁵¹ noted that the diversion of 10,000 c.f.s. at Chicago was taken into consideration in the allocation of the waters naturally falling over Niagara Falls. The Canadian Commissioners stated that Chicago sought to justify itself for the use of this amount by the necessity of preserving the public health of its inhabitants and evidenced its good faith by the expenditure of about \$50,000,000 on the sanitary district project.

Realizing the need for a comprehensive convention to settle the many diversion problems along the American-Canadian border, the United States and Great Britain entered into preliminary negotiations to determine the terms on which a settlement could be achieved that would be satisfactory. Upon instructions from the United States and Great Britain, an American member and a Canadian member of the International Waterways Commission conferred and submitted a draft treaty to the United States and to Canada in September, 1907.⁵² The draft used the expression "boundary waters" to include Lakes Superior, Michigan, Huron including Georgian Bay, St. Clair, Erie, and Ontario, the connecting and tributary waters of these lakes, the River St. Lawrence from its source to the ocean;⁵³ the Columbia River and all rivers and streams which cross the boundary line between Canada and the United States and their tributaries. It was provided that no water would be diverted from the Niagara River or from Lake Erie by way of the Niagara Peninsula in excess of 18,500 c.f.s. in the United States and 36,000 c.f.s. in Canada, except for necessary domestic and sanitary uses, and for the service of canals for purposes of navigation.

⁵⁰ Jan. 4, 1907, Canada, Sessional Papers, XLI, 1906-1907, No. 8, Sess. Paper No. 19, p. 173.

⁵¹ March 9, 1908, quoted in Hearings before House Committee on Rivers and Harbors, on the improvement of Illinois and Mississippi Rivers, and the diversion of water from Lake Michigan into the Illinois River, 68 Cong., 1 Sess., Pt. 2, pp. 1278-1279.

⁵² George Clinton, American Commissioner, and George C. Gibbons, Chairman of Canadian Section of Commission, to Sec. of State Root and to the Prime Minister of Canada, Sept. 24, 1907, in Anderson, Records, 1905-1908.

⁵³ Because of immediate criticism in Canada, Mr. Clinton and Mr. Gibbons submitted an amendment to modify the application of "boundary waters" to the St. Lawrence River in order not to include the entire river but only from its source to the forty-fifth parallel of north latitude. Mr. Clinton to Sec. Root, Dec. 3, 1907, *ibid.*

The Department of State submitted the draft treaty to Chandler P. Anderson in October, 1907, for his comment.⁵⁴ Mr. Anderson reported to the Secretary of State, Elihu Root, in December,⁵⁵ that the jurisdiction of the commission to be set up in the new arrangement, over "boundary waters" should be limited and should not include matters relating to the use of tributary waters or waters flowing across the boundary. Mr. Anderson declared that the right on the part of the United States to divert without the consent of Canada the waters of Lake Michigan through the Chicago drainage canal, and the waters of the Milk and St. Mary Rivers for irrigation purposes was recognized and sustained by international law. He pointed out that these waters could be distinguished from boundary waters in which both countries have certain interests which must be respected by the other. Mr. Anderson declared that if, however, such tributary waters and waters flowing across the boundary should lose their distinction from boundary waters and be classified with them, as proposed in the draft treaty, the right of exclusive control over them would be lost and Canadian consent to their diversion would be necessary in each instance.

In a memorandum on proposed provisions for a convention for the preservation of the falls and rapids of Niagara River, Secretary Root informed the British Ambassador, James Bryce, in February, 1908,⁵⁶ that the American maximum diversion within New York State for power purposes would be 20,000 c.f.s.⁵⁷ and that of Canada 36,000 c.f.s., provided that the power produced by the 16,000 c.f.s. excess allowed to Canada might be supplied to consumers upon either side of the river at the will of the producers. Such distribution was not to be prohibited by the two countries or to be subject to either export or import duty. However, this proposed limitation on the authority of Canada to interfere with the transmission of the power produced by the 16,000 c.f.s. excess was not included in the final draft of Article V of the treaty signed on January 11, 1909.⁵⁸

⁵⁴ Robert Bacon, Actg. Sec. of State, to Mr. Anderson, Oct. 15, 1907, *ibid.*

⁵⁵ Mr. Anderson to Sec. Root, Dec., 1907, *ibid.*

⁵⁶ Feb. 15, 1908, *ibid.* See also 34 Stat. 626.

⁵⁷ Sec. Root testified before the Senate Committee on Foreign Relations in Jan., 1909, that he followed the report of the International Waterways Commission and added 1,500 to the American maximum of 18,500 to get round numbers in the 1909 treaty. He stated: "... so our limit is higher than we want, but their limit could not be cut down below what it is because there are three companies on the Canadian side who have the right and works there. Two of these companies are owned in the United States, and the power they produce is now substantially in the United States, so that as long as that condition of things exists it is as well for us to have them over there as to have them on our side. That condition of things is bound to continue in substance, because their grants from Canada provide that they shall furnish one half of the power they produce in Canada at the same rates they charge in the State of New York, and the Canadians have held that that carries the right to furnish the other half in the State of New York, so that one half of the power produced is bound to come to the United States." Quoted in Hearings before subcommittee of the Senate Committee on Foreign Relations, on S. Res. 278, 72 Cong., 1 Sess., p. 1007.

⁵⁸ For text of Art. V, see p. 504. Mr. Anderson informed Senator Lodge in a communica-

After a conference with George C. Gibbons,⁵⁹ who had been delegated by Great Britain to negotiate with the United States, Mr. Anderson completed a draft treaty on the use and diversion of waters, which differed greatly from the first proposal, and he submitted the new draft for the approval of Secretary Root in August, 1908,⁶⁰ and with his approval, to Mr. Gibbons in November.⁶¹ In the preliminary article, the Anderson draft defined "boundary waters" as the waters from shore to shore of the lakes and rivers and connecting waterways along which the international boundary between Canada and the United States passes, not including the waters of rivers flowing across the boundary or tributary waters which in their natural channels would flow into such lakes, rivers and waterways, or waters flowing from such lakes, rivers and waterways. Article II provided:

Each of the High Contracting Parties reserves to itself or the several State Governments on the one side and the Dominion or Provincial Governments on the other as the case may be, subject to any treaty provisions now existing or hereafter adopted with respect thereto, the exclusive jurisdiction and control over the use and diversion, whether temporary or permanent, of all waters on its own side of the line which in their natural channels would flow across the boundary or into boundary waters, but it is agreed that any interference with or diversion from their natural channel of such waters on either side of the boundary, shall give rise to the same rights and entitle the injured parties to the same legal remedies as if such injury took place in the country where such diversion or interference occurs; but this provision shall not apply to cases already existing or to cases expressly covered by special agreement between the parties hereto.

Article III declared that no further or other uses or obstructions or diversions other than those provided for in the treaty or between the parties thereafter, whether temporary or permanent, of boundary waters or of waters flowing therefrom materially affecting the natural level or flow of boundary waters would be made on either side of the boundary except by the authority of the United States or Canada within its jurisdiction and with the approval of a joint commission created in the later provisions of the proposed treaty. Article IV provided that the amount of water which would be taken from Lake Michigan for the Chicago drainage canal would not exceed the average rate of [blank] cubic feet per second. Article VIII gave the commission jurisdiction to pass upon all applications for the use or obstruction or diversion of waters defined as boundary waters when its approval was needed under Article III.

On November 24, Mr. Anderson submitted the following proposal to Secretary Root:⁶²

tion on Feb. 6, 1909, that Sec. Root had the assurance of Mr. Gibbons that the Canadian Government would not attempt to interfere with the distribution of the excess power during the life of the 1909 treaty. Anderson, Letters, VI, 396.

⁵⁹ Aug. 20, 1908, see *ibid.*, VI, 166 and 224.

⁶⁰ Aug. 26, 1908, *ibid.*, VI, 197.

⁶¹ Nov. 12, 1908, Anderson, Records, 1905-1908.

⁶² *Ibid.*

It is agreed on the part of the United States that the permanent diversion of water from Lake Michigan for the Chicago drainage canal shall be limited to an amount which shall not lower the level of the Great Lakes system more than (8?) inches below the normal mean low water level during the portion of the year when navigation is open.

Mr. Gibbons, in acknowledging the fair spirit of the draft treaty submitted by Mr. Anderson, suggested to him on November 24 ⁶³ that the preliminary article be shortened to define "boundary waters" as the waters from main shore to main shore of the lakes and rivers along which the international boundary between Canada and the United States passes. Mr. Gibbons inserted "10,000" in the blank space in Article IV to provide that the diversion of water by the Chicago drainage canal from Lake Michigan would not exceed 10,000 c.f.s. After a conference between Mr. Anderson and Mr. Gibbons on November 27, a revised draft ⁶⁴ rejected the definition proposed by Mr. Anderson in his draft of August. Yielding to Secretary Root's suggestion, the negotiators omitted Article IV, thus leaving out any reference to the Chicago diversions from Lake Michigan.⁶⁵ An additional paragraph to modify the effect of the first paragraph of Article II was contemplated by Mr. Anderson and Mr. Gibbons, and the following two alternative suggestions were considered by them on December 2: ⁶⁶

The foregoing provision shall not be construed as an agreement authorizing diversions on either side which in their effect would be productive of material injury to the navigation interests on the other side.

It is understood, however, that neither government intends by the foregoing provision to surrender any right, which it may have, to object to any diversions of waters on the other side of the boundary the effect of which would be productive of material injury to the navigation interests on its own side of the boundary.

Mr. Anderson informed Mr. Gibbons, however, that a second paragraph should not be added to Article II,⁶⁷ but Mr. Gibbons protested vigorously.⁶⁸ He pointed out that since they had yielded to Secretary Root's suggestion to leave out the provision dealing with Chicago, under the single paragraph of Article II unlimited diversion was authorized at Chicago and in Minnesota. Though Mr. Gibbons believed that the principle adopted by the International Waterways Commission that diversion in one country having an

⁶³ Nov. 24, 1908, Anderson, Records, 1905-1908.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.* See also Mr. Gibbons to Mr. Anderson, Dec. 10, 1908, *ibid.*; and statements of Sec. Root at hearings before Senate Committee on Foreign Relations in Jan., 1909, quoted in Hearings before subcommittee of Senate Committee on Foreign Relations, on S. Res. 278, 72 Cong., 1 Sess., p. 1007.

⁶⁶ Anderson, Records, 1905-1908.

⁶⁷ Dec. 5, 1908, Anderson, Letters, VI, 352.

⁶⁸ Mr. Gibbons to Mr. Anderson, Dec. 10, 1908, Anderson, Records, 1905-1908. Mr. Gibbons noted at the bottom of his letter that his suggestions in this note of Dec. 10, 1908, were of course his personal views and were subject to the approval of the Government at Ottawa, Canada.

injurious effect upon interests in the other country should not be permitted, he waived that point for the sake of the general treaty. But he insisted that it was impossible to allow the one paragraph of Article II to remain without some restriction, as standing alone it would justify any diversion, no matter how injurious to the public interests, in boundary waters or in the other country. Accordingly, he submitted the following as an addition:

Nothing in this article is intended to authorize diversions in one country which will seriously interfere with public rights of navigation in boundary waters or in waters at a lower level than the boundary in rivers flowing across the boundary; and while each of the High Contracting Parties reserves its sovereign right of dealing with such diversions, each recognizes that it is desirable that such right should not be unnecessarily exercised to the injury of public interests in such boundary waters or in waters at a lower level than the boundary in rivers flowing across the boundary.

In reply, Mr. Anderson suggested the following ⁶⁹ instead, which was accepted by Mr. Gibbons ⁷⁰ and added as a second paragraph in Article II:

It is understood, however, that neither Government intends by the foregoing provision to surrender any right, which it may have, to object to any diversions of waters on the other side of the boundary the effect of which would be productive of material injury to the navigation interests on its own side of the boundary.

In further correspondence on the Niagara section of the draft treaty, Mr. Gibbons stated ⁷¹ that he had explained frequently why Canada was permitted to take a greater volume of water than the United States: "Perhaps it is not necessary to repeat that the 10,000 c.f.s. taken at Chicago and which, of course, was water diverted from Niagara, was taken into account, and further that consideration was given to the fact that very much more could be taken on our side without injury to the scenic effect." Mr. Gibbons added that the apparent advantage which Canada had in the diversion above the falls was not a real advantage as the Canadian companies were finding a market, and would have to continue to do so, in New York State for a large portion of their power.

The completed treaty was signed by Secretary Root and Ambassador Bryce on January 11, 1909,⁷² and it included the following provisions:

Preliminary Article. For the purposes of this treaty boundary waters are defined as the waters from main shore to main shore of the lakes and rivers and connecting waterways, or the portions thereof, along which the international boundary between the United States and the Dominion of Canada passes, including all bays, arms, and inlets thereof, but not

⁶⁹ Mr. Anderson to Mr. Gibbons, Dec. 14, 1908, Anderson, Records, 1905-1908.

⁷⁰ Mr. Gibbons to Mr. Anderson, Dec. 16, 1908, *ibid.*

⁷¹ Mr. Gibbons to Mr. Anderson, Dec. 15, 1908, *ibid.*

⁷² Malloy, Treaties, III, 2607; this JOURNAL, Vol. 4 (1910), p. 239.

including tributary waters which in their natural channels would flow into such lakes, rivers, and waterways, or waters flowing from such lakes, rivers, and waterways, or the waters of rivers flowing across the boundary.

Article II. Each of the High Contracting Parties reserves to itself or to the several State Governments on the one side and the Dominion or Provincial Governments on the other as the case may be, subject to any treaty provisions now existing with respect thereto, the exclusive jurisdiction and control over the use and diversion, whether temporary or permanent, of all waters on its own side of the line which in their natural channels would flow across the boundary or into boundary waters; but it is agreed that any interference with or diversion from their natural channel of such waters on either side of the boundary, resulting in any injury on the other side of the boundary, shall give rise to the same rights and entitle the injured parties to the same legal remedies as if such injury took place in the country where such diversion or interference occurs; but this provision shall not apply to cases already existing or to cases expressly covered by special agreement between the parties hereto.

It is understood, however, that neither of the High Contracting Parties intends by the foregoing provision to surrender any right, which it may have, to object to any interference with or diversions of waters on the other side of the boundary the effect of which would be productive of material injury to the navigation interests on its own side of the boundary.

Article III. It is agreed that, in addition to the uses, obstructions, and diversions heretofore permitted or hereafter provided for by special agreement between the parties hereto, no further or other uses or obstructions or diversions, whether temporary or permanent, of boundary waters on either side of the line, affecting the natural level or flow of boundary waters on the other side of the line, shall be made except by authority of the United States or the Dominion of Canada within their respective jurisdictions and with the approval, as hereinafter provided, of a joint commission, to be known as the International Joint Commission. . . .

Article V. The High Contracting Parties agree that it is expedient to limit the diversion of waters from the Niagara River so that the level of Lake Erie and the flow of the stream shall not be appreciably affected. It is the desire of both parties to accomplish this object with the least possible injury to investments which have already been made in the construction of power plants on the United States side of the river under grants of authority from the State of New York, and on the Canadian side of the river under licenses authorized by the Dominion of Canada and the Province of Ontario.

So long as this treaty shall remain in force, no diversion of the waters of the Niagara River above the falls from the natural course and stream thereof shall be permitted except for the purposes and to the extent hereinafter provided.

The United States may authorize and permit the diversion within the State of New York of the waters of said river above the Falls of Niagara,

for power purposes, not exceeding in the aggregate a daily diversion at the rate of twenty thousand cubic feet of water per second.

The United Kingdom, by the Dominion of Canada, or the Province of Ontario, may authorize and permit the diversion within the Province of Ontario of the waters of said river above the Falls of Niagara, for power purposes, not exceeding in the aggregate a daily diversion at the rate of thirty-six thousand cubic feet of water per second.

The prohibitions of this article shall not apply to the diversion of water for sanitary or domestic purposes, or for the service of canals for the purposes of navigation.

Secretary Root accepted the invitation of the Senate Committee on Foreign Relations to appear before it in January to discuss the treaty. In his testimony,⁷³ he repeatedly pointed out that he had very carefully guarded the terms of the treaty in order not to include the Chicago drainage canal diversion of the waters of Lake Michigan within any of its prohibitions.⁷⁴ The definition of "boundary waters" was drawn up to exclude Lake Michigan.⁷⁵ Secretary Root declared that Article II (1) would substitute the decisions of municipal courts for prolonged negotiations.⁷⁶ As an illustration of its applicability, he cited the situation of the settlers in Canada on the Milk River who had alleged rights and interests in the river, and who were accordingly interfering seriously with the arrangement of the question of the waters of the Milk River between the United States and Canada. It was found on investigation that there were 23 families involved on the Canadian side, and that Canada would not consent to anything that might hurt those families. It was estimated that only \$10,000 would settle the entire dispute. By Article II (1) such a situation need not lead to a prolonged international deadlock as the settlers would have their recourse to American courts to have their rights fully protected.

The Senate Committee also had before it a memorandum prepared by Mr. Anderson for the Department of State,⁷⁷ in which he pointed out the distinction which was drawn in the preliminary article between (1) boundary waters and (2) waters which were tributary to boundary waters and waters of rivers flowing across the boundary.⁷⁸ Article II was applicable only to waters which in their natural channels would flow across the boundary or into boundary waters and was not applicable to the use or obstruction or diversion of boundary waters. Article III, however, applied only to the uses, obstructions or diversions of boundary waters and was not applicable

⁷³ Quoted in Hearings before subcommittee of Senate Committee on Foreign Relations, on S. Res. 278, 72 Cong., 2 Sess., p. 1005.

⁷⁴ *Ibid.*, pp. 1006, 1007, 1008, 1009, and 1010.

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*, p. 1006.

⁷⁷ Quoted in Hearings before House Committee on Rivers and Harbors, on the improvement of the Illinois and Mississippi Rivers, and the diversion of water from Lake Michigan into the Illinois River, 68 Cong., 1 Sess., Pt. 2, p. 1294.

⁷⁸ Mr. Anderson did not mention here waters flowing from boundary waters, which might be classified in the second group.

to the uses, obstructions or diversions of tributary waters or waters flowing across the boundary. Mr. Anderson declared ⁷⁹ that the waters of Lake Michigan did not come within the treaty definition of boundary waters. He then called attention to the express provision in Article II (1) that it should not apply to cases already existing, which was intended to cover the canal system at Chicago. But in any case, Mr. Anderson continued, an examination of the provisions of Article II (1) showed that the right of action for damages applied to private or individual interests in distinction from public or governmental interests.⁸⁰ Such individual interests were given only the same rights which similar interests on the American side of the line would have in the absence of the treaty,⁸¹ thus recognizing that the settlement of the question of the use of the waters of Lake Michigan was a domestic question and left undisturbed the governmental rights of the United States with respect to it. Canadian private interests, in effect, were brought within the jurisdiction of the United States for this purpose.⁸²

On March 3, 1909, the Senate advised and consented to the ratification of the treaty, and on May 5, 1910, ratifications were exchanged at Washington between the United States and Great Britain.⁸³

When the Sanitary District of Chicago applied in February, 1912, to Secretary of War Henry L. Stimson for permission to increase the diversion of water from Lake Michigan to the drainage canal from 4,167 c.f.s., as already allowed, to 10,000 c.f.s., Secretary Stimson arranged to hear argument on the application the following month in Washington. The Sanitary District contended that its population exceeded 2,500,000 and was increasing rapidly, and that as the only method then available for disposing of the sewage of its

⁷⁹ Hearings before House Committee on Rivers and Harbors, on the improvement of the Illinois and Mississippi Rivers, and the diversion of water from Lake Michigan into the Illinois River, 68 Cong., 1 Sess., Pt. 2, p. 1297.

⁸⁰ *Ibid.*, Pt. 2, p. 1294.

⁸¹ *Ibid.*, Pt. 2, p. 1297.

⁸² In a letter from Mr. Anderson to Sec. of State Robert Lansing, May 9, 1918, with reference to a question asked by Sec. Lansing of Mr. Anderson with regard to the application of the 1909 treaty to the diversion of water from Lake Michigan for the Chicago drainage canal, Mr. Anderson quoted from his correspondence with Mr. Gibbons in 1908. Mr. Anderson declared that in view of this correspondence and Article II (2), as agreed to by Mr. Gibbons and himself, no restriction was imposed with reference to the diversion of the waters from Lake Michigan for the Chicago drainage canal, nor did Great Britain surrender any right which it may have had to object to any interference with or diversion of the waters of Lake Michigan for the canal, in case the effect should be productive of material injury to the navigation interests on the Canadian side of the boundary. Anderson, Records, 1909-1911.

⁸³ Malloy, *Treaties*, III, 2607; this JOURNAL, Vol. 4 (1910), p. 239. For the activities of the International Joint Commission set up by this treaty, see C. Joseph Chacko, *The International Joint Commission between the United States of America and the Dominion of Canada* (New York, 1932). As the hearings and orders of the Commission are in pursuance of authority given by the 1909 treaty, they are not indicative of the rules of international law governing the diversion of waters. Accordingly, the activities of the Commission are not considered in this study.

population was by diluting it with water flowing from Lake Michigan through the Chicago drainage canal, a greater amount of water was needed from Lake Michigan.

Opposing written and oral arguments were submitted to Secretary Stimson in behalf of the Canadian Government⁸⁴ and the Sanitary District of Chicago.⁸⁵ In a decision rendered in January, 1913, the Secretary of War denied the petition of the Sanitary District.⁸⁶ He concluded that the diversion of 10,000 c.f.s. would substantially interfere with the navigable capacity of the waters in the Great Lakes and their connecting rivers, and that being so, it would not be appropriate for him without the express sanction of Congress to permit such diversion. Secretary Stimson was not persuaded that the amount of water applied for was necessary for a proper sanitation of Chicago. His decision was based entirely on municipal law. He declared that the 1909 treaty was not in any way applicable to a determination of the questions that confronted him.

In response to an inquiry from the British Ambassador,⁸⁷ the Department of State declared in December, 1912, that the amount of water to be withdrawn from Lake Michigan to the drainage canal by the Chicago and Calumet Rivers together, would not exceed the total amount already authorized to be withdrawn through the Chicago River alone.⁸⁸ Nevertheless, the British Ambassador informed the Secretary of State in March, 1913, that Canada protested against the construction of the additional channel by way of the Calumet River for the diversion of water from Lake Michigan.⁸⁹ Canada feared that excessive diversion over the 4,167 c.f.s. maximum would be facilitated, and she particularly desired to make plain her attitude immediately of steadfast opposition to the policy involved in the proposed diversion. Ambassador Bryce maintained Canada's protest⁹⁰

⁸⁴ The Committee of the Privy Council of Canada authorized counsel and other representatives to submit a brief and to appear before Secretary Stimson to oppose any proposal which would result in lowering the level in the boundary waters and in the St. Lawrence River. Correspondence relating to diversion of the waters of the Great Lakes by the Sanitary District of Chicago, March 27, 1912, to Oct. 17, 1927, Canada, Sessional Papers, 1928, Sess. Paper No. 227, p. 3.

See Canada, Department of Marine and Fisheries, Papers relating to the application of the Sanitary District of Chicago for permission to divert 10,000 c.f.s. of water from Lake Michigan (Ottawa, 1912).

⁸⁵ *Ibid.*

⁸⁶ Canada, Sessional Papers, 1928, Sess. Paper No. 227, p. 7.

⁸⁷ See Gov. Gen. of Canada to the British Ambassador, Nov. 23, 1912, and a report of the Committee of the Canadian Privy Council, approved Nov. 19, 1912, *ibid.*, p. 4.

⁸⁸ Huntington Wilson, Acting Sec. of State, to Ambassador Bryce, Dec. 24, 1912, *ibid.*, p. 5. Cf. note 40.

⁸⁹ Ambassador Bryce to W. J. Bryan, Sec. of State, March 17, 1913, *ibid.*, p. 18. Cf. the Gov. Gen. to the British Ambassador, Feb. 12, 1913, *ibid.*, p. 14.

⁹⁰ Ambassador Bryce to Sec. Bryan, March 17, 1913, *ibid.*, p. 19. Cf. the Gov. Gen. to the British Ambassador, June 9, 1916, to reaffirm the position taken by Canada in 1912 and 1913, *ibid.*, p. 20.

both on the ground that any diversion of water from Lake Michigan which prejudicially affects the navigation of the Great Lakes infringes the rights secured to Canada by the Ashburton-Webster Treaty of 1842 in the channels in the River St. Lawrence and in the River Detroit and in the other passages and channels referred to in Article 7 of that treaty,⁹¹ as well as the rights of navigation in boundary waters and in Lake Michigan to which the Dominion is entitled under the Boundary Waters Treaty of 1909, and also on the ground that apart from these treaties the authorities of the United States or the authorities of any State have not under the recognized principles of international law any right to divert from Lake Michigan by any means, or for any purpose, such an amount of water as will prejudicially affect the navigation of boundary waters in which both Canada and the United States are deeply and vitally interested. The navigation of these boundary waters, upon the improvement and development of which as international waterways each country has spent many millions of dollars, is a question of vital interest to both the United States and Canada and it should be secured absolutely from injurious diversion on either side of the boundary line to the end that the interests of navigation and commerce, common to both countries, may be adequately preserved.

Soon after the refusal of Secretary Stimson in January, 1913, to permit an increased flow from Lake Michigan, the Sanitary District of Chicago was notified by the Department of War that it was tapping Lake Michigan for more than the 4,167 c.f.s. allowed to it by the permit of the Secretary of War under the authority of the Act of Congress of 1899.⁹² The district informed the Secretary of War that it was bound by the Illinois State statute of 1889⁹³ which required that the Chicago channel should be constructed of a size sufficient to take care of the sewage and drainage of Chicago by providing for a continuous flow of not less than 20,000 c.f.m. of water for each 100,000 of the population within the Sanitary District. The United States filed a bill in equity on October 6, 1913, in the Federal District Court to enjoin the Sanitary District of Chicago from diverting more than 4,167 c.f.s. of water

⁹¹ Art. VII of treaty of 1842: "It is further agreed that the channels in the river St. Lawrence on both sides of the Long Sault Islands and of Barnhart Island, the channels in the river Detroit on both sides of the island Bois Blanc, and between that island and both the American and Canadian shores, and all the several channels and passages between the various islands lying near the junction of the river St. Clair with the lakes of that name, shall be equally free and open to the ships, vessels, and boats of both parties." Malloy, *Treaties*, I, 650.

⁹² Sec. 10 of Act of March 3, 1899: "That the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; . . . and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to beginning the same." 30 Stat. 1121, 1151.

⁹³ Act of May 29, 1889, Annotated Statutes of Illinois, *op. cit.*, III, Ch. 42, par. 4307.

from Lake Michigan.⁹⁴ There was some delay in concluding the case, but even after it was submitted to Judge Landis for his decision, he kept the case for about six years before delivering an oral opinion in favor of the United States on June 19, 1920; he did not, however, enter a decree.⁹⁵ After the resignation of Judge Landis, in 1922, Judge Carpenter in June, 1923, entered a decree enjoining the Sanitary District of Chicago from withdrawing more than 4,167 c.f.s. of water from Lake Michigan, the decree to go into effect the following December.⁹⁶

Upon appeal to the Supreme Court of the United States, the district court decree was affirmed in an opinion rendered by Mr. Justice Holmes in January, 1925, effective the following March 5, without prejudice to any permit that might be issued by the Secretary of War according to law.⁹⁷ As there was a conflict between federal and state legislation, Mr. Justice Holmes declared that the controversy was not between equals. The United States was asserting her sovereign power to regulate commerce and to control the navigable waters within her jurisdiction, and Illinois was requiring the Sanitary District to maintain a conflicting minimum diversion of water. The basis of the decision was the authority of the United States to remove obstructions to interstate and foreign commerce. This federal power was superior to that of the States to provide for the welfare or necessities of their inhabitants. Mr. Justice Holmes considered that the evidence was sufficient, if evidence was necessary, to show that a withdrawal of water on the scale directed by the Illinois statute threatened and would affect the level of the lakes, and that that was a matter which could not be done without the consent of the United States. The court opinion in dictum referred to the 1909 treaty as also forming a foundation for a superior federal control over State legislation, but this dictum rested on an erroneous conception of the applicability of Article III to Lake Michigan. The court intimated that Lake Michigan is a boundary water under the treaty of 1909; but it is clear from the evidence submitted in this study that Lake Michigan is not a boundary water, and that Article III is not applicable to Lake Michigan. Accordingly, the suggestion of the court that the approval of the International Joint Commission was necessary for the use of the waters of Lake Michigan was an erroneous one. The later effort of the British Ambassador⁹⁸ to refer to this dictum of the Supreme Court to substantiate the claim of Great Britain that there are limitations on the use of the waters of Lake Michigan by the United States was ill-founded.

The British Ambassador, Sir Auckland Geddes, informed Secretary of

⁹⁴ Sanitary District of Chicago v. United States, 266 U. S. 405.

⁹⁵ *Ibid.*, 266 U. S. 405, 432.

⁹⁶ Opinion of Judge Carpenter quoted in Hearings before House Committee on Rivers and Harbors, on the improvement of the Illinois and Mississippi Rivers, and the diversion of water from Lake Michigan into the Illinois River, 68 Cong., 1 Sess., Pt. 2, p. 453.

⁹⁷ Sanitary District of Chicago v. United States, 266 U. S. 405.

⁹⁸ See p. 511 and note 109.

State Hughes in April, 1921,⁹⁹ that his attention had been drawn by the Canadian Government to the intention of the Sanitary District of Chicago to secure the authority of Congress to increase the diversion of water from Lake Michigan possibly beyond 10,000 c.f.s. Ambassador Geddes recalled the earlier correspondence that had taken place between the United States and Great Britain on this subject and repeated the representations made by the British Ambassador in March, 1913, to the Secretary of State. Ambassador Geddes stressed the fact that, "apart from the question raised by specific treaty stipulations, the recognized principles of international law do not confer either upon the federal authorities of the United States or upon any individual State of the Union the right to divert from Lake Michigan, by any means or for any purpose, such an amount of water as will prejudicially affect the navigation of boundary waters in which both Canada and the United States are interested." He suggested that the United States should agree that no solution of the area question was likely to be permanently sound or satisfactory unless it were based upon a recognition of the principle, established by international practice, that no permanent diversion should be permitted to another watershed from any watershed naturally tributary to waters forming the boundary between the two countries. Secretary Hughes replied in May that no such bill as was suggested by the British Ambassador had been introduced in Congress.¹⁰⁰

The British Embassy in December, 1923, informed the Secretary of State¹⁰¹ that the Canadian Government still maintained its attitude of opposition to the diversion of water from Lake Michigan because of the injurious effect of such diversion both upon navigation and water power. The following February the British Embassy again noted to the Secretary of State¹⁰² that the Government of Canada was unalterably opposed to the proposed diversion of water from the Great Lakes watershed to that of the Mississippi River. The British Embassy declared that it was common knowledge that the diversion that had already taken place at Chicago had lowered the waters of the Great Lakes. It was asserted that the amount of injury sustained by navigation interests might be seen from the fact that every inch of navigable water meant an additional 60 or 80 tons of carrying capacity. As the waters of the Great Lakes were the heritage of both the people of the United States and the people of Canada, the Dominion Government was of the opinion that it was quite obvious that these waters should be conserved for the interests of both peoples. The British Embassy expressed the hope of the Government of Canada that the Government of the United States would not only not permit any further diversion of water from Lake Michigan, but would

⁹⁹ April 22, 1921, Canada, Sessional Papers, 1923, Sess. Paper No. 227, p. 21.

¹⁰⁰ Sec. Hughes to Amb. Geddes, May 11, 1921, *ibid.*, p. 23.

¹⁰¹ H. G. Chilton, British Chargé d'Affaires ad interim, to Sec. Hughes, Dec. 29, 1923, *ibid.*, p. 31.

¹⁰² Mr. Chilton to Sec. Hughes, Feb. 13, 1924, *ibid.*, p. 35.

intimate to, and if necessary insist upon, the Sanitary District of Chicago adopting some more scientific method of sewage disposal than was then foreshadowed.

In response to similar notes from Great Britain in March and June of 1924,¹⁰³ the Secretary of State informed the British Ambassador¹⁰⁴ that the formulation of a comprehensive statement of the views of the United States concerning the diversion of water from Lake Michigan would have to be deferred for a time because certain of the questions involved were then under consideration by Congress and the Supreme Court of the United States. As already stated, the Supreme Court enjoined the Sanitary District of Chicago from withdrawing more than 4,167 c.f.s. from Lake Michigan by a decree effective March 5, 1925.¹⁰⁵ Notwithstanding another protest from the British Ambassador,¹⁰⁶ the Secretary of War on March 3, 1925, authorized an increase in the volume of water which the Sanitary District was entitled to divert from Lake Michigan to 8,500 c.f.s. until December 31, 1929.¹⁰⁷ The Sanitary District had been diverting 8,500 c.f.s. at the time of the court decision in 1925,¹⁰⁸ and the Secretary of War realized that if the district were to be limited to 4,167 c.f.s. suddenly, the Chicago sewage would pour out into the port of Chicago. The permit issued by the Secretary of War required the Sanitary District to make immediate arrangements to carry out sewage treatment by artificial processes in order to decrease the amount of water needed from Lake Michigan.

In a note to the Secretary of State in February, 1926, the British Ambassador discussed¹⁰⁹ American proposals for the construction of an Illinois and Mississippi waterway depending upon the indefinite continuance of the abstraction of the necessary water from the Great Lakes through the Chicago drainage canal. He contended that whatever temporary and limited concessions might be made upon the ground of public health to the Chicago authorities, no other ground warranted the withdrawal of water from the Great Lakes. Canada believed "it to be a recognized principle of international practice that unless by joint consent, no permanent diversion should be permitted another watershed from any watershed naturally tributary to the waters forming the boundary" between the United States and Canada.

The British Ambassador pointed out that the United States Supreme

¹⁰³ Sir Esme Howard, Br. Amb., to Sec. Hughes, March 21, 1924, *ibid.*, p. 42; same to same, June 13, 1924, *ibid.*, p. 43.

¹⁰⁴ Sec. Hughes to Amb. Howard, June 28, 1924, *ibid.*, p. 45.

¹⁰⁵ Sanitary District of Chicago v. United States, 266 U. S. 405.

¹⁰⁶ Amb. Howard to Sec. Hughes, Feb. 24, 1925, Canada, Sessional Papers, 1928, Sess. Paper No. 227, p. 46.

¹⁰⁷ Permit issued by John W. Weeks, Sec. of War, *ibid.*, p. 48.

¹⁰⁸ See Report of the Special Master, Charles E. Hughes, to the Supreme Court of the United States, Oct. term, 1927, relating to lake levels, 70 Cong., 1 Sess., H. Doc. 178, p. 53.

¹⁰⁹ Amb. Howard to Sec. Kellogg, Feb. 5, 1926, Canada, Sessional Papers, 1928, Sess. Paper No. 227, p. 60.

Court, in its opinion in *Sanitary District of Chicago v. United States*, recognized that the treaty of 1909 expressly provided against uses "affecting the natural level or flow of boundary waters" without the authority of the United States or the Dominion of Canada within their respective jurisdictions, and the approval of the International Joint Commission. The United States denied the British contentions as to the legal status of the withdrawal of water from Lake Michigan.¹¹⁰ The earlier discussion in this paper¹¹¹ regarding the dictum of the Supreme Court quoted by the British Ambassador clearly points out that the suggestion of the Supreme Court and the British Ambassador that the approval of the International Joint Commission is necessary for the use of the waters of Lake Michigan is erroneous. Lake Michigan is not a boundary water, and the quoted section of Article III of the 1909 treaty is not applicable to it.

Although the United States suggested that the construction of compensatory works would offset the lowering of the lake levels,¹¹² Great Britain refused to enter upon a discussion of such plans if they involved an assumption that the existing abstraction of water from Lake Michigan were to continue.¹¹³ With the appointment of a Canadian Minister to the United States, the negotiations of the United States were shifted from Great Britain to Canada. Accordingly, it was to the Canadian Minister that the Secretary of State addressed his note of October, 1927,¹¹⁴ in which he repeated that the United States Government was not prepared to admit the conclusions of law stated in the British note of February, 1926, on the question of the abstraction of water from one watershed and the diversion of it into another. The Secretary of State declared that in view of the recommendations of the report of the Joint Board of Engineers appointed by the United States and Canada,¹¹⁵ it would appear that the question as to the practical results of diversion in its effect on navigation could be entirely remedied. In answer to the observation of the Canadian Government that the installation of compensatory works to restore lake levels would not recoup to the Great Lakes system the power lost by the diversion at Chicago, the Secretary of State said he would, without in any way admitting the principles of compensation, call attention to the fact that Canada received 36,000 c.f.s. at Niagara as against 20,000 c.f.s. on the American side for power purposes. In conclusion he declared that all these problems appeared to the American Government as

¹¹⁰ Sec. Kellogg to Amb. Howard, July 26, 1926, *ibid.*, p. 64.

¹¹¹ See p. 509.

¹¹² Sec. Kellogg to Mr. Chilton, Envoy Extraordinary and Minister Plenipotentiary, Chargé d'Affaires ad interim, Dec. 7, 1926, Canada, Sessional Papers, 1928, Sess. Paper No. 227, p. 67.

¹¹³ Laurent Beaudry, Chargé d'Affaires, to Sec. Kellogg, Sept. 1, 1927, *ibid.*, p. 68.

¹¹⁴ Sec. Kellogg to Vincent Massey, Oct. 17, 1927, *ibid.*, p. 69.

¹¹⁵ See Report of the Joint Board of Engineers on the Improvement of the St. Lawrence River between Lake Ontario and Montreal and on Related Questions, submitted Nov. 16, 1926, to the Governments of the United States and Canada (Washington, 1927).

matters that might be settled by practical engineering measures which might be adopted pending further discussion of the principles involved.

In 1925 and 1926 Wisconsin, Minnesota, Michigan, Ohio, Pennsylvania, and New York filed amended bills in the United States Supreme Court for an injunction against Illinois and the Sanitary District of Chicago to stop the further withdrawal of 8,500 c.f.s. of water from Lake Michigan under the permit issued by the Secretary of War in March, 1925.¹¹⁶ The court referred the cause to Charles Evans Hughes as Special Master, who found¹¹⁷ that the full effect of a diversion of 8,500 c.f.s. from Lake Michigan at Chicago through the drainage canal, would be to lower the levels of Lakes Michigan and Huron approximately 6 inches at mean lake levels, the levels of Lakes Erie and Ontario approximately 5 inches at mean lake levels, and the levels of the connecting rivers, bays, and harbors, so far as they had the same mean levels as the lakes.¹¹⁸ Mr. Hughes reported to the Supreme Court that there was no doubt that the diversion permitted at Chicago was primarily for the purposes of sanitation and that the disposition of Chicago's sewage had been the dominant factor in the promotion, maintenance and development of the drainage enterprise.

After reviewing the findings of the Special Master, Mr. Chief Justice Taft in delivering the opinion of the court in *Wisconsin et al. v. Illinois and the Sanitary District of Chicago* in 1929¹¹⁹ declared that the normal power of the Secretary of War under Section 10 of the 1899 Act of Congress¹²⁰ was to maintain the navigable capacity of Lake Michigan and not to destroy it by diversions. He noted that some flow from Lake Michigan might be necessary to keep up the navigability of the Chicago River, but that amount was negligible as compared with the 8,500 c.f.s. being diverted through it to the Chicago drainage canal. The court held that the plaintiff States were entitled to a decree which would be effective in bringing the violation of their rights by the Sanitary District and the unwarranted part of the diversion to an end. The court decided that it was its duty by an appropriate decree to compel the reduction of the diversion to a point where it rested on a legal basis and thus to restore the navigable capacity of Lake Michigan to its proper level. Accordingly, in April, 1930, the Supreme Court decreed¹²¹ that the Sanitary District of Chicago and Illinois were enjoined from divert-

¹¹⁶ *Wisconsin et al. v. Illinois and the Sanitary District of Chicago*, 278 U. S. 367.

¹¹⁷ Report of Mr. Hughes to Supreme Court, Nov. 23, 1927, 70 Cong., 1 Sess., H. Doc. 178.

¹¹⁸ *Ibid.*, p. 53.

¹²⁰ See note 92.

¹¹⁹ 278 U. S. 367 (Jan. 14, 1929).

¹²¹ *Wisconsin et al. v. Illinois et al.*, 281 U. S. 696 (April 21, 1930). Cf. the second report of the Special Master and the opinion of Mr. Justice Holmes on April 14, 1930, in *Wisconsin et al. v. Illinois et al.*, 281 U. S. 179.

See editorial comment by J. W. Garner, "The Chicago Sanitary District Case," this JOURNAL, Vol. 22 (1928), p. 837; and also J. Q. Dealey, Jr., "The Chicago Drainage Canal and St. Lawrence Development," *ibid.*, Vol. 23 (1929), p. 307. Cf. H. A. Smith, "The Chicago Diversion," British Year Book of International Law, X (1929), 144.

ing more than 6,500 c.f.s. from Lake Michigan, until December 31, 1935, when the maximum would be reduced to 5,000. After December 30, 1938, they were enjoined from diverting more than 1,500 c.f.s. The Supreme Court retained jurisdiction of the suit. In October, 1932, the complainant States applied to the court¹²² to secure execution of the decree of April, 1930. In accordance with the recommendations submitted by a Special Master appointed by the court,¹²³ a decree was entered in May, 1933, to require Illinois to provide the money necessary and to take the appropriate steps to secure the completion of adequate facilities for the treatment and disposition of sewage in order that the amount of water diverted from Lake Michigan through the Chicago drainage canal might be reduced in accordance with the decree of April, 1930, without creating a dangerously unsanitary condition in and about Chicago.¹²⁴

On July 18, 1932, the United States and Canada signed a treaty for the completion of the Great Lakes-St. Lawrence deep waterway.¹²⁵ The preliminary article defined the Great Lakes system as comprehending Lakes Superior, Michigan, Huron, Erie and Ontario, and the connecting waters, including Lake St. Clair.¹²⁶ The two countries, after recognizing their common interest in the preservation of the levels of the Great Lakes system, agreed in Article VIII (a) that the diversion of water from the Great Lakes system, through the Chicago drainage canal, should be reduced by December 31, 1938, to the quantity permitted as of that date by the decree of the United States Supreme Court of April, 1930, that is, to 1,500 c.f.s. It was provided that in the event of the Government of the United States proposing, in order to meet an emergency, an increase in the permitted diversion of water and in the event that the Government of Canada took an exception to the proposed increase, the matter should be submitted, for final decision,

¹²² *Wisconsin et al. v. Illinois et al.*, 287 U. S. 568.

¹²³ E. F. McClennen was appointed by the court as Special Master on Dec. 19, 1932, 287 U. S. 578; he submitted his report on March 13, 1933, 288 U. S. 594.

¹²⁴ *Wisconsin et al. v. Illinois et al.*, 289 U. S. 710. Cf. 289 U. S. 395.

The net diversion of water from Lake Michigan during 1935 averaged 6,484 c.f.s. See Semi-Annual Report of the Sanitary District of Chicago of Jan. 1, 1937, made pursuant to decree of April 21, 1930, to the Supreme Court of the United States, p. 12. The report was received by the court on Jan. 11, 1937, 57 S. Ct. 318. The net diversion during 1936 was reduced to average 4861 c.f.s., Semi-Annual Report of Jan. 1, 1937, p. 13. The net diversion during 1937 was 4997 c.f.s., Semi-Annual Report of Jan. 1, 1938, pp. 12-13.

Congressman Claude V. Parsons, of Illinois, introduced the following bill in the House of Representatives (H. R. 8327) on Aug. 21, 1937, which was referred to the Committee on Rivers and Harbors: "That in order to regulate and promote commerce among the several states and with foreign nations and to protect, improve, and promote navigation and navigable waters in the Mississippi Valley, the Secretary of War is hereby authorized and directed to withdraw from Lake Michigan, in addition to all domestic pumpage, an annual average of five thousand cubic feet of water per second, to flow into the current of the Lakes-to-the-Gulf Waterway heretofore authorized by Congress." Cong. Rec., LXXX, 9683.

¹²⁵ Great Lakes-St. Lawrence Deep Waterway Treaty between the United States and Canada, Sen. Ex. C, 72 Cong., 2 Sess.

¹²⁶ Cf. note 143.

to an arbitral tribunal which would be empowered to authorize, for such time and to such extent as was necessary to meet the emergency, an increase in the diversion of water and to stipulate such compensatory provisions as it might deem just and equitable.

The United States and Canada agreed in Article VIII (b) that no further diversion of water from the Great Lakes system or from the International Section ¹²⁷ to another watershed should thereafter be made except by the authorization of the International Joint Commission already set up in the 1909 treaty. Article VIII (d) provided that, in the event of diversions being made into the Great Lakes system from watersheds lying wholly within the borders of either country,¹²⁸ the exclusive rights to the use of waters equivalent in quantity to any waters so diverted should be vested in the country diverting such waters, and the quantity of water so diverted should be at all times available to that country for use for power purposes below the point of diversion, as long as it constituted a part of boundary waters. In Article VIII (e) it was agreed that compensatory works in the Niagara and St. Clair Rivers, designed to restore and maintain the lake levels to their natural range, should be undertaken at the cost of the United States as compensation for the diversion through the Chicago drainage canal, and at the cost of Canada for the diversion on the Canadian side for power purposes.

President Hoover submitted the proposed Great Lakes-St. Lawrence treaty to the Senate on January 19, 1933.¹²⁹ James Grafton Rogers, Assistant Secretary of State, who was in principal charge of the treaty negotiations with Canada, appeared as a witness before a subcommittee of the Senate Committee on Foreign Relations to explain Article VIII.¹³⁰ He declared that in the negotiations with Canada, he realized that there were practical considerations involved, and he "was not very much concerned with whether those were domestic law, international law, or something else; they might be called comity; they might be called the mere result of the necessity of getting along with a neighbor nation, or neighboring states."¹³¹ Mr. Rogers pointed out that the United States and Canada made an agreement for the maintenance of the desired levels of the Great Lakes, and it was recognized that while theoretically, perhaps, each nation had the right within its own boundaries to do as it saw fit, there were limits of companionship which required accommodation.¹³² Mr. Rogers considered that the consent of Can-

¹²⁷ "International Section" was defined in the preliminary article as meaning that part of the St. Lawrence River through which the international boundary line runs and which extends from Tibbetts Point at the outlet of Lake Ontario to the village of St. Regis at the head of Lake St. Francis. Cf. note 144.

¹²⁸ Cf. note 144.

¹²⁹ Sen. Ex. C, 72 Cong., 2 Sess.

¹³⁰ Hearings on S. Res. 278, 72 Cong., 1 Sess., p. 279.

¹³¹ *Ibid.*, p. 297.

¹³² Mr. Rogers mentioned the Lake of the Woods treaty of Feb. 24, 1925, as an illustration of the spirit of consideration which entered into American negotiations and agreements with Canada. See U. S. Treaty Series No. 721 (ratifications exchanged July 17, 1925); this JOURNAL, Supp., Vol. 19 (1925), p. 128.

ada to the diversion of a definite amount of water from Lake Michigan by the Sanitary District of Chicago was a definite advance for the Chicago interests.¹³³

On January 10, 1934, President Roosevelt advocated acceptance of the treaty, noting that he was satisfied that the treaty contained adequate provision for the needs of the Chicago Sanitary District and for navigation between Lake Michigan and the Mississippi River.¹³⁴ However, on March 14, the Senate failed to pass by the necessary two-thirds vote the resolution consenting to the ratification of the treaty.¹³⁵

In January, 1938, Canada requested the United States¹³⁶ to enter into an agreement to permit Canada the exclusive right to the use for power purposes of waters in the boundary waters equivalent to the volume diverted into Lake Superior from another watershed wholly within Canada.¹³⁷ It was estimated that the average diversion would amount to 1200 c.f.s. The agreement would enunciate a principle incorporated in Article VIII (d) of the 1932 Great Lakes-St. Lawrence treaty. The consent of the United States was needed for the carrying out of the Canadian plan, which was presented to the Canadian Government by the Hydro Electric Power Commission of Ontario, because of Articles III, V, and VIII of the convention of 1909.¹³⁸ Secretary of State Cordell Hull conveyed an adverse decision to the Canadian Minister, Sir Herbert Marler, on March 17, 1938.¹³⁹ Secretary Hull pointed out that the proposal could only benefit Canada, but that the Government of the United States would consent to incorporate such a proposal in a mutually satisfactory agreement dealing with all the varied and important problems of the Great Lakes-St. Lawrence River basin.

On May 28, 1938, the United States submitted to Canada a tentative draft of a proposed general treaty establishing a plan for a comprehensive utilization of the Great Lakes-St. Lawrence River basin for navigation and power purposes.¹⁴⁰ The new proposal was a rewrite of the unratified 1932 treaty,

¹³³ Hearings on S. Res. 278, 72 Cong., 1 Sess., p. 305.

¹³⁴ Department of State, Press Releases, X, 14.

¹³⁵ Cong. Rec., LXXVIII, 4475.

¹³⁶ W. A. Riddell, for the Canadian Minister, to Cordell Hull, Sec. of State, Jan. 27, 1938, Department of State, Press Releases, XVIII, 408.

¹³⁷ The proposed diversion of water was from the Kenogami River, a tributary of the Albany River, via Long Lake, all in the Province of Ontario, into Lake Superior.

¹³⁸ For the text of Arts. III and V, see p. 504. Art. VIII provides: "This International Joint Commission shall have jurisdiction over and shall pass upon all cases involving the use or obstruction or diversion of the waters with respect to which under Articles III and IV of this treaty the approval of this Commission is required, and in passing upon such cases the Commission shall be governed by the following rules or principles which are adopted by the High Contracting Parties for this purpose:

"The High Contracting Parties shall have, each on its own side of the boundary, equal and similar rights in the use of the waters hereinbefore defined as boundary waters. . . ." Malloy, *Treaties*, III, 2607; this JOURNAL, Vol. 4 (1910), p. 239.

¹³⁹ Department of State, Press Releases, XVIII, 400.

¹⁴⁰ Cordell Hull, Sec. of State, to Sir Herbert Marler, Can. Min., Department of State, Press Releases, No. 256, May 31, 1938, p. 3.

with several additions. To meet Canadian objections to the earlier treaty,¹⁴¹ the 1938 draft treaty provided that the United States could go forward immediately with her power development program, while Canada could defer hers until as late as 1949. Article IX¹⁴² was inserted to provide for necessary works to distribute and control the waters of the Niagara River as well as to preserve and enhance the scenic beauty of the American and the Canadian Falls. The United States is to be permitted to authorize the additional diversion within the State of New York of the waters of the Niagara River above the Falls for power purposes of 5000 c.f.s. in excess of the amount specified in Article V of the 1909 treaty. Canada is to be permitted to authorize a similar additional diversion within the Province of Ontario.

Only slight changes were made in the provisions of Article VIII. Section (e) was rewritten to instruct the Great Lakes-St. Lawrence Basin Commission, which is to be set up by the treaty, to undertake, among its many supervisory and advisory duties, a study of the desirability of compensation and regulatory works in the Great Lakes System.¹⁴³ Upon the approval of the United States and Canada of such works, the Commission would prepare plans for their construction and recommend to the two Governments an equitable allocation of their cost. The Governments would make arrangements by an exchange of notes for the construction of such works as they might agree upon. Under the provisions of Article VIII (d)¹⁴⁴ of the new proposal, as well as under the same article in the 1932 draft treaty, Canada could proceed with her desire to divert 1200 c.f.s. into Lake Superior from another watershed wholly within Canada and withdraw the same amount for power purposes from the boundary waters at a lower point.

A second paragraph was added to Article VII, which declared in paragraph one that the rights of navigation by citizens or subjects of the United States and Great Britain in the St. Lawrence River and the Great Lakes system should be maintained:

Nothing in this article or in any other article of this treaty shall be construed as infringing or impairing, in any way, the sovereignty of the United States of America over Lake Michigan.

¹⁴¹ Cf. M. P. Hepburn, Prime Minister of Ontario, to Congressman Walter G. Andrews of New York, Feb. 12, 1938, Cong. Rec., LXXXIII, 10450.

¹⁴² Cf. the Niagara convention and protocol signed by the United States and Canada on Jan. 2, 1929, but not in force. Correspondence and Documents relating to St. Lawrence Deep Waterway Treaty 1932, Niagara Convention 1929, and Ogoki River and Kenogami River (Long Lake) Projects and Export of Electrical Power (Ottawa, 1938), p. 125. See Warren Robbins, Am. Min., to Can. Sec. of State for External Affairs, March 4, 1935, *ibid.*, p. 12.

See also President Roosevelt to Congressman Andrews, March 25, 1938, Cong. Rec., LXXXIII, 10450.

¹⁴³ The earlier definition of "Great Lakes System" was changed to include Georgian Bay in Lake Huron. Preliminary article (c).

¹⁴⁴ The provisions of Art. VIII (d) were also made applicable in the event of the diversion of rivers into the International Section above their existing points of confluence.

"International Section" was defined in the 1938 draft treaty to mean that part of the St. Lawrence River through which the international boundary line runs. Preliminary article (f).

CLOSING OBSERVATIONS

In the diplomatic correspondence and negotiations with Great Britain and, later, Canada, the United States has been consistent in maintaining the position that the United States has a legal right under international law to use or divert (1) the waters of tributaries (which are wholly within the territory of the United States) to boundary waters and (2) the waters of a river flowing across the boundary, while the river is within the territory of the United States. Even when the situation was reversed, and Canada diverted the waters of the Milk River while it flowed in Canadian territory, the United States did not claim that there was any limitation in international law on the action of Canada. Great Britain and Canada, on the other hand, have contended on several occasions that international law does place restrictions on the right of the United States to the use or diversion of the waters of tributaries to boundary waters and the waters of a river flowing across the boundary. The element of navigability did not enter into the disputes involving the waters of a river flowing across the boundary. But in the case of the waters of a tributary flowing into boundary waters, the position of the United States has been that navigability is not a controlling factor on the right of the United States under international law to divert water from the tributary. On the other hand, Great Britain and Canada have maintained that international law limits the right of the United States to divert the waters of tributaries if the navigability of boundary waters is affected thereby.

It is unfortunate that the diplomatic correspondence has not always clearly observed the sharp distinction between rights under international law to the use or diversion of waters in the above two situations from the diversion of boundary waters. In the latter situation, the United States, Great Britain, and Canada have agreed that international law places limitations on their use or diversion in order that the United States and Canada might share equally in the boundary waters. Confusion has arisen at times when Great Britain and Canada have sought erroneously to apply the rule governing the equal division of boundary waters to the waters of tributaries to boundary waters and rivers flowing across the boundary. This study has included a full discussion of the United States Supreme Court cases involving the waters of Lake Michigan to present a complete picture of the Chicago Sanitary District situation. Unhappily, Great Britain and Canada have not always appreciated that these decisions have been based on municipal legislation and are not relevant to a determination of the rules of international law governing the United States and Great Britain and Canada in regard to the diversion of the waters of Lake Michigan.

The proposed 1938 draft Great Lakes-St. Lawrence waterway treaty offers to settle the outstanding disputes between the United States and Canada along the boundary basin. It is not concerned with the determination or maintenance of existing rights under rules of international law, but instead it endeavors to terminate disagreements of the past by means of compromises and the exchange of benefits.

EDITORIAL COMMENT

THE EXPROPRIATION OF OIL PROPERTIES BY MEXICO

The oil controversy in Mexico is at least twenty years old. The first move against private oil rights came in 1917. In the Constitution promulgated in that year by General Carranza, Article 27 nationalized the mineral deposits, including petroleum, in the subsoil. A few years later, however, the Supreme Court of Mexico held that this provision of the Constitution was not to be applied retroactively, and that it did not apply to owners who had theretofore obtained oil on their properties or otherwise manifested their intention to exercise their petroleum rights in the subsoil. However, as a result of the Constitutional provision, Mexico did obtain rights in thousands of square miles of prospective oil lands—all of the prospective oil lands of Mexico, it is said, except the areas already held by American and other foreign concerns.

The next step occurred in December, 1925, when the Mexican Congress passed an oil law providing among other things, that the pre-Constitutional fee simple titles be turned into concessions for a limited number of years. The United States vigorously protested against this action. Eventually the Supreme Court of Mexico held that this law was unconstitutional, and a compromise was made.¹

The third and present step was initiated in November, 1936, when the Syndicate of Oil Workers made demands on the oil companies for a new labor contract for the whole industry. The workers met at Mexico City in August, 1936, to draft a general collective contract. At the end of three months of discussion the Syndicate transmitted to the oil companies the text of a standard agreement, embodying excessive demands. After six months of futile negotiations with the oil companies a general strike was called on May 28, 1937, which lasted about ten days. Then the Mexican Labor Board on appeal of the Syndicate took up the controversy as an "economic question" and appointed a committee to investigate the companies' economic capacity to pay. Finally, on December 18, 1937, the Labor Board adopted the committee's recommendations which substantially covered the demands of the Syndicate and also imposed additional conditions. On December 28, 1937, the oil companies petitioned the Supreme Court of Mexico for *amparo* against the enforcement of the Board's award of December 18. During the court's consideration of the case inflammatory speeches were made by labor leaders and officials of the Mexican Government, including the Minister of Labor and the President himself, favorable to the demands of the Syndicate. It is said that Justice Icaza, of the Supreme Court, excused himself from sitting in the case (he had been challenged as an associate of a

¹It is understood that the foregoing decisions of the Supreme Court were in effect overruled by a decision of May 10, 1938, on an old petition filed several years earlier by the Huasteca Petroleum Co.

high officer of the Syndicate), but denounced the companies from the bench and declared it was the duty of the court to decide the issues from the political rather than the legal aspect. On March 1, 1938, the Supreme Court denied the petition and substantially upheld the award of the Labor Board. The court, for one reason or another, declined to review the erroneous findings and the irregularities pointed out in the companies' petition for *amparo*. It would seem that the court regarded the Labor Board as an independent source of power to determine an "economic conflict" and create, as would a legislature, new legal relationships between employer and employee which could not be disturbed by the court. Thereafter followed a short period of negotiations aimed to modify the conditions laid down by the Labor Board. During these negotiations the companies, in a spirit of compromise, offered wage and benefit increases to the amount of some twenty-six million pesos. The negotiations failed. On March 12 the District Court denied a stay of execution of the award, and thereupon the companies, on March 15, advised the Board that it was physically impossible to operate under the conditions of the award, which not only increased expenses by an amount variously estimated at twenty-six to forty-one million pesos per year, but also practically took the management and control of operations out of the hands of the companies. Thereupon the Labor Board, on petition of the Syndicate, declared its award of December 18 terminated for noncompliance by the companies, and penalized the companies for three months' wages. This move was apparently preparatory for what was to follow. On March 18, 1938, President Cardenas issued a decree taking over the oil properties on behalf of the Government.

The decree, after laboring in the preamble to make out a case of necessity for intervention by the Government, proceeds:

There are hereby declared expropriated, because of their being of public utility, and in favor of the Nation, the machinery, installations, buildings, pipe-lines, refineries, storage-tanks, ways of communication, tank-cars, distributing stations, water-craft, and all other real and personal property [of some fifteen named companies]. (Art. 1)

The Secretariat of National Economy and Secretariat of Finances are directed to occupy the properties. (Art. 2)

The Secretariat of Finance shall pay the corresponding indemnification to the companies expropriated in accordance with the provisions of Article 27 of the Constitution and Articles 10 and 20 of the Expropriation Law, in cash, and in a period which shall not exceed ten years. The funds for making payment shall be taken by the Secretariat of Finance from a certain percentage, to be determined later, of the production of petroleum and its derivatives taken from the properties expropriated and the product of same shall be deposited, pending legal formalities, in the Treasury of the Federation. (Art. 3)²

² The preamble of the decree refers to the following provisions of the Expropriation Law of Nov. 23, 1936, and also to Art. 27 of the Constitution:

Have the laws of Mexico been complied with?³ It is a well known rule of international practice that aliens are to be given the benefits of the provisions of the local laws. Besides the Expropriation Law above mentioned, reference may be made to pertinent provisions of the 1917 Constitution. Article 27 states that "Private property shall not be expropriated except for reasons of public utility and by means of indemnification." The phrase "by means of indemnification" replaced the words "indemnification *having been made*"

Art. 1. The following are held to be causes of public utility:

V. The satisfaction of the needs of the population as a whole in case of war or of internal disturbances; the supplying to the cities or other centers of population of food-stuffs or other articles of necessary consumption, and the means employed for combating or preventing the propagation of epidemics affecting either humans or animals, fires, plagues, floods or other public calamities;

VII. The defense, conservation, development or profitable use of natural elements subject to exploitation;

X. The measures necessary for preventing the destruction of natural elements and the damage that property may suffer in detriment of the population as a whole.

Art. 4. The declaration referred to in the foregoing article shall be made by an order that shall be published in the *Diario Oficial* (official organ of publication of the Government) of the Federation, and notice thereof shall be personally given to all parties concerned. Should the domicile of the said parties be unknown, a second publication of the said order in the *Diario Oficial* of the Federation shall serve as personal notice duly given.

Art. 8. In the cases to which Parts V, VI and X of Article 1 of this present law refer, the Federal Executive, once the corresponding declaration has been made, shall have power to order the seizure of the property that has been the object of expropriation or of temporary seizure, or to impose the immediate execution of the provisions of limitation of ownership rights, and the interposition of an administrative appeal of revocation shall not cause the suspension of the seizure of the property or properties concerned, or of the execution of the provisions limiting the rights of ownership.

Art. 10. The price that shall be fixed on the thing expropriated as indemnification therefor shall be based on the amount that as the fiscal value of the same is recorded in the catastral or revenue offices, whether the said value has been declared by the owner concerned or whether it has been merely accepted by him in a tacit manner by reason of his having paid his taxes upon the said basis. The excess of value or the decrease in value that private property may have gained or lost by cause of improvements or of damage made or suffered after the date on which the fiscal value was assigned shall be the only matter subject to expert opinion and to judicial resolution. The same procedure shall be observed when it is a question of objects the value of which should not appear as fixed in the records of the revenue office.

Art. 20. The authority carrying out the expropriation shall fix the form and the terms in which the indemnification shall be paid, which terms shall in no case ever comprise a period of more than ten years.

³ On April 4 last, suit for *amparo* against this decree and the acts thereunder was filed but apparently has not yet been decided by the court of last resort.

in the Constitution of 1856. It would seem therefore that the intention of the framers was to modify the 1856 rule of *prior* indemnification.⁴

Article 27 further provides:

The amount fixed as compensation for the expropriated property shall be based on the sum at which the said property shall be valued for fiscal purposes in the catastral or revenue offices, whether this value be that manifested by the owner or merely impliedly accepted by reason of the payment of his taxes on such a basis, to which there shall be added ten per cent. The increased value which the property in question may have acquired through improvements made subsequent to the date of the fixing of the fiscal value shall be the only matter subject to expert opinion and judicial determination.⁵

The exercise of the rights pertaining to the Nation by virtue of this article shall follow judicial process; but as a part of this process and by order of the proper tribunals, which order shall be issued within the maximum period of one month, the administrative authorities, shall proceed without delay to the occupation, administration, auction, or sale of the lands and waters in question, together with all their appurtenances, and in no case may the acts of the said authorities be set aside until final sentence is handed down.

In addition, Article 14 provides that no one shall be deprived of his property, possessions or rights without due process of law before a duly created court and in conformity with previously existing laws; and Article 22 declares that the confiscation of property is prohibited.

None of these requirements of Mexican law in respect of public utility, judicial procedure and indemnification, have been met by the Cardenas decree. Certainly the proceedings before the Labor Board and the courts in this matter did not contemplate or cover these essentials of expropriation under the Mexican Constitution. The oil properties have been seized without an order from the courts and without any indemnification having been made or offered. It was not an orderly expropriation according to law; it was an arbitrary seizure contrary to law.

Have the requirements of international law been met? If they have, then the governments of which the oil companies are nationals have no ground for complaint. It seems unnecessary to go into a lengthy discussion of the question of "denial of justice" when we are confronted, not with lawful expropriation, but with an arbitrary act of the head of a state, particularly in view of the fact that it has been impossible so far to obtain a judicial review of

⁴ Compare with Art. 20 of the Expropriation Law, which appears to contemplate instalment payments, as does Art. 3 of the Cardenas decree. Moreover, to provide for paying the indemnity from profits of operation involves speculative conditions which may never be realized. Nearly all of the Constitutions of the Latin American States provide for prior indemnification.

⁵ This procedure is but partly judicial and clearly does not take into account all elements of adequate compensation under international law.

the facts and law of this controversy by the Supreme Court of Mexico. The duty to resort to courts of justice is reciprocal. The seizure of the oil properties by simple fiat should relieve the owners from any obligation to exhaust the local remedies.⁶ In this situation the law of nations asks only whether there has been a seizure by the Mexican Government for any purpose whatever. If there has been such a seizure, then international law insists upon full and prompt indemnification.

It is clear that a state may not hide behind the bars of its own laws to avoid the fulfillment of its international obligations. In the case of *Shufeldt v. Guatemala*, 1931, in which a concession-contract had been canceled by executive action, the Chief Justice of British Honduras, as Arbitrator, in making an award said:

It is very competent for the Government of Guatemala to enact any decree they like and for any reasons they see fit, and such reasons are no concern of this Tribunal. But this Tribunal is only concerned where such a decree, based even on the best of ground, works an injustice to an alien subject, in which case the Government ought to make compensation for the injury inflicted and cannot invoke any municipal law to justify its refusal to do so.⁷

The question of taking property on the ground of public utility, as required by the Mexican Constitution, arises chiefly in cases where there has been a semblance of orderly expropriation pursuant to law. Local laws generally require the exercise of eminent domain only in the public interest,⁸ and this question is usually to be determined by the courts. Where a controversy arises over irregularities in expropriation proceedings this question is important, but in the present situation of summary action by decree, though in the name of public utility, international law does not necessarily consider the motive or purpose involved. It looks rather to the arbitrary act and requires compensation therefor. This is well shown in the Smith claim against Cuba for the loss of property through irregular expropriation proceedings in the Cuban courts. The Arbitrator held:

That the attempted expropriation of the claimant's property was not in compliance with the Constitution, nor with the laws of the Republic; that the expropriation proceedings were not, in good faith, for the purpose of public utility.

The Arbitrator believed the property should be restored to the claimant, but awarded compensation instead.⁹

As to judicial proceedings, undoubtedly international law requires due

⁶ *El Triunfo Company v. San Salvador*, U. S. For. Rel. 1902, p. 859.

⁷ U. S. Arbitration Series No. 3, Washington, 1932.

⁸ Various terms are used to denote this concept, such as public utility, public interest, public welfare, public use, and the like. A general impersonal law banning a certain activity in the exercise of the police power in the interest of the public welfare and rendering property useless and worthless, may not be expropriatory or confiscatory. *This JOURNAL*, Vol. 21 (1927), p. 692, and *Proceedings of Am. Soc. Int. Law* (1927), p. 38.

⁹ *This JOURNAL*, Vol. 24 (1930), p. 384.

process of law in cases of orderly expropriation. In such cases international complaints are aimed at irregularities resulting in miscarriage of justice. There were apparently serious irregularities in the proceedings before the Labor Board which were not cured by appeal to the courts, but these were not proceedings for the purpose of expropriation. They had to do only with capital-labor contracts, though they may have been confiscatory in effect. In the presence of the Cardenas decree, these questions are largely of historical interest. There was no due process of law or a day in court so far as this decree was concerned. International law, therefore, denominates it an arbitrary act. As is stated in the award against Panama in the *de Sabla* case, 1934, "It is axiomatic that acts of a government in depriving an alien of his property without compensation impose international responsibility."¹⁰

Whether property has been taken by expropriation proceedings or by tortious action, international law imposes the duty of making adequate reparation. This obligation to make amends exists quite apart from and is not based upon provisions of municipal law. Strictly speaking, just compensation properly relates to lawful expropriation, whereas damages refers to tortious action. It is clear that damages might be more comprehensive than just compensation for property taken. This distinction between lawful and unlawful dispossession is commented upon by the Permanent Court of International Justice in the *Chorzów Factory Case*.¹¹ While prior or simultaneous compensation is probably the general rule in expropriation by judicial process, it is in the nature of things not the practice in case of executive seizure. In the latter case reparation is generally determined afterward by compromise or arbitration. In the arbitration of the Norwegian claims against the United States, 1922, for the expropriation of certain uncompleted ships and ship-building contracts between Norwegian ship-owners and American shipyards, the Hague Tribunal in awarding damages against the United States emphasized "just compensation without delay." The Tribunal said:

The Tribunal is not bound by [certain United States laws] nor by any other municipal law in so far as these provisions restrict the rights of the claimants to receive *immediate and full compensation with interest* from the day on which compensation should have been fully paid *ex aequo et bono*.¹²

In assessing indemnity, international commissions have not followed definite rules. They have properly treated each case according to its peculiar circumstances and considered several standards of value in reaching the final result. These standards may be the original or acquisition cost less depreciation, cost of reproduction new less depreciation, fair market value at the time and place of taking, intrinsic value as of such time and place, book

¹⁰ Hunt's Report, p. 447; this JOURNAL, Vol. 28 (1934), p. 611.

¹¹ Whiteman, *Damages in International Law*, pp. 1533-1534.

¹² This JOURNAL, Vol. 17 (1923), p. 394.

value, present value, and so on. These standards are complicated by many factors such as outstanding debts, liens, contract obligations, and other legal rights, as well as the value of a business as a going concern. In the present case there are peculiar factors to be considered, *viz.*, the cost of exploration over wide territory to locate the pools, special organization expenses, the value of rights to petroleum still underground, and the like. The Mixed Claims Commission, United States and Germany, assessed the damages for the destruction of a large number of plants and tangible properties of subsidiaries of American corporations. In doing so the Commission used "the reasonable market value of the property as of the time and place of taking in the condition in which it then was, if it had such market value; if not, then the intrinsic value of the property as of such time and place."¹³ In computing "reasonable market value" the Commission took into account "the nature and value of the business done, their earning capacity based on previous operations, urgencies of demand and readiness to produce to meet such demand which may conceivably force the then market value above real production cost, even the good will of the business, and many other factors."¹⁴ In the Chorzów Factory Case, above mentioned, the Permanent Court referred the question of reparation to a commission of experts, and said:

The essential principles contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of Arbitral Tribunals—is that reparation must so far as possible wipe out all of the consequences of the illegal act and re-establish the situation which would in all probability have existed if that act had not been committed.

It added that restitution in kind or the value thereof plus damages for any additional losses should serve to determine the amount of "compensation due for an act contrary to international law."¹⁵ It is a notorious fact that Mexico is in no position to make the compensation called for by these rules.

It is manifest, therefore, that the seizure of the oil properties by decree of President Cardenas cannot be justified under these elemental principles of international law. The act is also a bald repudiation of Mexico's own official assurances solemnly given to the United States in consideration of the recognition of the Obregon Government in 1923.¹⁶ In the negotiations at Mexico City the principle was repeatedly stated by the American Commissioners and accepted by the Mexican representatives that expropriation of property, real or personal, for any purpose was to be based upon "indemnification for the just value thereof at the time of the taking having been made in cash."

¹³ Administrative Decision No. III, Decisions and Opinions, p. 63; this JOURNAL, Vol. 18 (1924), p. 605.

¹⁴ Administrative Decision No. VII, Decisions and Opinions, p. 331; this JOURNAL, Vol. 20 (1926), p. 190.

¹⁵ 1 Hudson, World Court Reports, p. 677.

¹⁶ The Cardenas decree also seems contrary to the principle of the decision of the Mexican Supreme Court of Nov. 17, 1927. This JOURNAL, Vol. 22 (1928), p. 421.

This understanding was officially confirmed by an exchange of notes in August, 1923, stating that the Presidents of the respective countries had taken note of the minutes of the Commission and approved the declarations made therein by their respective commissioners.

This case is a striking example of the lawless bravado now rampant among nations in this time of gay contempt for public feeling. It would appear to fall under the ban of Secretary of State Hull's admonitions on the subject of breaches of international law.³ Undoubtedly the Department of State must have let Mexico know in no uncertain terms its stand on the law and equity of the case, although the Secretary's brief statements to the press are the only indications of what is going on, and President Cardenas professes American acquiescence. Here opportunity bids this Government to uphold "respect for law and observance of the pledged word." It also bids Mexico to do the only fair thing in the circumstances—to restore the immense properties which she has unlawfully seized and which the world knows she cannot pay for.

L. H. WOOLSEY

THE DENUNCIATION OF TREATY VIOLATORS

The principle *pacta sunt servanda* is undoubtedly a principle of international law;¹ in fact, some jurists assert it to be the fundamental norm of international law.² "The faithful observance of international agreements," "the principle of the sanctity of treaties," "respect by all nations for the rights of others and performance by all nations of established obligations," "the revitalizing and strengthening of international law," were among the "fundamental principles of international policy" set forth by Secretary Hull on July 16, 1937, and subsequently endorsed with more or less enthusiasm by sixty states.³

Congress, it is true, does not have the initiative or primary responsibility in handling foreign relations under the United States Constitution, but its collaboration with the executive is often necessary, especially in providing such instruments for conducting foreign policy as the Army, Navy, Department of State and Foreign Service, and in authorizing such measures as arms embargoes, criminal prosecutions, reprisals, and war. Congress has, in fact, given unusual attention to legislation and appropriations in this field during the past year.

It was, therefore, pertinent to its functions, at a time when allegations of

¹ Harvard Research draft convention on the Law of Treaties, Art. 20, this JOURNAL, Supp., Vol. 29 (1935), p. 977.

² *Ibid.*, p. 987. See critique by Josef L. Kunz of this theory advanced by Verdross and Kelsen, "The Vienna School and International Law," N. Y. University Law Quar. Rev., March, 1934, Vol. 11, p. 34.

³ Dept. of State Publications, No. 1079, Washington, 1937. Secretary Hull emphasized these principles in his National Press Club address of March 17, 1938, and in his Nashville address of June 3, 1938.

treaty violation have been frequent, for Congress to request information of the Department of State on the subject. This request, introduced by Representative Scott of California, as House Resolution 465 (75th Congress, 3rd Session), was transmitted to the President by the Committee on Foreign Affairs on April 19, 1938. The President was requested:

To advise the House of Representatives, if not incompatible with the public interests—(1) whether any nation or nations during the last few years have violated any treaties to which they and the United States are signatories; (2) if so, what nation or nations, when, and in what manner; (3) specifically, whether any signatory nation has violated the treaty between the United States and other powers providing for the renunciation of war as an instrument of national policy, commonly called the Kellogg-Briand Pact; the so-called Nine-Power Treaty relating to the principles and policies to be followed in matters concerning China; the treaties, acts, and resolutions adopted at Buenos Aires in 1936; and by the Inter-American Conference for the Maintenance of Peace; and the treaty between the United States, the British Empire, France, and Japan relating to their insular possessions and insular dominions in the region of the Pacific Ocean.

Apparently information was particularly sought on violations of treaty obligations not to resort to force—on what has been technically called aggressions—though the resolution was broad enough to cover all cases in which treaties to which the United States was a party had been violated.

The reply, signed by Acting Secretary of State Sumner Welles on April 23, 1938,⁴ suggests caution in denouncing treaty violators:

The determination by this Government of whether or not an action by another nation is in fact a violation of an obligation assumed under a treaty or agreement to which both that nation and the United States are parties, and the expression of opinion on the part of this Government that such violation has taken place must necessarily be governed by the circumstances of the occasion.

He continues, however, that occasions have arisen in recent years where the Government has "officially and publicly" stated that other nations have violated treaties. Reference is then made specifically to the statements of the United States in the summer and early autumn of 1935 "when it appeared probable that an invasion of Ethiopia by Italian forces might occur" and the two Governments were reminded of the provisions of the Pact of Paris; and also to the statement by the Secretary of State on October 6, 1937, that "the action of Japan in China is contrary to the provisions of the Nine-Power Treaty and to those of the Kellogg-Briand Pact." A final paragraph suggests that fifteen nations are in default or in arrears upon payments of money to the United States under existing agreements but assumes that the inquiry was not directed to such delinquencies.

This request and reply raised fundamental issues with respect to the propri-

⁴ Dept. of State Press Releases, April 30, 1938, p. 511.

ety and expediency of formal criticism of the behavior of one state by another.

Vattel wrote in the section of his treatise bearing on neutrality: "It belongs to every free and sovereign state to decide in its own conscience what its duties require of it, and what it may or may not do with justice. If others undertake to judge of its conduct, they encroach upon its liberty and infringe upon its most valuable rights."⁵

Van Vollenhoven⁶ vigorously criticizes this statement of Vattel, which he says aligns the latter with Richelieu's system of "paramount power which refuses to account for its deeds" rather than with Grotius' system "which arraigns state crimes." "According to Grotius, the criminal state may be punished by the others. According to Vattel, even the country invaded, foaming at the mouth with anger, may not judge of the assaulter of its territory," writes Van Vollenhoven, quoting Vattel, "If the enemy observes all the rules of formal warfare we are not to be heard in complaint of him as a violator of the law of nations."⁷ But, according to Van Vollenhoven, Vattel not only writes bad doctrine, he attempts to link this bad doctrine with Grotius. "If Vattel had said, 'I overthrow Grotius; I rend him to pieces; I replace the offspring of his overstrung fancy by wholesome realism' the duel would have been a fair one, but he lavishes compliments on Grotius. . . . For 160 years it has been possible to represent Vattel as supporting and restoring Grotius. . . . In truth, he levels him with the ground."⁸

Without going into the justice of Van Vollenhoven's accusations, a task which would require a detailed consideration of many, sometimes contradictory, passages from Vattel,⁹ let us consider (1) what, if any, limitations contemporary international law places upon the freedom of a state to criticize others? (2) what, if any, obligations a state is under to make such criticisms? and (3) how it is wise to exercise whatever freedom the law grants in this respect?

(1) International law clearly forbids the higher officials of a state to indulge in uncomplimentary or insulting comments upon the personality of another state or of its rulers. Such incidents as President Jackson's comment in a message to Congress upon the French non-payment of claims in 1834, President Taylor's comment on the Austrian treatment of Hungary in his message of 1849, General Smedley Butler's comment on Mussolini's reckless driving in 1931, and Mayor La Guardia's comment on Hitler in 1937, raised the issue.¹⁰ While the character of the officer and the circumstances in which

⁵ Vattel, *Le Droit des Gens*, Vol. III, c. 12, sec. 188, Trans. Carnegie ed., p. 304.

⁶ The Three Stages in the Evolution of the Law of Nations, The Hague, 1919, p. 28.

⁷ Vattel, *op. cit.*, sec. 190.

⁸ Van Vollenhoven, *op. cit.*, p. 27.

⁹ See, for example, Introduction, sec. 16, and Vol. III, c. 3, sec. 40.

¹⁰ Moore, *Digest of International Law*, Vol. 1, p. 222; Vol. 7, p. 124; Department of State Press Releases, Jan. 29, 1931; March 6, 20, 1937; Stowell, "Respect due to Foreign Sovereigns," this JOURNAL, Vol. 31 (1937), p. 301 ff.

his remarks were made, as well as the substance of the remarks themselves, have been considered elements in determining the state's responsibility, it appears that if the utterance is public, is attributable to one state, and is insulting to the personality of another state or of its ruler, the first state is legally bound to apologize.¹¹

Such cases, however, are to be distinguished from cases in which criticism is directed, not against a personality, but against a policy. Comments, critical of the policy of another state, have been common, but they have often been considered improper if they concern the "domestic policy" of that state. Diplomatic officers are usually instructed not to refer publicly to the internal politics of the country to which they are accredited.¹² When officials of one state have publicly criticized the treatment by another state of its own nationals in its own territory, or another state's laws on such "domestic questions" as tariffs or immigration, the state criticized has often manifested resentment. Writers, however, are not wanting who defend the propriety of criticisms of this kind when the situation causing the criticism is sufficiently serious to invite "humanitarian intervention" or to constitute an "abuse of rights." Justification for such criticism is thus sought on the ground that a rule of international law, which prohibits gross inhumanity and abusive exercises of power even in a state's internal administration, has been violated.¹³

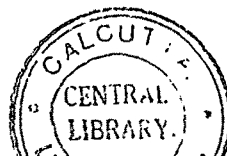
While the foreign policy of a state, as it impinges on the interests of others, is obviously an appropriate topic of diplomatic correspondence, formal criticism of such policy has sometimes been considered improper except as it is manifested by acts deemed contrary to international law or treaties to which the critic is a party. Thus it is usually said that while states may give information, make representations, or "intercede" about policies which affect their interests, they may formally protest or "interpose" only when their rights are violated.¹⁴ This distinction is not easy to draw. Japan implied that, in view of the gentlemen's agreement of 1908, her rights were involved in the pending American Immigration Act of 1924, and that enactment of the measure would inevitably bring "grave consequences" upon the relations of the countries, an allegation which Congress resented on the assumption that immigration regulation was a "domestic question" and could not be the occa-

¹¹ Comments made by officials not responsible to the chief executive, or not acting in the scope of their official functions, are not usually attributed to the state. The subject is elaborately dealt with in an unpublished study on "State Responsibility for the Hostile Utterances of Its Officers" by Sidney Hyman, U. of Chicago Library, 1938.

¹² See U. S. Diplomatic Instructions, 1927, VIII, 10.

¹³ Ellery Stowell, *International Law*, N. Y., 1931, p. 349 ff.; Lauterpacht, *The Function of Law in the International Community*; Jessup, "The defense of oppressed peoples," *this JOURNAL*, Vol. 32 (1938), p. 116; Under Secretary of State Sumner Welles' address in Baltimore, May 24, 1938.

¹⁴ Stowell, *op. cit.*, p. 427; Borchard, *Diplomatic Protection of Citizens Abroad*, 1919, pp. 440-441.



sion for a "veiled threat."¹⁵ When Japan submitted memoranda from Japanese merchants against certain schedules in the proposed Smoot-Hawley Tariff of 1930, the Japanese Ambassador was careful to indicate that they were submitted merely for information.¹⁶

Leaving aside criticisms of a state's policies or acts based on economic, moral, or other grounds, and confining attention solely to criticisms alleging a violation of international law or treaty, does international law impose any limitations upon the making or publication of such comments?

An official note from one government to another protesting against the latter's behavior does not require the consent of the state criticized for publication. While a state cannot publish the diplomatic correspondence it receives without consent of the sending state, it can publish the diplomatic correspondence it sends without consent of the receiving state.¹⁷

But, though there is no formal impropriety in a state's publication of its own documents, there may be substantive impropriety. It has been suggested that a note alleging violation of international law or treaty is improper unless the protesting state has received material injury as a consequence of the violation. Thus the United States at first objected to the British note protesting that the Canal Tolls Act of 1912 violated the Hay-Pauncefote Treaty. The objection was based on the ground that no injury had yet been sustained by Great Britain, because the President had not yet exercised the power to proclaim discriminatory tolls given to him by the legislation, and no tolls had been collected on any British vessel. The British, however, insisted that an act of Congress giving formal authority to proclaim and collect discriminatory tolls in derogation of British treaty rights could properly be protested.¹⁸ Germany, Austria, and France, it is well known, protested against the seizure of Mason and Slidell from the British ship *Trent* by an American war vessel in 1862, although these states were not directly injured. They alleged, however, that as neutrals they had a vital interest in the observance of neutral rights, and could protest¹⁹—a position which was supported by the armed neutralities of 1780 and 1800, the various proposals for a solidary attitude of neutrals during the World War, and the provision requiring such an attitude in the Argentine Anti-War Treaty of 1933. The protest of the United States and other neutrals in 1916 against the deportation of civilians from Belgium by German military authorities was based on the

¹⁵ The documents are printed in *International Conciliation*, June, 1925, No. 211, pp. 186, 192. See also Roy H. Akagi, *Japan's Foreign Relations*, Tokyo, 1936, p. 442 ff.

¹⁶ Tariff Act of 1929, Hearings before the Committee on Finance, U. S. Senate, 71st Cong., 1st Sess., on H. R. 2667, Vol. 18, p. 126.

¹⁷ See Dept. of State Order, March 26, 1925, final paragraph, which requires permission from foreign governments for publication only of documents received from them.

¹⁸ The correspondence is printed in *Diplomatic History of the Panama Canal*, 63rd Cong., 2nd Sess., Sen. Doc. 474, pp. 85, 99, 101.

¹⁹ Montague Bernard, *Neutrality of Great Britain during the American Civil War*, London, 1870, p. 196 ff.

even broader ground that a violation of international law and humanity by a belligerent toward its enemy was of interest to all states.²⁰

These illustrations show that no narrow conception of "legal interest" has been thought necessary to justify the making and publishing of protests against violations of international law and treaties. It is submitted that international law contains no rule forbidding states from asserting publicly that in their opinion another state has violated its duties under international law or a treaty to which it is bound.²¹

(2) Are there circumstances under which it becomes the duty of states to make such protests? Clearly not so far as customary international law is concerned. States are free to withhold protests even when their own vital interests are affected by a breach of international law or treaty. All the more are they free to refrain from protest when their more remote interest in the general maintenance of respect for international law and treaty is alone involved.

It seems probable, however, that certain treaties impose a duty to denounce certain types of illegal behavior by other states. The parties to the Pact of Paris "solemnly declare in the name of their respective peoples that they condemn recourse to war for the solution of international controversies." Does this require merely an abstract condemnation of war, or does it impose a duty to condemn specifically every recourse to war in violation of the treaty? The fact that the declaration is "in the name of their respective peoples" suggests that if such a specific condemnation is required it ought to be published, so that the people can know what is being done in their name. The Stimson doctrine implied from the Pact of Paris a duty not to recognize *de facto* changes brought about by means contrary to the Pact. Such a withholding of recognition involves a judgment that the Pact has been violated. Consequently, if non-recognition is a duty, the assertion that the Pact has been violated is also a duty whenever the violation has resulted in *de facto* changes. It is to be noted that the recent instances of treaty violation by Italy and Japan, cited by Mr. Welles, were in connection with such circumstances.

The parties to the Argentine Anti-War Treaty, of which the United States is one, "solemnly declare that they condemn wars of aggression in their mutual

²⁰ J. W. Garner, *International Law and the World War*, London, 1920, Vol. 1, p. 177. On June 3, 1938, Acting Secretary of State Welles made a formal statement to the press expressing "emphatic reprobation" at the bombing of civilians in the Spanish and Far Eastern hostilities.

²¹ "Wherever in the world the laws which should protect the independence of nations, the inviolability of their territory, the lives and property of their citizens, are violated, all other nations have a right to protest against the breaking down of the law. Such a protest would not be an interference in the quarrels of others. It would be an assertion of the protesting nation's own right against the injury done to it by the destruction of the law upon which it relies for its peace and security." Elihu Root, "The Outlook for International Law," *Proc. Am. Soc. Int. Law*, 1915.

relations or in those with other states." The qualification, "of aggression," suggests more concretely than in the case of the Pact of Paris a duty to state an opinion whether actual hostilities constitute such a war. The Argentine Treaty also provides specifically that the parties "will not recognize any territorial arrangement which is not obtained by pacific means, nor the validity of the occupation or acquisition of territory that may be brought about by force of arms." It is hard to avoid the deduction from this of a duty to declare that any specific territorial rearrangement, occupation or acquisition has or has not been "obtained by pacific means," or "brought about by force of arms."

Mention may also be made of numerous treaty provisions such as Article VII of the Nine-Power Washington Conference Treaty, implemented in the Fall of 1937 by the Brussels Conference, Articles I and II of the Four-Power Treaty relating to insular possessions in the Pacific, Article III of the Argentine Anti-War Treaty, Article VI of the Buenos Aires Coördination Treaty, Articles I and II of the Buenos Aires Maintenance of Peace Treaty, and Articles XI, XV and XVI of the League of Nations Covenant, providing for consultation in case of actual or threatened aggression contrary to treaty. Such provisions doubtless imply a duty of the consulting state to express an opinion whether treaties have been violated. The assertion by the United States that Japan had violated the Pact of Paris and the Nine-Power Treaty through her invasion of China was in connection with such a duty at the Brussels Conference.

(3) It is to be observed that these provisions, implying an obligation to denounce illegal behavior by other states, are confined in the main to illegal hostilities, actual or threatened. With respect to other violations of international obligations, states, whether directly injured by the illegal behavior or not, are free to remain silent. What are the considerations which should influence states in their decision to remain silent or publicly to denounce a treaty violation?

One of the important sanctions of international law is public opinion, but public opinion cannot operate unless the public has its attention focused on breaches of that law. Governments lead the opinion of their peoples, especially in foreign affairs. Consequently, if governments pass over breaches of international law or treaty in silence, the people will seldom be able to form an opinion approving or condemning action in international relations. Public opinion would not visit upon delinquent states "the terrible consequences, which [according to Elihu Root] come upon a nation that finds itself without respect or honor in the world and deprived of the confidence and good will necessary to the maintenance of intercourse."²²

Governments, however, which continually sought out and denounced the minor international delinquencies of other states, from which they suffered no

²² Elihu Root, "The Outlook for International Law," *Proc. Am. Soc. Int. Law*, 1915.

immediate inconvenience, would not be popular. To charge a sovereign state with violating an obligation of international law or treaty is a serious matter, often causing recrimination and hampering diplomatic relations of the state making the charge, as well as the one against which it is made. It is, therefore, not surprising that states have hesitated to make such charges unless important interests of their own were affected. On the whole this is a salutary rule. Yet if world opinion is to be a sanction against breaches of international law, states must, in principle, recognize their interest in general respect for that law and for the treaties to which they are parties, and conceive themselves as injured by contempt for such obligations even when another is the immediate victim. As Solon is reported to have said: "That commonwealth is best administered in which any wrongs that are done to individuals are resented and redressed by the other members of the community as promptly and as vigorously as if they themselves were personal sufferers."²³

Wise policy suggests that the state which has not been directly injured by a treaty violation observe two limitations in denouncing the state deemed guilty of that violation. First, it should await the result of international procedures of inquiry, conference, or adjudication to determine whether there has in fact been a treaty violation, and it should utilize the results of that determination in its own denunciation.

Secondly, it should refrain from comment unless the violation involves a breach of customary international law or a general treaty to which it is a party, asserting a fundamental principle of the community of nations. Elihu Root insisted that the familiar distinction between civil and criminal law should be recognized in international law.

We are all familiar [he said] with the distinction in the municipal law of all civilized countries between private and public rights and the remedies for the protection or enforcement of them. Ordinary injuries and breaches of contract are redressed only at the instance of the injured person, and other persons are not deemed entitled to interfere. It is no concern of theirs. On the other hand, certain flagrant wrongs the prevalence of which would threaten the order and security of the community are deemed to be everybody's business. If, for example, a man be robbed or assaulted the injury is deemed not to be done to him alone but to every member of the state by the breaking of the law against robbery or against violence. Every citizen is deemed to be injured by the breach of the law because the law is his protection and if the law be violated with impunity his protection would disappear.²⁴

Resort to hostilities in violation of such treaties as the League of Nations Covenant, the Pact of Paris, the Argentine Anti-War Treaty, is the outstand-

²³ Plutarch, Solon, Sec. 18, quoted by Sir Edward Creasy, *First Platform of International Law*, London, 1876, p. 44; note 21 *supra*.

²⁴ Root, *op. cit.* The same distinction was recognized by Sec. Hull in his press interview

ing type of treaty violation in this class. To prevent, denounce, and remedy such breaches is the business of every state.

The reply of Acting Secretary Welles conforms to both of these limitations, perhaps with undue caution. Possible breaches of bilateral treaties were not alluded to, although the United States has alleged such breaches by Germany, the Soviet Union, and perhaps other states in recent years.²⁵ It was assumed that breaches of international financial contracts were outside the scope of the inquiry. It was apparently assumed that Congress was interested primarily in breaches of fundamental treaties, breaches which might be characterized as crimes against the community of nations.

Furthermore, the two cases of breach of such treaties referred to had been examined by international procedures, and the conclusions reached by these procedures had been accepted by the United States. It would, perhaps, have been premature to characterize the German activity in annexing Austria, activities which seem to have involved threats of violence, if not violence itself, as a breach of obligations under the Pact of Paris. There might be a question whether "a signatory state which threatens to resort to armed force for the solution of an international dispute or conflict is guilty of a violation of the Pact," although the Budapest Articles of Interpretation assert that it is.²⁶ The care of the United States in confining its recognition of the German

of May 7, 1938 (Press Releases, May 7, 1938, p. 559), when he urged his interlocutor to "lift your attention, vision, and thought up to these great treaties that really have been violated like the Nine Power Pact, the Kellogg Pact, and all the others that go to the very heart of the peace situation."

²⁵ See letter of Secretary of State Hull, Sept. 11, 1933 (Press Releases, Sept. 22, 1934, p. 1), calling attention to the obligation of Germany under Arts. 1 and 2 of the Treaty of Berlin between the United States and Germany incorporating Art. 170 of the Treaty of Versailles, by which Germany agreed to prohibit the importation and exportation of arms, munitions and war materials of every kind and stating that consequently "This Government would view the export of military planes from this country to Germany with grave disapproval." (See comment of Secretary Hull, May 6, 1938, Press Releases, May 7, 1938, p. 545 ff., explaining that even if there was an obligation of Germany to prohibit import of arms, there was no obligation of the United States to prohibit export of arms to Germany, consequently licenses could not be refused for such export under Sec. 5 (f) of the Neutrality Act of April 29, 1937.) The continued licensing of arms shipments from the United States to Germany indicates that Germany has been violating her treaty obligation to the United States. See also note of the United States to the Union of Soviet Republics protesting against activities in connection with the All-World Congress of the Communist International as "a flagrant violation of the pledge given by the U.S.S.R. on November 16, 1933, with respect to non-interference in the internal affairs of the United States." (Press Releases, Aug. 31, 1935, p. 1.) Since the Welles letter, the United States has alleged another treaty violation by Germany in connection with the Jewish property declaration decree. *Ibid.*, May 14, 1938, p. 576.

²⁶ International Law Assn. Report of 38th Conference, 1934, pp. 49-52, 67. Some doubt was expressed on this point in the House of Lords debate of Feb. 20, 1935, *ibid.*, pp. 318, 321.

assumption of control in Austria to "necessity" and "facts" and in limiting the consequences of this assumption to "practical measures" and "practical purposes" suggests that the possibility of breach of the Pact and consequent applicability of the non-recognition doctrine remains open,²⁷ a suggestion borne out by the explicit reaffirmation of the non-recognition doctrine by the Secretary of State on May 12, 1938.²⁸

QUINCY WRIGHT

THE POWER TO PUNISH NEUTRAL VOLUNTEERS IN ENEMY ARMIES

Japan recently threatened to punish under her Penal Code an American citizen, Elwyn Gibbon, who had fought in the Chinese air forces and was arrested in Japan on his way from Hong Kong to the United States on a British steamer. Gibbon was detained only a few days, charged with participating in the bombing of Taihoku and in active military operations against Japan. He was then released, after interposition by the Department of State, on the reported ground that the Penal Code was not applicable to him because he was a neutral on his way to the United States.

The case nevertheless raises a number of interesting questions, in the light of the fact that many American youths have served or are now serving in the Spanish Loyalist¹ and some in the Chinese forces. Some of the issues involved relate to the United States laws and passport regulations, to the degree of diplomatic protection to which such venturesome Americans are entitled, to their legal status while in belligerent service and when captured, and to their status, in relation to the enemy government, while on the way to or from their belligerent engagement.

Inasmuch as American citizens applying for passports for travel abroad must make an affidavit to the Department of State naming their destination and the object of their visit, passports would doubtless be denied to American citizens manifesting an intention to enlist, even abroad, in foreign belligerent service. While they would not be violating the criminal law² if the enlistment took place abroad, the Department would probably not knowingly grant passports for foreign belligerent service. In the case of the Spanish Civil War, special measures were taken to prevent American citizens from joining either faction, but the survivors of the 3,000 who evaded the restriction³ may have their passports taken up when caught outside Spain, and may later be denied

²⁷ Press Releases, April 9, 1938, p. 465.

²⁸ *Ibid.*, May 14, 1938, pp. 575-6.

¹ It has recently been reported, *New York Times*, May 23, 1938, that probably 3,000 American citizens have fought in the Loyalist forces and a small number in the Franco forces. How many are serving in China is apparently not known.

² Title 18, Sec. 22, of the United States Code, Rev. Stat. 5282.

³ On Jan. 13, 1937, the Department published a telegram to the Consul General at Barcelona deploring the participation of American citizens in the civil war as "unpatriotically inconsistent" with this Government's policy of "most scrupulous non-intervention in Spanish internal affairs." *New York Times*, Jan. 14, 1937. Passports were stamped "not valid for travel in Spain"; the restriction did not extend to doctors, nurses and others with exceptional missions.

new passports; but they will probably not otherwise be punished for violating the representations in their applications. Original intent to evade is hard to prove to a jury. And unless they took an oath of allegiance to the government they served, they did not forfeit their citizenship under American law. In view, however, of the dangers to which such unneutral conduct exposes the United States, and the attractions of supposedly ideological and other conflicts to impetuous Americans, it may be well to amend the Neutrality Act of 1937 by an express provision to the effect that such unneutral service shall produce a loss of American citizenship, or at the very least a complete loss of American protection.

At the present time, whether on humanitarian or other grounds, diplomatic protection is not entirely lost. While such Americans are necessarily exposed to the military risks they encounter,⁴ and while the United States will not usually advance any claim for their salaries or for compensation for supplies or unneutral aid Americans may have furnished a foreign government, this Government has on occasion interposed to secure an observance of the rules of war or a mitigation of a harsh penalty or a right to a fair trial.⁵ The diplo-

⁴ Even noncombatant foreigners are exposed to the risks of their location, whether in civil or international war. Secretary Bayard in 1888 maintained: "It is the duty of foreigners to withdraw from such risks and if they do not, or if they voluntarily expose themselves to such risks, they must take the consequences." Moore's Digest, VI, 963. This was the position assumed by the United States toward foreigners in the Civil War. It has been maintained by international arbitration. *Gelbtrunk (United States) v. Salvador*, For. Rel. 1902, 873, 878; cf. Lord Grenville's reply to British subjects resident in France who protested against requisitions during the Franco-Prussian War. Atlay's Wheaton, Sec. 151, j; Phillimore, International Law, II, 6. It is not easy to account for the recent announcement (Feb. 25, 1938) that American citizens in China are under "no obligation whatsoever to take precautionary measures" against their injury by the contending armed forces, and that "if American nationals or property are injured in consequence of the operations of Japanese armed forces, the United States will be compelled to attribute" to Japan "responsibility for the damage." The basis for such responsibility would seem to rest on grounds outside the law. In the case of the *Juragua Iron Co. v. United States*, 212 U. S. 297 (1909), a claim against the United States by an American corporation whose property in Cuba had been burned and destroyed by order of General Miles because it was thought that it might contain fever germs, the Supreme Court remarked that the property in Cuba had the status of "enemy's property . . . subject under the laws of war to be destroyed whenever, in the conduct of military operations, its destruction was necessary for the safety of our troops or to weaken the power of the enemy." For further precedents on this point, cf. Moore's Digest, VI, 883 *et seq.*; Borchard, Diplomatic Protection of Citizens Abroad, 246 *et seq.* Nor would the position be any different if it were contended, erroneously, that there is no state of war in China, for the United States disclaimed responsibility for the injuries inflicted during the bombardment of Greytown in 1854 and the attack on Vera Cruz in 1914.

⁵ Cf. *Carroll (Great Britain) v. United States*, where the penalty for seditious conduct was remitted to expulsion; *Santangelo (United States) v. Mexico*, April 11, 1839, Moore's Arbitrations, 3333; *Dubos (France) v. United States*, Jan. 15, 1880, *ibid.*, 3319. Cf. case of Orton W. Hoover, American aviator, arrested in 1930 while allegedly aiding the Brazilian Government forces against the Vargas revolution, and arrested again in 1932 while allegedly helping the São Paulo militia in an abortive rebellion against Vargas. The Department of

matic interposition of Secretary Knox on behalf of the Nicaraguan widows of Cannon and Groce, two American adventurers who had joined the Estrada rebel forces against Zelaya and were executed when captured, was unusual and was probably not influenced by political hostility to Zelaya;⁶ whereas Great Britain withdrew its protection from Arbuthnot and Ambrister who had stirred up the Blackfeet Indians in the Florida campaign of General Andrew Jackson, and after summary trial by a military court were shot for "levying war against the United States."⁷ Except for a concrete national interest that needs defense, it would seem preferable not to create a diplomatic issue out of an injury to an American citizen who has violated his neutral obligations, even if not the letter of the existing neutrality statutes.

When such an American citizen is killed or wounded in the course of military service, no claim is advanced—and it would seem to make little difference whether he was serving with the constituent government or with the rebels or on either side in an international war. But when he is captured, there has been a disposition to encompass his release and return to the United States, or at least to see that the rules of war are observed in his behalf. Where he is not discriminated against as an American citizen, the question arises whether this is not an inadvisable intervention and whether diplomatic protection should not be completely withdrawn. If Gibbon had been brought down and captured by the Japanese, should the United States have protested against his punishment under the criminal law of Japan rather than the laws of war, assuming that Japan, like France, punished a neutral who fought against the state?⁸ While it is now practically universally admitted that a state may punish a foreigner for a crime committed abroad against the safety of the

State undertook to obtain Hoover's release. N. Y. Times, Nov. 6, Nov. 7, Nov. 14, 1930; Oct. 21, 1932. Case of Lieutenant Commander Harold F. Grow, held prisoner by Peruvian junta. N. Y. Times, Aug. 27, Aug. 31, Sept. 11, 1930, Jan. 13, 1931. Case of Harold B. Dahl, American aviator who was arrested by the Franco forces. The Department of State undertook to prevent the death penalty. N. Y. Times, Sept. 3, 1937, and Sept. 4, 1937. The Department makes inquiries concerning the whereabouts and welfare of prisoners in the Spanish civil war. N. Y. Times, June 1, 1938. In a press conference June 7, President Roosevelt threatened to revoke the licenses of American airplane pilots who enlisted in revolts against established governments abroad. He seems to make a distinction between civil wars and international wars. N. Y. Times, June 8, 1938.

⁶ This Journal, Vol. 4 (1910), 674; for Secretary Knox's note see *ibid.*, Supplement, 1910, p. 249.

⁷ Mr. Rush, Minister at London, to Mr. Adams, Secretary of State, Jan. 25, 1819, Moore's Digest, VI, 621. Halleck, International Law (London, 1908), II, 200.

⁸ The French *Code d'Instruction Criminelle*, Arts. 5 and 7, and the Criminal Code, Arts. 76, 77, 83–85. One of the crimes against "the security of the state" includes plots and intrigues directed toward facilitating the entry of enemies into French territory and assistance to the enemies of France. Travers, *Le droit pénal international*, I, 519. Garçon, *Code pénal annoté*, Art. 76, No. 3, quoted in Harvard Research in International Law, Jurisdiction with Respect to Crimes, Dickinson, Reporter, this JOURNAL, Supp., Vol. 29 (1935), p. 559 and cases cited p. 558. It is not entirely clear from the French decisions that criminal punishment is visited on such a neutral serving the enemies of France, but it might be.

state⁹—as distinguished from a crime committed against a citizen—and while it would be illegal to deal with nationals of the enemy state in military service under the penal code instead of the rules of war, is it certain that a neutral, intervening voluntarily in a foreign war, is entitled to the same consideration? Would a state whose penal code thus undertook to punish foreigners, violate international law? It seems doubtful.

That leaves remaining then only the question whether such power to punish for an extraterritorial offense against the state is exhausted when the unneutral military service has terminated. We may pretermitt the point that Japan exercises extraterritoriality in China. Would not Gibbon have violated the penal laws of Japan and be subject to punishment, even though his service in China had terminated? It may be assumed that no international offense was committed by taking him off a British vessel that had come to rest in a Japanese port. And would Japan have acted illegally if it had arrested him on proof that he was on his way to China to serve in the forces against Japan?

These and similar questions are likely to arise if it becomes a common practice for Americans to engage in foreign military service against countries or governments with which their own country is at peace. Penal codes may undertake to extend their jurisdiction to cover such offense against the security of the state, and we shall then be faced with the question whether such assumption of jurisdiction involves any violation of international law.

EDWIN BORCHARD

CAN CIVIL WARS BE BROUGHT UNDER THE CONTROL OF INTERNATIONAL LAW?

(It is well established that civil wars, in the sense of internal struggles by different factions to obtain control of the government of the same territorial area, belong within the class of domestic questions which are outside the control of international law. According to the theory that a "sovereign state" retains jurisdiction over all matters which it has not by custom or by specific agreement yielded to the regulatory authority of the community of nations, the existence of a civil war is a problem for the state itself in the exercise of its "sovereignty".) The community of nations may not pass upon the circumstances which led to the outbreak of the insurrection or rebellion; it may not inquire into the reasons for the breakdown of the constitutional machinery of the state; above all, it may not suggest a basis of agreement between the parties by which the war might be brought to an end. Third states may not so much as resort to the procedure of good offices and mediation, which of all the procedures for the peaceful settlement of international disputes interferes least with traditional sovereign rights.

✓ ((The principle that there is no right of intervention on the part of the com-

⁹ Harvard Research in International Law, Art. 7, *loc. cit.*, 543 *et seq.*, and excellent commentary thereunder citing statutory, judicial, scientific, and treaty authority.

munity of nations in a civil war, is not limited by the fact that there are rules regulating the recognition of insurgency and belligerency. For these rules bear not upon the right of the community of nations to control in any way the relations of the belligerent factions with each other, but merely the relations of third states with each faction individually. Quite obviously the existence of civil war will affect the trade of third states with those sections of the country which are the theater of war; and it may also affect the personal and property rights of citizens of third states who happen to be within the area of warfare.)) In consequence international law has prescribed more or less definitely the conditions under which recognition may be given by third states to the belligerency of the faction in rebellion against the *de jure* government; and the act of recognition brings into operation the traditional law of neutrality applicable to formal war between independent states. But neither the law of recognition nor that of neutrality consequent upon it involves any right on the part of the community of nations to set in motion the procedures of pacific settlement applicable to war between two separate states. Nor is there any provision in the Covenant of the League of Nations bearing upon the rights or obligations of members of the League in the event of civil war as distinct from public international war.))

((The failure of international law to develop any general rule expressing the right of the community of nations to intervene between the parties to a civil war was naturally accompanied by the assertion on the part of individual states of a right to take the law into their own hands.) The result was that the nineteenth century witnessed numerous interventions on the part of third states to promote the success of one faction or the other. The members of the Quadruple Alliance, for example, saw in the revolutionary movements following the Congress of Vienna a menace to their national interests, and they set forth in the Protocol of Troppau their intention to assist legitimate governments when threatened with revolutionary liberal movements.) Belief in democracy and constitutionalism took on in those days something of the religious fervor associated in these latter days with fascism and communism. How long, it was argued, could absolute monarchy hold its own within its national boundaries if neighboring states were to come under the control of democratic governments based upon some pretended will of the people expressed in written constitutions? The only protection for the existing order was for the monarchs to accept the principle of mutual assistance and to lend their aid to their fellow monarchs to suppress uprisings against their authority. It is an academic question whether out of these conditions there developed something that might be called a "right of intervention" on the part of individual states whose national interests appeared to them to be menaced by revolutionary liberalism.) The United States entered at the time a strong dissent against the acceptance of such a principle as part of international law; and the subsequent development of constitutional governments resulted in its complete abandonment a generation or two later.

R (What we have been witnessing in Spain for the past two years is in a broad way a reversal of the earlier revolt of liberalism against monarchical legitimacy. For this time it is the conservative groups that are the rebels; it is the army and the propertied interests that are questioning the authority of the *de jure* government; and in their challenge to the constitutional régime they are receiving the support of clericals who have normally been on the side of the established order. It is in its social aspects a war of class against class, not a war of geographical section against geographical section, as in the case of the Civil War in the United States. Its international repercussions are due to the fact that the Communist Government of Russia finds a national interest in the success of the radical elements in control of the *de jure* Government of Spain, while the Fascist Governments of Germany and Italy on their part look upon the establishment of a radical régime in Spain as a menace to their own national safety.)) At the same time, while other neighboring governments have refrained from taking official action in favor of one side or the other, they have found it difficult to restrain their citizens from taking sides and they have witnessed within their own boundaries a sharpening of the alignment of class against class which has had disturbing effects upon their domestic peace.

R (What constructive solution can be found for this new problem of international relations which, unless it be solved, threatens to become more and more dangerous during the coming years? The solution by way of collective non-intervention, while in principle more in accord with the traditions of international law, has in practice presented difficulties which have made it impossible of realization. The London Non-Intervention Committee simply could not restrain the several totalitarian governments from giving aid to the side whose success seemed vital to their interests; with the result that the civil war in Spain has been perilously near to being the prelude to international war. The practical failure of collective non-intervention is paralleled by its inherently immoral evasion of community responsibility.))

✓ (Is there a solution by way of collective mediation between the parties in conflict? Could collective intervention have succeeded where collective non-intervention has failed? In theory it would seem that there should be principles of law applicable to civil war just as there are principles of law applicable to conflicts between individuals within national boundaries and to conflicts between nations, although these last are not being successfully applied at the present moment. That the issues involved in civil war may be exceedingly complex is obvious enough. No better illustration could be found than in the case of Spain itself. But the complexity of issues bears merely upon the difficulty of applying principles, not upon the principles themselves. What might those principles be?

R (It may doubtless be taken as a starting point that the government in power under the constitution of the state should have a *prima facie* claim to the support of the community of nations in any procedure of mediation. What more would be needed to give to a *de jure* government an absolute claim for

support from the community of nations? Clearly such a government must be prepared to respect certain fundamental rights of individuals and of minorities. The suggestion that majorities, assuming that the *de jure* government constitutes a majority, can do no wrong is no more tenable in the case of democracies than in the case of totalitarian governments. The progress of law in constitutional governments has consisted in self-imposed restraints, by which even majorities may not encroach upon a reserved field of fundamental privileges and immunities which are so vital to the individual that his continued acquiescence in democratic processes is conditioned upon them.))

Is it possible to formulate such a body of privileges and immunities, such a charter of fundamental rights, that might be used by the organized community of nations as a basis of mediation between the parties to a civil war? And what sanctions, positive by way of active assistance or negative by way of cessation of trade, might be devised in the event that one party to the civil war was willing to accept the mediation of the community of nations and the other refused?)) Any attempt to answer such questions in detail would make it clear at once how complicated the issues are; and the fact that there are to-day within the community of nations a number of totalitarian governments possessing a unity of national sentiment in favor of a particular class ideology would unquestionably obstruct the effort to secure an agreement as to the procedure to be followed and the basis upon which the mediation might be carried out. The whole idea might be dismissed as utopian, as visionary as a "castle in Spain", if it were not that conditions indicate that civil wars of the kind in Spain are likely to increase rather than diminish unless the issues underlying them are met constructively rather than by a resort to force. ✓

The method by which the United States has met the problem within the scope of its federal constitution is suggestive, if not sufficiently parallel to the international problem to permit inferences to be drawn from it. In accordance with Section 4 of Article IV of the Constitution, the United States (using the plural) "shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion; and on application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic violence." The guarantee of a popular form of government is absolute; and on that basis the Union pledges itself to protect the *de jure* government of a State against domestic violence. It is somewhat disconcerting to find that the Supreme Court, in the case of Luther v. Borden (7 Howard, 1), felt that it could not question the "republican" character of a government which was in fact aristocratic rather than popular. But that situation soon corrected itself; and with the adoption of the Fourteenth Amendment a new development was added to Article IV in the application to the individual States of a Federal charter of fundamental rights of life, liberty and property. As things now stand, the right and the obligation of the Federal Government to intervene on the side of the *de jure* government in the event of domestic violence within a particular State are contingent upon the

conformity of the laws of the *de jure* government with the guarantees, both in respect to individuals and in respect to minorities, set forth in the Fourteenth Amendment and in the numerous decisions of the Supreme Court interpreting it. But one must climb the mountain of hope and prophecy to get a vision of an international law incorporating the principles and the procedure of the Fourteenth Amendment. 1)

C. G. FENWICK

THE LITVINOFF ASSIGNMENT AND THE GUARANTY TRUST COMPANY CASE

The Supreme Court of the United States has again found it unnecessary to deal with the underlying legal situations which have arisen from the Soviet nationalization decrees and the subsequent recognition of the Soviet Government.¹ In the instant case,² the facts were that the Imperial Russian Government opened a bank account with the Guaranty Trust Company in 1916. In July, 1917, during the incumbency of the Provisional Government of Russia which was recognized by the United States, Mr. Serge Ughet, Financial Attaché of the Russian Embassy in the United States, deposited five million dollars in that account. Four months later the Provisional Government was overthrown and the Soviet Government came into power. The subsequent course of events, with the continued recognition by the United States of Mr. Bakhmeteff and Mr. Ughet as the diplomatic representatives of Russia until the recognition of the Soviet Government in 1933, are familiar. Under the Litvinoff Assignment, so-called,³ the United States brought suit against the Guaranty Trust Company in 1934 to recover the balance of the account of the Russian Government, a demand for the same having been refused. The Trust Company moved to dismiss the complaint on the ground that the recovery was barred by the New York six-year statute of limitations.⁴ The principal question of international law presented was whether a local statute of limitations applied to a suit brought by a foreign sovereign. The District Court held that it did; the Circuit Court of Appeals, Second Circuit, held that it did not;⁵ the Supreme Court held that it did.⁶ The United States argued that even if the Soviet Government was barred by the statute of limitation, the United States was not. The Supreme Court properly held that "the

¹ See this JOURNAL, Vol. 31 (1937), pp. 481, 484.

² Guaranty Trust Company of New York v. The United States, No. 566, October Term, 1937 (58 Sup. Ct. 785; 303 U. S.—).

³ This JOURNAL, Vol. 28 (1934), pp. 90 and 545; *id.*, Supp., p. 10.

⁴ The Guaranty Trust Company alleged that it made an unqualified repudiation of liability on the account in 1918 when it applied the balance in the account as credit against indebtedness alleged to be due it by the Russian Government as a result of the latter's seizure of accounts of the Trust Company in Russian banks. Under New York law, the statute of limitations would run from the date of such repudiation. The District Court in an unreported opinion found that such repudiation was proved.

⁵ United States v. Guaranty Trust Co. of New York (1937), 91 Fed. (2d) 898.

⁶ Since the Circuit Court of Appeals had not passed on the question of the repudiation, the case was remanded to that court "for further proceedings in conformity with this opinion."

United States never acquired a right free of a preëxisting infirmity" and that the rule *nullum tempus occurrit regi* was therefore not applicable.

The decision of the Supreme Court on the principal point is believed to be sound, but neither the opinion of the court nor the briefs of the parties reveal a profound understanding of international law which the same court has often declared to be part of the law of the land. The court's theory in this case is that a foreign sovereign suing in a domestic court does so as a matter of comity and not of right; that the sovereign plaintiff must conduct its suit in accordance with the procedural rules of the forum; that the statute of limitations is a part of those procedural rules; and that, accordingly, the foreign sovereign must bring its suit within the statutory period. These are sound propositions,⁷ even though a contrary rule might be reached by continental European courts which hold that statutes of limitations are substantive and not procedural as they are considered to be in the United States.⁸ The view of the forum on this question should undoubtedly prevail, since the essential point is the use of the remedies of the forum by the foreign sovereign. However, in reaching its conclusion on this question, the Supreme Court starts from the erroneous proposition that a foreign sovereign's immunity from a suit in which it is sought to be made a defendant also rests upon comity. The court relies upon the familiar cases of *The Exchange* and *The Pesaro* and the more recent case of *The Navemar*. It shows no appreciation of the fact that the rule of immunity has been accepted by the courts of practically all countries and can clearly be shown to rest upon international law.⁹

It may be pointed out that the Government's brief fails to make the most of its opportunities for arguing that the statute of limitations is not one of the procedural rules to which the foreign sovereign plaintiff must bow. This failure is due to an apparent unwillingness to deal with the point squarely as one of international law which, in the absence of any direct judicial precedent, needed to be argued on principle. Circuit Judge Swan's suggestion in the opinion of the court below that rules regarding counter-claims and the like relate to procedure after the sovereign has sought the aid of the court, while the defense of limitation refers to something occurring prior to the resort to the court, is ingenious but not convincing.

The Government pressed the quite indefensible argument that the unfortu-

⁷ See Research in International Law, Harvard Law School, Draft Convention on Competence of Courts in regard to Foreign States, this JOURNAL, Supp., Vol. 26 (1932), p. 455 ff. This draft convention is not directly cited in the opinions or in the briefs.

⁸ Cheatham, Dowling and Goodrich, Cases and Materials on Conflict of Laws, p. 371. This distinction is not appreciated in either brief where the decision of the French Court of Cassation in *Gouvernement espagnol c. Veuve et Héritiers d'Aguado* is discussed.

⁹ See Harvard Research Draft, *op. cit.*, p. 527 ff. The brief of the petitioner, while learned, is not persuasive in endeavoring to suggest that the rule of immunity is "of fairly recent development in our law." A contrary rule "in the middle ages" does not militate against the establishment of a customary rule of international law through the course of the last hundred years.

nate doctrine of retroactivity of recognition¹⁰ should be applied so as to nullify the recognition of the diplomatic representatives of the Provisional Russian Government, thus supporting the argument that since an unrecognized government may not sue, the statute of limitations would not run against the Soviet Government during the period of its disability to sue. Although the court does not forsake the doctrine of retroactivity, it fortunately was unwilling to carry it to this extreme. The court properly points out that "the rights of a sovereign state are vested in the state rather than in any particular government which may purport to represent it" and that the courts must follow the executive branch of the government in determining who is the recognized representative of the state. The court indicates its approval of the distinction between acts of a foreign government "within its own territory prior to recognition, and the effect upon previous transactions consummated here between its predecessor and our own nationals."¹¹

The Government in its brief also argued that under the doctrine of the Belmont case,¹² the Litvinoff Assignment must be deemed to have superseded any conflicting state law or policy, including a state statute of limitations. The court soundly argues that the international agreement does not bear such an interpretation in this respect, but it continues with the unnecessary and unsound dictum that "Even the language of a treaty wherever reasonably possible will be construed so as not to override state laws or to impair rights arising under them."¹³

The briefs of both parties endeavor to utilize cases before international tribunals in which it has been held that a state in pressing the claim of its national is not barred by a statute of limitations of the defendant state but may be barred by laches. Neither brief reveals an understanding of the fundamental and elementary distinction between such cases and those in which a sovereign sues in a domestic court. It is perhaps significant that in citing the *George W. Cook* case before the United States-Mexican General Claims Commission, both briefs cite the *Annual Digest of Public International Law Cases* which contains a brief extract and summary, instead of the official volume of the *Opinions of the Commissioners* or even the full text in this JOURNAL.¹⁴

While, as already indicated, the basic conclusion of law which the court reached is believed to be sound, the factual situation is peculiar. The State

¹⁰ See this JOURNAL, Vol. 31 (1937), pp. 481, 482.

¹¹ The court does not accept the theory of the Government's brief that the Soviet Government's repudiation of Mr. Bakhmeteff was an act within its own territory which should be retroactively validated by recognition.

¹² See this JOURNAL, Vol. 31 (1937), p. 481.

¹³ For the sound basis of treaty interpretation, see Hyde, "The Interpretation of Treaties by the Supreme Court of the United States," this JOURNAL, Vol. 23 (1929), p. 824.

¹⁴ Vol. 22 (1928), p. 185. The petitioner's brief gives Ralston's Supplement as an additional citation.

of Russia, precluded from bringing suit through an agent of its choice, was bound by the failure to act of an agent which it repudiated and who repudiated the authority of its actual government. The result is one of the many unfortunate consequences of the unrealistic procedure followed by the Government of the United States in recognizing for sixteen years a non-existent government. Had the United States followed the more reasonable theory of recognizing that the Soviet Government was the Government of Russia, while refusing to establish diplomatic relations with it because of disapproval of its policies, many anomalies would have been avoided.

It may also be noted that by accepting the Litvinoff Assignment, the Government of the United States closed a channel through which—if the State of Russia be entitled to the moneys deposited with the Guaranty Trust Company—the funds involved in this case might have been recovered. Had the Soviet Government been the plaintiff in this action and been barred by the New York statute of limitations, the matter could have been pressed against the Government of the United States through diplomatic channels. The United States as assignee has no such recourse.

PHILIP C. JESSUP

✓ ANGLO-IRISH ACCORD

In the long history of effort to adjust Anglo-Irish relations, the understandings arrived at on April 25, 1938, seem likely to assume considerable importance. Surely, if only the very recent phase of these relations be taken into account, the wholesome effect of the settlement may be appreciated. Irish refusal in the matter of land annuities, British denial to Irish products of benefits allowed to goods from other members of the Commonwealth under the Ottawa agreements, and Irish retaliation in the form of duties and export bounties, had brought about a tension which lasted for nearly six years. During the period came such legislation in Ireland as the External Relations Act, 1936, the convening of an Imperial Conference (in 1937) from which the Irish Free State was conspicuously absent, and finally, the end of the Irish Free State and the emergence under a new Constitution, effective December 29, 1937, of an entity which is no longer called Saorstát Éireann but Eire, and which has an elected President and no Governor General. The easing of tension between Eire and the United Kingdom in a rational, legal manner is reassuring at a time when resort to violence in international relations is not unknown, and when threats of greater violence are widely heralded.

In form as well as substance, the new arrangement presents valuable material for observers of international legal relations. There are three agreements which have a joint preamble.¹ By the first, Great Britain will transfer to Eire by the end of the current year Admiralty property and rights at the three fortified harbors, Berehaven, Cobh (Queenstown), and

¹ Texts are in *Cmd.* 5728.

Lough Swilly, which have been held under the Anglo-Irish Treaty of 1921.² By the financial agreement, Eire will pay to the United Kingdom £10,000,000 in full satisfaction of "all financial claims of either of the two Governments against the other arising out of matters occurring before the date of this Agreement."³ By the trade agreement, Eire will secure as favorable treatment as the Dominions receive for their products under the Ottawa agreements, some British goods will enjoy free entry into Ireland, and the economic war will be terminated with the relaxation of the barriers which had been erected in Ireland especially against British products. The detailed application of the plan will proceed with reasonable flexibility, which will allow the British to safeguard the stability of prices of agricultural products, will permit Eire to protect new industries (particularly through the agency of her Prices Commission), and will protect both parties against dumping. The agreement, which is to run for three years, contains a mild form of revision clause in Article 18:

Should either Government come to the conclusion that the objects of this Agreement are not being attained in any particular respect, or that a change of circumstances necessitates a variation in its terms, the other Government, upon receiving a notification to that effect, will enter immediately into consultation with the first Government, and both Governments will use every endeavour to find an equitable solution of the matter.

That the significance of the understanding transcends the sum of the separate provisions, seems clear. A motion ratifying the agreements was carried without a division in the Dail, and the Parliament at Westminster promptly passed the Eire (Confirmation of Agreements) Bill. In view of the progress which Eire has made toward full statehood, there is not likely to be serious question as to whether these are really international undertakings, such as was raised with respect to the Anglo-Irish Treaty of 1921.⁴ Called an "historic appeasement,"⁵ the accord is reported to have been enthusiastically received in both countries. It leaves open one large political question—that of partition—which Mr. de Valera continues to hold up as of primary importance and as the "sole remaining obstacle to a final reconciliation between the peoples of the two countries."⁶ The Irish

² 26 League of Nations Treaty Series, 10-18. Arts. 6 and 7 of this treaty and the annex thereto are expressly abrogated. With the transfer under the new agreement will be handed over buildings, magazines, emplacements, instruments, and fixed armaments with ammunition therefor.

³ The amount of claims thus to be satisfied has been estimated at about £100,000,000. The agreement does not affect the liability of Eire to continue payment of £250,000 a year for property damage, under the agreement of Dec. 3, 1925, nor inter-governmental payments in respect to unredeemed bank notes, withdrawal of United Kingdom silver coin from Eire, trustee savings banks, and double taxation.

⁴ Correspondence published in 27 League of Nations Treaty Series, 449-450.

⁵ Manchester Guardian Weekly, April 29, 1938, p. 321.

⁶ The Times (London), April 27, 1938, p. 11.

leader has assured his countrymen that the new agreements can cause no obstacle or delay to Ireland's becoming a completely sovereign and independent state.⁷ In England the Opposition have not failed to suggest rumors of a secret understanding for reunion of the two parts of Ireland (as to which, however, Prime Minister Chamberlain gave a categorical denial),⁸ and to imply that Ireland might in a future war be an ally of Great Britain at the price of union with Uster.⁹ From the other side, in a strongly convincing opinion, Mr. de Valera has said, in reply to suggestions that Irish neutrality might have been sacrificed, that, whether England willed it or not, force of circumstances would make her an ally of Eire in the event of war.¹⁰ He has given assurance that the fortified harbors, which he says will be strengthened and modernized by Eire, will not be used as a base for attack upon Great Britain.

The application of the contractual provisions is to go on with a maximum of consultation. The putting into effect of the agreements should have the effect of permitting a natural flow of trade, and may well furnish an illustration of the successful operation of treaty arrangements which are motivated by mutual respect and consideration, and which are in line with realism.

ROBERT R. WILSON

THE EXPORT OF ARMS TO GERMANY AND THE TREATY OF BERLIN

Recently the Department of State has been subjected to criticism in the public press¹ on the ground that by permitting the export of arms to Germany, there is committed a violation of the Neutrality Act of 1937, which prohibits the grant of export licenses for arms, ammunition and implements of war where such export would violate a "treaty to which the United States is a party." It was assumed by the critics that the United States was bound by Article 170 of the Treaty of Versailles, supposedly incorporated by reference in the Treaty of Berlin, by which the "importation into Germany of arms, munitions and war materials of every kind shall be strictly prohibited."

The critics adduced in their support the fact that in September, 1934, the Department of State had in a press release published a letter of 1933 to an airplane manufacturer in which the opinion was expressed that the export of military aircraft to Germany would be a violation of Article 170 and hence of Germany's "treaty obligations to the United States." An editorial in this JOURNAL,² and an analytical article by Mr. Edmund W. Pavenstedt,³ now of

⁷ The Times (London), April 28, 1938, p. 14.

⁸ *Id.*, May 6, 1938, p. 8.

⁹ *Id.*, May 6, 1938, p. 9. In the course of his remarks, Mr. Churchill referred to Southern Ireland as a state which was an "undefined and unclassified anomaly," and said that no one knew what its juridical and international rights and status were.

¹⁰ *Id.*, April 30, 1938, p. 14.

¹ Pearson and Allen in "Washington Daily Merry-Go-Round," May 13, 1938.

² This JOURNAL, Vol. 29 (1935), p. 286.

³ "German Rearmament and United States Treaty Rights," 44 Yale L. J. 996 (1935).

the Department of Justice, undertook to demonstrate that the clauses dealing with the disarmament of Germany, Part V of the Treaty of Versailles, in which Article 170 is included, had never been deemed among the "rights, privileges, indemnities, reparations or advantages," which the Knox-Porter Resolution, the forerunner of the Treaty of Berlin, was designed to preserve for the benefit of the United States and its citizens. Senator Knox, the draftsman, considered that these provisions include "those parts which will provide compensation of our citizens for the losses they suffered because of the war, and those parts which will assure them equality of treatment with the nationals of the most favored nation in all matters pertaining to residence, business, profession, trade, navigation and commerce."⁴ The most liberal construction cannot read into such benefits or advantages any reference to the disarmament of Germany.⁵

The draftsmen of the Treaty of Versailles, as the record shows, did not contemplate the perpetual disarmament of Germany, nor have the governments most vitally interested acted on any such assumption. On February 3, 1935, Great Britain and France undertook to release Germany from the obligations of Part V of the Treaty of Versailles on certain conditions. The United States, it is understood, was not consulted, nor was its consent asked or given. Since then, both Great Britain and France have supplied munitions to Germany, and would doubtless deny that they were violating the Treaty of Versailles. German disarmament, moreover, was conditioned upon a general limitation of armaments which has not occurred. It would therefore be extraordinary that a provision of the Treaty of Versailles which has fallen of its own weight and whose obsolescence has been acquiesced in, voluntarily or obligatorily, by Great Britain and France and others, should now be deemed to bind the United States.

But even if the disarmament provisions of the Treaty of Versailles should be deemed to have been once applicable to the United States, the fact is that the United States concluded a treaty with Germany, December 8, 1923, which provided that "Each of the high contracting parties also binds itself unconditionally to impose no higher or other charges or restrictions or prohibitions on goods exported to the territories of the other high contracting party than

⁴ 59 Cong. Rec. 6565 (May 5, 1920).

⁵ For a similar reason, the decisions of American courts which casually assumed that the Versailles prohibition on German nationals to question the war measures of the Allied Powers was an "advantage" to which the United States laid claim under the Treaty of Berlin, are believed to be erroneous. *United States v. Chemical Foundation*, 272 U. S. 1, 11 (1926); *Lange v. Wingrave*, 295 Fed. 565 (D. C., S. D. La. 1924); *Munich Reinsurance Co. v. First Reinsurance Co.*, 6 Fed. (2d) 742 (C. C. A. 1925); *Klein v. Palmer*, 18 Fed. (2d) 932 (C. C. A. 2nd, 1927). The broad reservoir of "rights, privileges, indemnities, reparations or advantages" needed identification and specification by the Executive, for the question whether a treaty or article thereof is or is not in force as to the United States is in first instance a political question. The meaning of a treaty admittedly in force presents a judicial question.

are imposed on goods exported to any other foreign country." (Art. 7, para. 3.)⁶

This treaty came into force in 1925, and obviously supersedes the prohibition of Article 170 of the Treaty of Versailles. In its nondiscriminatory provision, it remained in force until 1935, when the United States felt that German discriminations against American trade warranted an abrogation of these provisions; whereupon, by treaty between the two countries, the above-quoted article, among others, was terminated.⁷

But this termination by no means revived Article 170 of the Treaty of Versailles. Even before 1935, the British, French and other governments had resumed the trade in aircraft and other arms with Germany,⁸ and apparently decided to regard Article 170, and, indeed, probably the whole of Part V, as abrogated *sub silentio*. This seems the only practical solution of the problem and represents a common method of terminating political treaties.

From whatever point of view the matter be regarded, therefore, the suggestion that the United States is bound by Article 170 of the Treaty of Versailles, or is violating the Neutrality Act by not preventing the sale of aircraft or arms to Germany, seems devoid of any legal foundation.

EDWIN BORCHARD

THE PROPOSED INTERNATIONAL CRIMINAL COURT

The possibility of creating an international criminal court has been bruited at various times during the past two decades. At the Peace Conference in Paris in 1919, a Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties suggested the creation of an *ad hoc* international "high tribunal" to deal with four categories of "violations of the laws and customs of war and of the laws of humanity."¹ The suggestion

⁶ 44 Stat. L. 2137. A similar provision is to be found in Art. 5 of the Treaty with Japan of 1911 (Malloy, III, 79). It serves, in addition to the ordinary obligations of neutrality, to prevent any discrimination in the export of commodities, including any official discouragement of such export, to Japan. Recently, the State Department has been adjured by numerous groups to embargo arms to Japan alone. Under law and the treaty, this cannot be done. The Neutrality Act can be enforced, for, of course, there is a state of war in China and has been since July, 1937. Cf. New York Times editorial, June 15, 1938. The suggestion [8 Amer. Law School Rev. 1226 (April 1938)] that because diplomatic relations between the belligerents have not been severed — they now have been — or because war has not been declared, or because neutrality proclamations have not been issued, or because the parties choose not to admit that it is a war, therefore, it is not a state of war, is disingenuous. "If the law supposes that," said Mr. Bumble, "... the law is a ass, a idiot." The law does not thus flout common sense. *Kawasaki Kisen Kaisha of Kobe v. Batham Steamship Co.*, May 26, 1938, London Times, May 27, 1938, p. 4. Perhaps physical war conditions in China are now such that the Neutrality Act should be permitted to take its course. Only a few of its provisions are mandatory.

⁷ Treaty of June 3, 1935, U. S. Treaty Series, No. 897.

⁸ Cf. 44 Yale L. J. 996, at 1021.

¹ The report of the commission was published in this JOURNAL, Vol. 14 (1920), pp. 95-154. See also James W. Garner, "Punishment of offenders against the laws and customs of war," *ibid.*, p. 70.

found no place in the treaties of peace of that period, but provisions were included in Article 227 of the Treaty of Versailles for a "special tribunal" to try the former German Emperor, the tribunal to be "guided by the highest motives of international policy, with a view to vindicating the solemn obligations of international undertakings and the validity of international morality." These provisions proved abortive, yet they served to stimulate an interest in the development of an international criminal justice which found expression in various quarters.

In 1920, the Commission of Jurists which met at The Hague to prepare a draft of the Statute of the Permanent Court of International Justice adopted a *voeu* recommending the creation of a separate High Court of International Justice, "competent to try crimes constituting a breach of international public order or against the universal law of nations."² This *voeu* may not have represented a very firm conviction of some of the members of the Committee of Jurists.³ It was not received with enthusiasm by the Council of the League of Nations;⁴ it failed to elicit any resolution in the First Assembly, but the Third Committee of the Assembly expressed the view that "there is not yet any international penal law recognized by all nations, and that, if it were possible to refer certain crimes to any jurisdiction, it would be more practical to establish a special chamber in the Court of International Justice."⁵

In non-official circles, however, the idea was received with some hospitality during the years following 1920. Meeting at Buenos Aires in 1922, the International Law Association went on record after an enlivened debate as favoring the creation of an international criminal court, and envisaged the drafting of a proposed statute for it;⁶ a draft submitted to the Association at Stockholm in 1924 was referred to a committee,⁷ and favorable action on it was taken at Vienna in 1926.⁸ Meanwhile, the Interparliamentary Union had given some consideration to a proposal to confer criminal jurisdiction on the

² Proceedings of the Committee of Jurists, 1920, p. 748.

³ In 1921, following an address before the American Society of International Law by Professor Jesse Reeves on "International Criminal Jurisdiction," Mr. Elihu Root, who had served as a member of the 1920 Committee of Jurists, is reported to have said: "With reference to the action of the Hague Committee of Jurists regarding the International Court of Justice, I would like to state that the committee did not recommend it. The project was submitted to the committee, and, I think, the last day of the session, or the day before, it was brought up by the president, Baron Descamps, of Belgium, but the committee did not consider it or discuss it. They referred it to the Council for consideration without any action on the part of the committee. I doubt if there would have been a single vote in the committee except that of the author of the project in its favor." Proceedings of the American Society of International Law, 1921, p. 69.

⁴ *Procès-verbal* of the 10th Session of the Council, 1920, pp. 181-2.

⁵ Records of the First Assembly, Committees, p. 589.

⁶ International Law Association, Report of the 31st Conference, 1922, p. 86.

⁷ *Id.*, Report of the 33d Conference, 1924, pp. 74-111.

⁸ *Id.*, Report of the 34th Conference, 1926, p. 183. The proposed "Statute of the Court" adopted by the conference is on pp. 130-142.

Permanent Court of International Justice, at its meeting in Washington in 1925.⁹ An International Congress of Penal Law, held at Brussels in 1926, adopted a resolution favoring the exercise of criminal jurisdiction by an international court.¹⁰

More significant than this action by unofficial conferences, however, is the literature on the subject which appeared during the decade following 1920.¹¹ For it reveals the spell which the idea of an international criminal court exercised on many minds.

Born of a different order of ideas is the plan for an international criminal court embodied in the convention opened for signature on November 16, 1937. Following the assassination of King Alexander I of Yugoslavia and the French Minister for Foreign Affairs at Marseilles on October 9, 1934,¹² the French Government proposed to the Council of the League of Nations the adoption of "international measures" for the suppression of political crimes, including the creation of an international criminal court,¹³ and on December 10, 1934, the Council set up a committee of experts to prepare a draft of a convention "to assure the repression of conspiracies or crimes committed with a political and terrorist purpose."¹⁴ This committee having worked over a period of

⁹ *Union Interparlementaire, Compte rendu de la XXIII^e Conférence*, 1925, pp. 46-50, 475, 801.

¹⁰ *Actes du Congrès International de Droit Pénal*, 1926, p. 634.

See also a report by a subcommittee, in *Proceedings of the American Society of International Law*, 1922, pp. 69-71.

¹¹ Without attempting an exhaustive bibliography, mention may be made of the following: H. H. L. Bellot, "*La Cour permanente internationale criminelle*," 3 *Revue internationale de droit pénal* (1926), pp. 323-337; J. L. Brierly, "Do We Need an International Criminal Court?" 8 *British Year Book of International Law* (1927), pp. 81-88; M. A. Caloyanni, "The Permanent International Court of Criminal Justice," 2 *Revue internationale de droit pénal* (1925), pp. 326-354, 3 *id.* (1926), pp. 492-515; Caloyanni, "*La Cour criminelle internationale*," 5 *id.* (1928), pp. 261-264; Donnedieu de Vabres, "*La Cour permanente de Justice internationale et sa vocation en matière criminelle*," 1 *id.* (1924), pp. 175-201; A. Lévy, "A Proposed Code of International Criminal Law," 6 *id.* (1929), pp. 18-32; V. Pella, "*La criminalité collective des États et le droit pénal de l'avenir*" (2d ed., Bucarest, 1926), 360 pp.; Pella, "*Rapport sur un projet de statut d'une Cour criminelle internationale présenté au Conseil de direction de l'Association internationale de droit pénal*," 5 *Revue internationale de droit pénal* (1928), pp. 265-292; Philmore, "An International Criminal Court and the Resolutions of the Committee of Jurists," 3 *British Year Book of International Law* (1922-23), pp. 79-86; J. A. Roux, "*A propos d'une Cour de cassation internationale*," 6 *Revue internationale de droit pénal* (1929), pp. 12-17; Roux, "*L'entraide des états dans la lutte contre la criminalité*," *Académie de droit international*, 36 *Recueil des Cours* (1931), pp. 77-181; Q. Saldaña, "*La justice pénale internationale*," 10 *id.* (1925), pp. 223-429; E. Vadasz, "*Jurisdiction criminelle internationale*," 5 *Revue de droit international, de sciences diplomatiques et politiques* (1927), pp. 274-279; H. von Weer, *Internationale Strafgerichtsbarkeit* (Berlin: Dümmler, 1934), 176 pp.

¹² Extradition of certain persons accused of this crime was refused by Italy on the ground that the crime was political, but they were convicted *par contumace* in France. See Hudson, *Cases on International Law* (2d ed., 1936), p. 946 n.

¹³ *League of Nations Official Journal*, 1934, pp. 1731, 1839.

¹⁴ *Idem*, p. 1760.

several years, a diplomatic conference met at Geneva on November 1, 1937, with thirty-six states or members of the League of Nations represented.¹⁵

Two conventions were opened to signature on November 16, 1937: the Convention for the Prevention and Punishment of Terrorism was promptly signed by representatives of twenty states,¹⁶ and the Convention for the Creation of an International Criminal Court was signed by representatives of ten European states.¹⁷ Only states which ratify or accede to the first may ratify or accede to the second convention. Within a year after the deposit of seven ratifications or accessions to the latter convention, representatives of the ratifying or acceding states are to be convened by the Netherlands Government to fix the date for its entry into force; but that result is to be conditioned upon the entry into force of the Terrorism Convention, which is to take place ninety days after the deposit of three ratifications or accessions. After the entry into force of the convention, the representatives of the parties would also consider "all questions bearing on the establishment and the working of the court," with power to decide "what modifications are necessary in order to attain the objects of the . . . Convention." Subsequent meetings of these representatives are also envisaged (Article 46).

The proposed International Criminal Court would be permanent, with its seat at The Hague. It would consist of five judges and five deputy judges of different nationality (unless there are less than twelve parties to the convention). The judges would be jurists of competence in criminal law, chosen by the Permanent Court of International Justice from among persons nominated by the parties; the regular term of the judges would be ten years. Only five members of the court would sit in any case. The Registry of the Permanent Court of International Justice would be asked to serve the new court, also. The salaries of the judges, on a fixed scale, would be payable by the states of which they are nationals. A "common fund" would be established for a special allowance to the Registrar, and for meeting "the costs of proceedings and other expenses involved in the trial of cases" (Article 44).

The court would be set up for the trial of persons accused of an offense dealt with in the Terrorism Convention. *Inter alia*, the latter deals with the following offenses: (a) wilful acts causing death or grievous harm to heads of state or their spouses, or to persons charged with public functions (if they are made victims in their public capacity); (b) wilful destruction of property devoted to a public purpose; (c) wilful acts calculated to endanger life; (d) attempts to commit the foregoing offenses; (e) manufacture, supply, or possession of arms or explosives with a view to committing such offenses;

¹⁵ The Final Act of the Conference was published in League of Nations Document, C.548.M.385.1937.V. All of the members of the League of Nations and ten states not members were invited to be represented at the conference.

¹⁶ *Idem*, C.546.M.383.1937.V.

¹⁷ *Idem*, C.547.M.384.1937.V. The signatories were Belgium, Bulgaria, Czechoslovakia, France, Greece, Netherlands, Rumania, Spain, Turkey and Yugoslavia.

(f) conspiracy to commit, incitement to or participation in such offenses. Instead of punishing for these offenses in its own courts, or extraditing for them, a party to the convention might commit the accused for trial to the International Criminal Court, but it would be under no obligation to do so.

The law applicable by the court would be either that "of the territory on which the offence was committed," or "the law of the country which committed the accused for trial," whichever is less severe (Article 21). In the application of the law of a state of which no sitting judge is a national, a qualified jurist might be invited to sit with the court as an assessor. The prosecution of an accused would be conducted by the committing state, unless the state against which the alleged offense was directed, or otherwise the state on whose territory the offense was committed, should express a wish to prosecute; but a directly injured person might be permitted to become a *partie civile* before the court. The accused would be tried only on charges for which he has been committed. He would be defended by advocates "belonging to a bar and approved by the court," and if necessary the court would assign counsel for this purpose, "selected from advocates belonging to a bar" (Article 29). The state on whose territory the court is sitting would place at the court's disposal a suitable place for internment of the accused, and warders to guard him. Testimony would be heard by the court in the presence of counsel for the accused and of representatives of the participating states. The hearings would be in public, with power in the court to decide that they should be *in camera* (Article 35). Sentences by the court involving loss of liberty would be executed by a party "chosen with his consent by the court" (Article 40); the state which committed the accused would be bound to give such consent, and the sentence would always be executed by that state if it desired to do so. The executing state would have the power of pardon, after consulting the president of the court; and in case of a sentence of death, it could substitute "the most severe penalty provided by its national law which involves the loss of liberty" (Article 41).

A reading of this convention impresses one, first of all, with the boldness of the conceptions underlying its provisions. The common interest of all peoples of the modern world in the administration of criminal justice has been upheld in previous international instruments, and for several generations provision has been made for the special protection of this interest against certain types of terrorist violence.¹⁸ For example, the *attentat clause* has almost become standard in modern extradition treaties.¹⁹ The striking innovation in this convention lies in the coöperation provided for to relieve states of embarrassing burdens cast upon them more or less accidentally and at the same time to assure to other states due regard for their special interest

¹⁸ See the Treaty on Extradition and Protection against Anarchism, signed at Mexico City, Jan. 28, 1902. 6 Martens, *Nouveau recueil général* (3d sér.), p. 185.

¹⁹ Hudson's Cases on International Law (2d ed., 1936), p. 946 n.; Research in International Law, Extradition, in this JOURNAL, Vol. 29, Supp. (1935), pp. 114-115.

in repressing terrorist activities outside their own borders. The *rapporteur* of the conference, M. Pella (Rumania), emphasized the optional character of the court's jurisdiction.

Of particular interest is the relation of the proposed court to the Permanent Court of International Justice, so envisaged as to avoid any possible duplication or competition. The organization of the former would follow that of the existing Court in the main; but there are some notable differences, which suggest that the draftsmen of the convention desired to improve upon the Statute of the existing Court. For example, while the terms of all judges of the Permanent Court of International Justice expire simultaneously, those of judges of the International Criminal Court are staggered, so that "every two years, one regular and one deputy judge shall retire" (Article 10). Placing oneself in the order of ideas of the draftsmen of the convention, one may entertain some doubt as to the desirability of the provision that judges' salaries should be paid by the states of which they are nationals; the experience of the Central American Republics with such a disposition, in connection with the Central American Court of Justice,²⁰ is not very reassuring.

Whether the convention should be brought into force or not, whether if it is brought into force the court as therein envisaged be created or not, certain ideas underlying the convention will certainly attract interest in the future and they may have influence in the further development of international legislation.

MANLEY O. HUDSON

²⁰ See Hudson, "The Central American Court of Justice," this JOURNAL, Vol. 26 (1932), p. 759.

CURRENT NOTES

THE THIRTY-SECOND ANNUAL MEETING OF THE SOCIETY — SIXTH CONFERENCE OF TEACHERS OF INTERNATIONAL LAW AND RELATED SUBJECTS

In accordance with the announcements in the last number of the JOURNAL, the American Society of International Law held its thirty-second annual meeting in Washington, April 28–30, 1938, partly in conjunction with the Sixth Conference of Teachers of International Law and Related Subjects, which met a day earlier but adjourned at the same time. The combined programs of the two meetings were carried out as follows:

Wednesday, April 27, 2:30 o'clock p. m.

CONFERENCE OF TEACHERS OF INTERNATIONAL LAW AND RELATED SUBJECTS

Opening of the Conference. JESSE S. REEVES, *Director*.

Welcome. GEORGE A. FINCH, *Assistant Director, Division of International Law, Carnegie Endowment*.

Report of Committee on Publications. ROBERT R. WILSON, *Chairman*.

Publications of the Department of State. CYRIL WYNNE, *Chief, Division of Research and Publication, Department of State*.

Report of the Executive Committee. CLYDE EAGLETON, *Chairman*.

The Conference on International Studies of the Committee on Intellectual Coöperation. JAMES T. SHOTWELL, *Chairman, American Committee on International Intellectual Coöperation of the League of Nations*.

Wednesday, April 27, 8:15 o'clock p. m.

Contributions from allied fields:

Economics. PROFESSOR EUGENE STALEY, *Fletcher School of Law and Diplomacy*.

Psychology of propaganda. PROFESSOR HAROLD LASSWELL, *University of Chicago*.

Thursday, April 28, 10:00 o'clock a. m.

Curricula in small colleges:

President BESSIE C. RANDOLPH, *Hollins College*.

Professor HAROLD TOBIN, *Dartmouth College*.

Professor IVAN M. STONE, *Beloit College*.

Professor MONTELL OGDEN, *Texas Technological College*.

Thursday, April 28, 2:15 and 4:15 o'clock p. m.

Visits to the Department of State and the National Archives.

JOINT MEETINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW AND THE CONFERENCE OF TEACHERS OF INTERNATIONAL LAW AND RELATED SUBJECTS

Thursday, April 28, 8:15 o'clock p. m.

Opening of the 32nd Annual Meeting of the American Society of International Law. JESSE S. REEVES, *Vice-President of the Society*.

The nature, place, and function of international law today. PROFESSOR NORMAN A. MACKENZIE, *University of Toronto*.

The theory of international law. PROFESSOR JOSEF L. KUNZ, *University of Toledo*.

Friday, April 29, 10:00 o'clock a. m.

International law of copyright. WALLACE McCLURE, *Treaty Division, Department of State.*

Discussion led by CLEMENT L. BOUVÉ, *Register of Copyrights.*

Some administrative aspects of international broadcasting. IRVIN STEWART, *former Vice-Chairman, Federal Communications Commission.*

Discussion led by HARVEY B. OTTERMAN, *Treaty Division, Department of State.*

Friday, April 29, 2:15 o'clock p. m.

International law of the air:

In time of peace. HOWARD S. LEROY, *member of the Bars of New York and the District of Columbia.*

Discussion led by WILLIAM R. VALLANCE, *Assistant to the Legal Adviser, Department of State.*

Neutral rights and duties. PROFESSOR PHILIP C. JESSUP, *Columbia University.*

Discussion led by MORTON W. ROYSE, *New York.*

Friday, April 29, 8:15 o'clock p. m.

War declared and the use of force. PROFESSOR GEORGE GRAFTON WILSON, *Harvard University.*

Discussion led by ALBERT E. HINDMARSH, *Instructor in Government, Harvard University.*
Responsibility for damages to persons and property of aliens in undeclared war. PROFESSOR CLYDE EAGLETON, *New York University.*

Discussion led by FREDERICK S. DUNN, *Professor of International Relations, Yale University.*

Saturday, April 30, 10:00 o'clock a. m.

Conclusion of preceding discussions.

Business meeting.

Adjournment of the Society.

Saturday, April 30, 2:15 o'clock p. m.

Closing session of the Teachers Conference.

Annual Banquet, Saturday, April 30, 7:30 o'clock p. m.

Toastmaster:

Honorable JOHN DICKINSON, *Chairman, Committee on Annual Meeting.*

Speakers:

His Excellency COUNT JERZY POTOCKI, *Ambassador of Poland.*

Honorable FRANCIS B. SAYRE, *Assistant Secretary of State.*

M. JAN HOSTIE, *Legal Adviser to the Belgian Foreign Office.*

The separate meetings of the Teachers Conference were held in the Brookings Institution. The joint meetings with the Society were held at the Carlton Hotel.

The Society met under the cloud of illness of its President, Dr. James Brown Scott, who was unable to take part. His place was taken by Vice-President Jesse S. Reeves. Several hundred members were present at all of the sessions. The papers and addresses were excellent and most timely. The discussions were interesting, earnest and prolonged. At every session the presiding officer found it necessary to declare an adjournment before all the members who desired to speak could be accommodated.

At the business meeting of the Society, all of the officers were reelected for

another year. Dr. Charles Cheney Hyde, of Columbia University, was elected an Honorary Vice-President to fill the vacancy caused by the death of the Honorable Newton D. Baker. President William C. Dennis, of Earlham College, was elected a Vice-President in succession to Dr. Hyde, and the following new class was elected to the Executive Council for the three-year term ending in 1941:

D. F. Fleming, Tennessee	Norman J. Padelford, Massachusetts
Green H. Hackworth, D. C.	Irvin Stewart, New York
Henry B. Hazard, D. C.	Graham H. Stuart, California
Philip C. Jessup, New York	Quincy Wright, Illinois

To evidence its appreciation of the distinguished service which he has rendered to the cause which the American Society of International Law was formed to promote, it elected to honorary membership Dr. Hans Kelsen, the eminent exponent of the Vienna school of international law, now living in Geneva.

The Society adopted an amendment to its constitution authorizing the Executive Council to provide for student memberships. Some changes were made in the personnel of committees, the membership of which will appear in the printed Proceedings of the meeting now in press. A special committee was appointed by the Executive Council to consider the nomination of officers in advance of the next annual meeting. Professor James W. Garner of the University of Illinois, is Chairman of the special committee.

The Sixth Conference of Teachers of International Law and Related Subjects adopted a number of resolutions, among them one commending especially the publication program of the Department of State. Professor Charles G. Fenwick, of Bryn Mawr College, was elected Director of the next conference, Professor Harold S. Quigley, of the University of Minnesota, Chairman of the Executive Committee, and Professor Frederick S. Dunn, of Yale University, Chairman of the Committee on Publications. A resolution was adopted establishing a Committee on the Curricula of Small Colleges, of which President Bessie C. Randolph, of Hollins College, was made Chairman. Another resolution provides for a study of vocational opportunities in the general fields of international law and international relations, of which Professor George Bernard Noble, of Reed College, was appointed Chairman.

The complete proceedings of the Teachers Conference will shortly be available in printed form to members of the conference and other interested teachers of international law and international relations.

GEORGE A. FINCH,
Secretary

ASSISTANCE TO PUBLICATION

The American Council of Learned Societies, of which the American Society of International Law is a constituent member, announces the continu-

ance in 1938 of assistance to the publication of a limited number of meritorious works in the field of the humanities written by American scholars. Works proposed for publication should be in the form of volumes of conventional size. They may present the results of constructive research, or be important books of reference, or critical editions of valuable texts. Doctoral dissertations will not be considered save in exceptional cases. Plans for the manufacture, publication, and distribution of each assisted work, and for the disposition of any proceeds, must be approved by the Executive Committee of the Council.

Applications for the next awards of grants in aid of publication, on forms provided for the purpose, must be received in the Executive Offices of the Council, 907 Fifteenth Street, N. W., Washington, D. C., on or before November 1, 1938. Applications must include descriptions and critical appraisals of the works proposed, together with full manufacturing specifications and estimates of cost. No work can be considered of which the manuscript is not available for examination in completed form.

THE END OF SWITZERLAND'S "DIFFERENTIAL" NEUTRALITY

On May 14, 1938, the Council of the League of Nations voted a resolution which reads:

The Council of the League of Nations, which has before it the requests contained in the memorandum of the Swiss Federal Council, which the representative of Switzerland has explained in the session of the Council of May 11, 1938,

Considering the unique situation of Switzerland, which results from her permanent neutrality which is based on a time-honored tradition and is recognized by the law of nations,

Recalling that the Council by its declaration in London of February 13, 1920, recognized that the permanent neutrality of Switzerland is justified by the interests of general peace, and as such is compatible with the Covenant,

Approves of the report of the representative of Sweden and under the preceding conditions takes notice of Switzerland's intention, based on her permanent neutrality, henceforth no longer to coöperate in any way in executing the provisions of the Covenant concerning sanctions, and declares that she will not be called upon to do so.

The Council of the League of Nations states furthermore that the Swiss Government expresses its will to leave unchanged in all other respects the position of Switzerland as a member of the League of Nations and to continue to give the facilities, which have been accorded to the League for the free exercise by its institutions of their activities in Swiss territory.¹

This resolution restores Switzerland's integral neutrality which had guided the foreign policy of this country as a permanent principle since the battle of Marignano in 1515, and which, together with the inviolability of her territory and her independence from foreign influence, has been recognized by the

¹ The resolution is quoted from the *Neue Zürcher Zeitung*, May 16, 1938.

signatories of the acts of Vienna and Paris of 1815 as "corresponding to the true interests of all European States." Article 435 of the Treaty of Versailles,² as well as the resolution of the Council of the League of Nations of February 13, 1920, which made Switzerland's accession to the League possible, have confirmed this principle.

This accession, however, and the maintenance of neutrality exclude each other. For the principle of collective security, which is the very foundation of the League, means confederacy, partiality, intervention; whereas neutrality implies aloofness, impartiality, abstention. Therefore, these two principles can neither in theory nor in practice exist together. The Council of the League of Nations seemingly had succeeded in conciliating both principles by its resolution of February 13, 1920. This so-called "Declaration of London" excused Switzerland from military measures while maintaining her obligation to financial and economic sanctions³ and thus created the international status which is known as "differential" or "partial" neutrality. This status has so far provided the basis of Swiss foreign relations and has been proposed, in the theoretical discussions of collective security in recent years, especially with respect to the United States, as a means to maintain the status of neutrality within a system of collective security.⁴

² This article reads as follows: "The high contracting parties, while they recognize the guarantees stipulated by the Treaties of 1815, and especially by the Act of November 20, 1815, in favor of Switzerland, the said guarantees constituting international obligations for the maintenance of peace, declare . . ."

³ The resolution reads as follows: "The Council of the League of Nations, while affirming that the conception of neutrality of the members of the League is incompatible with the principle that all members will be obliged to coöperate in enforcing respect for their engagements, recognizes that Switzerland is in a unique situation, based on a tradition of several centuries which has been explicitly incorporated in the law of nations; and that the members of the League of Nations, signatories of the Treaty of Versailles, have rightly recognized by Article 435 that the guarantees stipulated in favor of Switzerland by the Treaties of 1815 and especially by the Act of November 20, 1815, constitute international obligations for the maintenance of peace. The members of the League of Nations are entitled to expect that the Swiss people will not stand aside when the high principles of the League have to be defended. It is in this sense that the Council of the League has taken note of the declaration made by the Swiss Government . . . in accordance with which Switzerland recognizes and proclaims the duties of solidarity which membership of the League of Nations imposes upon her, including therein the duty of coöperating in such economic and financial measures as may be demanded by the League of Nations against a Covenant-breaking state, and is prepared to make every sacrifice to defend her own territory under every circumstance, even during operations undertaken by the League of Nations, but will not be obliged to take part in any military action or to allow the passage of foreign troops or the preparation of military operations within her territory.

"In accepting these declarations, the Council recognizes that the perpetual neutrality of Switzerland and the guarantee of the inviolability of her territory as incorporated in the law of nations, particularly in the Treaties and in the Act of 1815, are justified by the interests of general peace, and as such are compatible with the Covenant. . . ." (League of Nations Official Journal, 1920, pp. 57, 58.)

⁴ Cf., for instance, Cassin, International Studies Conference, *La Sécurité collective*, Paris,

This contradictory conception is the typical offspring of the legalistic spirit which dominated the work of the League of Nations to an unfortunately great extent, and which attempts to replace political decisions by the creation of legal formulae. Ingeniously contrived legal clauses, as far as they do not reflect real political decisions, can at best create the illusion of solving a political problem. They can for a time disguise the political reality behind a veil of legalistic constructions, but they cannot spirit it away. And as soon as the political problem emerges from academic debates as an urgent actuality which requires to be solved, the legal formula reveals its practical futility. This is exactly what happened when, on the occasion of the League of Nations sanctions against Italy, Switzerland's "differential" neutrality had to face its first trial, and failed.

Neutrality is a legal status that aims at keeping the neutral state out of war. Therefore, the rights and duties which make up its content result neither from an abstract legal concept called "neutrality" nor from the free will of the state desiring to remain neutral, but from the risk of war with which the belligerents threaten the neutral. Neutrality is thus a negative status whose legal consequences depend on the development of the technique of warfare as well as on the military measures which the belligerents are likely to put into effect in this concrete war. There are no such things as rights and duties of neutrality which would apply everywhere and at all times. The rights and duties of neutrality are the mere reflex of the attitudes the belligerents are likely to take when the neutral intervenes in the war in this or that way. An intervention which with high probability will expose the neutral to warlike reactions on the part of a belligerent lies beyond the limits of real neutrality. Participation in military measures always means of necessity abandonment of neutrality and involvement in war, but by no means does participation in economic and financial sanctions of necessity leave the "neutral" immune from that danger.⁵

1936, pp. 453, 454; Eagleton, Graham, Quincy Wright, *Proceedings of the American Society of International Law*, 1933, Vol. 27, pp. 63, 138, 157, 158, 163 *et seq.*; Quincy Wright, "The Future of Neutrality," *International Conciliation*, 1928, No. 242, p. 369. *Cf.*, however, Jessup, *Proceedings of the American Society of International Law*, *loc. cit.*, and Zahler, "Switzerland and the League of Nations, a Chapter in Diplomatic History," *American Political Science Review*, 1936, Vol. 30, p. 735 *et seq.*

⁵ The in other respects excellent message of the Federal Council to the Swiss people, recommending Switzerland's accession to the League, defends this differentiation in a very unconvincing way. Its attempt to differentiate, moreover, between the legal status of neutrality and a policy of neutrality (see Message from the Federal Council of Switzerland concerning the question of the accession of Switzerland to the League of Nations, Cambridge, 1919, p. 36 *et seq.*) is perhaps still more unreal and legalistic than the former attempt. According to this conception, there would be three possibilities among which the neutral could freely choose: abstention from military measures required by the legal status of neutrality; participation in military measures prohibited by this legal status; and finally the confines wherein the neutral is allowed to maneuver as he likes, that is, to execute all kinds of non-military measures against one or the other warring party who in turn would not be

Switzerland, on the two occasions in recent history which confronted her with the practical solution of this problem, was well aware that because of the all-embracing nature of modern warfare, participation in economic and financial measures against one warring party would bear for her almost the same risks of war as the execution of military measures, and by her practical attitude she rejected the artificial differentiation between military and economic measures. "Today it is no longer necessary to prove," stated the Swiss Federal Council during the World War,⁶ "that under the present conditions of production, supply, and transport, Switzerland's dependence on both groups of Powers should lead to economic neutrality, even if the latter were not the natural result of political neutrality." When Switzerland joined, though hesitatingly enough, the collective economic and financial action of the League of Nations against Italy, she had forgotten this lesson of the World War. Suddenly, political experience recalled to her what ideological propaganda and legalistic interpretation had succeeded in making her forget: that one cannot at the same time be neutral and partial, join one group of Powers in collective action against another one and still remain aloof from political and military entanglements, meddle with the political conflicts of the great Powers and still be sure of not being involved in war, and that therefore one has to choose between two things: (1) either to enter a system of collective security and abandon neutrality, or (2) to maintain neutrality and not participate at all in collective actions against other Powers.

When in 1920 the Swiss Government and Parliament, opposed by a very strong minority of the Swiss people,⁷ chose the former way, thus abandoning a tradition of four hundred years, they shared the then general belief in the efficiency of the League of Nations and in the possibility of its providing for the peaceful settlement of political conflicts by the juridical means of international organization, arbitration, and disarmament. Switzerland's return to the traditional integral neutrality is likewise the manifestation of a general state of mind. The representatives of the Great Powers in the Council of the League of Nations, as well as the report which was submitted to the Council on the Swiss question, laid the greatest stress upon Switzerland's unique

authorized by international law to retaliate with warlike actions. In a concrete historical situation, however, the neutral has to solve, not the legal question whether the belligerent is entitled by a very doubtful rule of international law to oppose a non-military intervention on the part of the neutral by an act of war, but the political problem whether the belligerent is likely to react in this way. And the aim of a far-sighted neutral is not so much to be in the right as to keep out of war. This is the viewpoint which now determines the neutrality policy of the so-called "traditional European neutrals."

⁶ See *Feuille fédérale*, 1917, Vol. III, p. 205.

⁷ 416,870 Swiss citizens and 11½ cantons voted for, 323,719 citizens and 10½ cantons against Switzerland's accession to the League, and it has been pointed out (by Robert C. Brooks, "Swiss Referendum on the League of Nations," *American Political Science Review*, 1920, p. 479) that 94 votes would have sufficed to destroy the favorable majority of the cantons and thus defeat the accession.

position and the therefore singular character of the recognition of Switzerland's integral neutrality within the framework of the League, which other members could not invoke as a precedent. The reasons, however, by which Switzerland justified her request to be freed from the obligations under Article 16 of the Covenant hold equally good for other members of the League, and have, since the collapse of the League of Nations sanctions against Italy, constantly been invoked for the same purpose by the Scandinavian States, Finland, Holland, and Poland.⁸ The interpretation which the Council has given to the new international status of Switzerland may be correct from a strictly legal standpoint. Viewed, however, in the light of the general situation in which the post-war international law finds itself at present, the recognition of this status is the first legal admission by the League itself of the collapse of the basic principle for which the League stands. Whereas in 1920 the League was strong enough to coerce the small European states to abandon their traditional neutrality in favor of the collective security of the League, in 1938 one of these small states is able to obtain from the League the formal recognition that one can be a member of the League without being obliged to live up to the fundamental principle for whose defense the League was founded. On February 13, 1920, Lord Balfour, then reporter of the Council on the Swiss question, could state: "Complete neutrality in everything economic and military is clearly inconsistent with the position of a member of the League";⁹ on May 14, 1938, the Council of the League declared that at least with respect to Switzerland these two positions are consistent. When the representatives of China and Russia abstained from voting for the resolution of May 14, 1938, because they were afraid to admit formally that collective security is no longer the guiding principle for all members of the League and thus is about to cease to be collective at all, they performed perhaps a useless demonstration, but they certainly interpreted the restoration of Switzerland's integral neutrality within the framework of the League more correctly than did the official statements of the League itself.

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THE CAIRO TELECOMMUNICATION CONFERENCES

The International Telecommunication Conferences of Cairo convened on February 1, 1938. The two conferences, namely, the Telegraph and Telephone Conference, and the Radio Conference, sat concurrently. The Telegraph and Telephone Conference adjourned on April 4 and the Radio Conference on April 8.

⁸ That these states, with the exception perhaps of the Scandinavian countries, seem to be satisfied with declaring Article 16 optional, is more of formal than of practical importance. For the goal of all small European states is the same: to keep out of the political and military entanglements of the Great Powers by restoring the traditional neutrality of the pre-war era.

⁹ See League of Nations Official Journal, 1920, p. 57.

The purpose of the conferences was to revise the regulations adopted at the Madrid Telecommunication Conference in 1932, and annexed to the International Telecommunication Convention of December 9, 1932, namely, the telegraph regulations, the telephone regulations, the general radio regulations and the additional radio regulations.¹

At Madrid for the first time the radio and telegraph conventions had been fused into one instrument. Prior to the Madrid Conference there had existed two different sets of international instruments regulating respectively radio and telegraph communications: on the one hand the International Telegraph Convention concluded at St. Petersburg in 1875 with the telegraph regulations annexed thereto, which had been revised from time to time, and on the other hand the radio conventions and regulations annexed thereto first drawn up at Berlin in 1906 and revised at London in 1912 and at Washington in 1927.²

The Madrid Convention "contains only statements of general principle, most of which are applicable alike to radio, telegraphy and telephony. . . . The statement of general principles in the Convention is supplemented by details incorporated in separate sets of regulations dealing with radio, telegraphy and telephony, respectively."³

According to Article 2 of the Madrid Convention, the regulations annexed to the convention "bind only the contracting governments which have undertaken to apply them, and solely as regards governments which have taken the same obligation." The same article further provides that "Only the signatories to the Convention or the adherents to this document shall be permitted to sign the Regulations or to adhere thereto. The signing of at least one of the sets of Regulations shall be obligatory upon the signatories of the Convention."

The United States ratified the Convention and the General Radio Regulations annexed thereto but did not become a party to the other regulations, namely, the additional radio regulations, the telegraph regulations, and the telephone regulations.

The Cairo Conference is probably the largest international conference ever to be held. Upward of eighty administrations were represented by official delegations. In addition about sixty private operating companies and twenty or more international organizations and private groups, such as the International Amateur Radio Union, the International Chamber of Com-

¹ See United States Treaty Series, No. 867, for the text of the convention and the radio regulations. See also League of Nations Treaty Series, Vol. 151 (1934), for the text of the conventions and all the regulations annexed thereto.

² See "The Madrid International Telecommunication Convention" by Irvin Stewart, *Air Law Review*, Vol. V, No. 3, p. 236.

³ See International Radio Telegraph Conference, Madrid, 1932, Report to the Secretary of State by the Chairman of the American Delegation, Department of State Conference Series, No. 15.

merce, the International Broadcasting Union, also participated in the labors of the conference.

The delegation of the United States to the Cairo Conference was composed of five delegates and nine technical advisers, under the chairmanship of the Honorable Wallace A. White, Jr., Senator from Maine. The delegation was accompanied by a staff of translators and clerks.

The inaugural session on February 1, 1938, was a joint session of both the Telegraph and Telephone Conference and the Radio Conference. The joint session was opened by His Majesty King Farouk and was presided over by the Egyptian Minister of Communications, who was selected as president for the two conferences. Thereafter, except when questions of interest to both conferences were to be considered, the two conferences worked independently of each other.

THE TELEGRAPH AND TELEPHONE CONFERENCE

The Telegraph and Telephone Conference set up five committees on telegraph regulations, on telegraph rates, on telephone regulations, on drafting, and to examine the management of the Bureau of the Union. The following are some of the more important results of the conference:

1. Maintenance of the status quo in the rate structure for clear language, cipher and code in the extra-European régime.
2. Unification of these languages at 92 per cent coefficient in the European régime.
3. Maintenance of the 200 per cent rate on urgent messages.
4. Establishment of a five-word minimum in the deferred message class.
5. Maintenance of existing regulations with regard to press messages to multiple destinations.
6. Opening of meetings of the International Consulting Committee on Telegraph (CCIT) to administrations not adhering to the telegraph regulations and widening of the scope of CCIT meetings which will now be authorized to consider tariff matters.
7. Maintenance of the existing regulations relating to the notifications of the equivalents for the gold franc which is used as the unit for the computation of rates and the establishment of international accounts.

The most important question before the Cairo Telegraph Conference was undoubtedly the question of the unification of the rate structure of the international telegraph services. Under the system adopted at Madrid, commercial code words of five letters were charged at 60 per cent of the charges imposed upon ordinary clear language telegrams. Prior to the Madrid Conference, ten-letter commercial code words were allowed at the same rate as ordinary clear telegrams. At Cairo many administrations were of the opinion that it was not equitable to charge the users of the full rate category at the basic rate and the users of code language (CDE) category at 60 per cent of this rate. They also appeared to believe that if the two classes were

unified into one category, the work of the telegraph administrations would be considerably simplified. Accordingly, numerous proposals were presented for the unification of telegrams in plain language, code language and cipher language.

These proposals were divided into three major groups which advocated:

(1) Unification at 60 per cent, the elimination of the deferred classification, the maintenance of the existing ratio for urgent telegrams and of the existing actual rate for letter-telegrams. This proposal was made by Germany and was supported by 21 administrations.

(2) Unification at 66 $\frac{2}{3}$ per cent, urgent telegrams at one and one-half times the new rate (the existing full rate), deferred, at three-fourths of the new rate (the existing actual rate), letter-telegrams at one-half the new rate (the existing actual rate). This proposal was made by Great Britain and was supported by 12 administrations.

(3) The maintenance of the status quo supported by 12 administrations.

France put forward a proposal very similar to the one suggested by Great Britain which advocated unification at 66 $\frac{2}{3}$, the suspension of the deferred service and the reduction of the night letter rate. This proposal was supported by four administrations.

However, none of the proposals with regard to unification obtained a majority vote, and as a result the status quo was maintained in the extra-European régime so that the rate for five-letter code words is still 60 per cent of the clear language words. In the European régime, however, the conference agreed to establish unification at 92 per cent of the existing rate.

THE RADIO CONFERENCE

In the five-year period which elapsed between the Madrid and Cairo Conférencés, increased demands for additional radio frequencies by the mobile, fixed and broadcasting services called for more restrictive rules to make the most economical use possible of existing facilities as well as a new consideration of the table of frequencies adopted at Madrid.

Some of the more important decisions of the Cairo Radio Conference included the following:

1. Adoption of a plan for radio channels for the world's seven main intercontinental air routes, including calling and safety service channels.

2. Widening of the high frequency broadcast bands to a total of 300 kilocycles and the adoption of special bands for tropical regions for regional use.

3. The limitation of the use of spark sets to three channels and the outlawing of spark sets except below 300 watts output.

4. Improved tolerance and bandwidth tables.

5. The extension of the allocation table to 200 megacycles for the European region. Other regions were given the right to effect their own arrangements above 30 megacycles.

6. Establishment of further restrictions on the use of 500 kilocycles frequency for traffic.

7. Bringing up to date of regulations relative to the maritime and aeronautical services.

Probably the most far-reaching result of the Radio Conference was the adoption of a plan for radio channels for intercontinental air routes. The frequencies which were allotted to the intercontinental air service, between 6500 and 23,380 kilocycles were not apportioned according to regions or countries but according to aeronautical routes. Each route was allotted a group of specific frequencies instead of a band of frequencies. Another important result of the Radio Conference was the revision of the table of frequencies. The bands between 10 and 2000 kilocycles underwent no important modifications—with the exception, however, of bands allotted to European broadcasting, which were extended by 60 kilocycles between 1500 and 1560 kilocycles and the use of the band 1500–1600 kilocycles in other regions for broadcasting on a shared basis with the fixed and mobile services. On the other hand, the bands included between 2000 and 5500 kilocycles have been allotted in great detail to the different services of the European régime. Moreover, the table of frequencies has been extended from 60,000 kilocycles to 200,000 kilocycles. Especial provision was made in the table of frequencies for tropical broadcasting in the Americas, where the bands 2300–2500 kilocycles and 4770–4900 kilocycles are permitted for broadcasting. The new bands allocated to short-wave broadcasting are actually extensions of the existing bands. They are 6150–6200 kilocycles; 9600–9700 kilocycles; 17,800–17,850 kilocycles; 21,550–21,750 kilocycles. Many arguments were advanced for additional broadcasting frequencies. It soon became evident, however, that frequencies could not be provided in sufficient numbers to satisfy all demands for other services, and broadcasting, like other radio services, had to adjust itself to the limitations of the spectrum.

VOTING

The question of voting at telecommunication conferences has always been a vexing one. One school of thought favored a vote for each separate telecommunication administration regardless of whether it was fully sovereign or independent, while the other school of thought wished to restrict voting to fully sovereign independent states. The Inter-American Radio Conference which was held at Habana in November, 1937, adopted a resolution embodying the principle of one vote to every independent sovereign country. The principle was opposed at Cairo by the numerous colonial Powers. The conference unanimously recommended the following procedure for voting at telecommunication conferences:

1. That for future plenipotentiary and administrative conferences the same rules apply with regard to voting as were applied at the Madrid and Cairo Telecommunication Conferences.

2. That consequently the countries listed in Article 21 of the Internal Regulations of the Cairo Conferences will, as a matter of right, be entitled to vote at future telecommunication conferences.

3. That at the first plenary assembly of future plenipotentiary and administrative conferences countries that are not now listed in Article 21 may ask to be included in the list of countries entitled to vote.

4. That in the case of countries whose independence and sovereignty are well recognized, such requests shall be acceded to as a matter of course by the first plenary assembly.

5. That the case of other countries making such requests shall be referred to a special committee on the right to vote for consideration and recommendation to the plenary assembly.

A solution was thus found to the vexing question of voting at telecommunication conferences.

It should be explained that the voting procedure adopted at Madrid and Cairo, to which reference is made in the resolution, allows one vote by an independent country and one additional vote for the whole of the colonial possessions of each of the colonial Powers as well as an additional vote to Germany and the Union of Soviet Socialist Republics.

LANGUAGE QUESTION

At the first plenary sessions of the Telegraph and Telephone Conference and the Radio Conference the Chairman of the American Delegation addressed a letter to Mr. Webb, Vice President of the Conferences, offering the services of the American Delegation for the unofficial translation into the English language of the documents of the conferences. The communication read, in part, as follows:

I am pleased to inform you that the Delegation of the United States is prepared in conformity with our tentative understanding with you and the Bern Bureau, if the suggestion is agreeably received, to coöperate in the same manner at the present Radio Conference and the Telegraph and Telephone Conference. The Delegation of the United States will, so far as its personnel will permit, at its expense, furnish translators and typists and the necessary supplies if the Bern Bureau will make available its facilities for the mimeographing and distribution of the documents and if the Egyptian Government will furnish the necessary office space, such distribution of documents to be only to those delegations requesting such translations.

The offer of the Delegation of the United States was accepted by the conferences. It was felt, however, that it was unfair to expect one delegation to assume the difficult administrative task and heavy financial burden entailed by the translations of documents at future telecommunications conferences and, consequently, a resolution, drafted by the United States Delegation, was circulated and signed by 44 delegations, the concluding paragraph of which reads as follows:

Be it resolved, That the Bern Bureau be authorized and directed to make unofficial translations in the English language of all documents of future plenipotentiary and administrative conferences and of committee meetings held under the authority of the Telecommunications Convention or the Regulations annexed thereto, and to distribute the same to the delegates and representatives of such administrations and to such expert observers, (as these terms are defined in the Internal Regulations of the Telecommunication Conferences, Cairo, 1938), as shall in writing request the same and shall agree to share equally with others availing themselves of such translations, the expenses of the Bureau in making the translations and the distribution thereof. It is understood that such translations shall be unofficial and not in derogation of the official French language.

After full debate, during the course of the second joint plenary assembly of the Telegraph and Telephone Conference and of the Radio Conference on March 22, the conferences unanimously authorized the Bureau of the Union to organize a service of unofficial translations during the general conferences and meetings of the International Consulting Committees on Telegraph (CCIT) and Radio (CCIR). It was also agreed by substantial majorities that this authorization should include the translation of the Book of Proposals for the general conferences, the CCIT and the CCIR.

The modalities of application of this decision of the plenary assembly were subsequently drawn up in a small committee, due regard being given to the desirability of keeping down the expenses of this new service.

Thus a satisfactory solution has been found to the important question of languages and the efforts of the American Delegation, as well as those of American Delegations at previous telecommunications conferences, have been in large degree successful.

The several Regulations adopted at the Cairo Conference will come into force on January 1, 1939, with the exception of Article 7 of the General Radio Regulations (Table of Allocation of Frequencies) which will become applicable as of September 1, 1939. These Regulations will supersede the Regulations adopted at Madrid in 1932. The United States, as at Madrid, only signed the General Radio Regulations. It is encouraging to note that the complex problems which confronted the conferences were resolved in a spirit of conciliation and realism which does credit to the representatives of the eighty administrations represented at the conferences and is in the best tradition of the Telecommunications Union. The delegates separated until the next telecommunication conference, which will take place at Rome in 1942, with the conviction that the Regulations adopted at Cairo are a distinct improvement on the Madrid Regulations.

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INTER-AMERICAN RADIO CONFERENCES, HABANA, 1937

It is a matter of common knowledge that the traditionally close relationship maintained among the Republics of North, Central and South America has been largely accentuated in recent years and has been greatly enhanced by the pronouncement of the "good neighbor" policy. The good will engendered by a careful adherence to that policy has not, however, been the sole contributing factor to that close relationship. A community of interest and mutuality of understanding have been developed by constantly increasing communications facilities, to which those of the air, namely, aviation and radio, have made material contributions.

While the speedy conveyance of passengers, mail and even goods by airplane has had a happy effect upon inter-American relationships, the contribution of radio has not always been so beneficial. The fact that radio developed over a considerable period of years without adequate legislative safeguards and without lasting conventional direction permitted the development of international conditions which the Radio Telegraph Convention, Washington, 1927, was not able wholly to correct. While that convention made large progress toward stabilization in radio and while that progress was materially supplemented by the International Telecommunication Convention, Madrid, 1932, and the passage by the Congress of the Communications Act of 1934, efforts appear to have been directed primarily toward a more orderly administration of radio in the United States and in its relation to European and even Far Eastern nations.

Consequently irritations arose with increasing frequency in the administration of radio in the American continent, due to the proximity of the American states and the efforts of each to find an adequate place for itself in the radio spectrum. These irritations especially manifested themselves in the limited portion of the spectrum set aside by the Madrid Convention for long-wave broadcasting, and the broadcasting development in the American continent has not ceased to be a source of misunderstanding and sometimes of actual ill-will. These conditions naturally contributed nothing of merit to inter-American relationships.

In 1933, from July 10 to August 9, there was held in Mexico City the North and Central American Regional Radio Conference which was participated in by representatives of Canada, Costa Rica, Cuba, El Salvador, United States of America, Guatemala, Honduras, Mexico and Nicaragua, but the difficulties experienced at that conference, especially with respect to broadcasting, were such that the agreement concluded there never became effective.

Since the Mexico City Conference, there has been witnessed not only an increasing struggle for frequencies but in some respects a more difficult problem in the increase of power, and the situation has reached the point where for many countries in the Americas it is difficult for radio stations to operate without seriously interfering with, or even destroying, the otherwise legiti-

mate operations of other stations, and this situation affects not only broadcasting but the safety and other facilities offered by international radio.

In view of the failure of the Mexico City Conference of 1933, there was some hesitancy about a repetition of that effort, and it was finally decided, upon the invitation of the Government of Cuba, that a preliminary North American Regional Conference should be held at Habana for an exploration of the field, a study of the problems of the participating states and an endeavor to arrive at a tentative basis for agreement. It was understood that only if that preliminary conference offered a reasonable basis for a solution of the problems should a further conference open to all American states be held.

The preliminary Habana Conference was held from March 15 to 29, 1937, and was attended by representatives of the Governments of Canada, Cuba, Mexico and the United States. While the difficulties facing the conference were great, a basis of solution was reached in the form of fifteen resolutions which it was felt by all participants would offer a foundation for a more comprehensive conference.

Accordingly, invitations were issued by the Cuban Government for the First Inter-American Radio Communications Conference to be convened at Habana on November 1, 1937. The conference was under the presidency of Dr. Wifredo Albanes, a member of the Cuban Senate, and the heads of the various delegations served as vice presidents. The Secretary General was Dr. Calixto Whitmarsh, a member of the Cuban diplomatic service.

An initiatives committee was established for the purpose of deciding upon matters of policy and of directing the general activities of the sessions. It was composed of the permanent president and the heads of the delegations present, including Commissioner T. A. M. Craven, of the Federal Communications Commission, who served as Chairman of the United States Delegation. There was, of course, a credentials committee, and the actual work of the conference was conducted in three operating bodies known as the Technical Committee, under the chairmanship of Commissioner Craven, the Juridical and Administrative Committee, under the chairmanship of the Honorable Mateo Marques Castro, a delegate from Uruguay, and the Drafting Committee, which was presided over by the Honorable Emilio Edwards Bello, a delegate from Chile.

In view of the number and complexity of the questions to be considered, the Technical Committee was divided into a broadcasting subcommittee and a technical subcommittee to consider matters other than broadcasting. From the broadcasting subcommittee there was eventually formed a sub-subcommittee to consider the special problem of broadcasting in the North American region.

The Juridical and Administrative Committee appointed a subcommittee to consider a number of the problems assigned to it, and in turn sub-subcommittees for the drafting of an inter-American convention and its

coördination with the South American Regional Radio Communications Agreement, Rio de Janeiro, 1937.

The Drafting Committee was divided into two subcommittees, one to consider the technical phases and the other the juridical and administrative aspects of all documents growing out of the conference.

The conference resulted in the signing on December 13, 1937, of the following documents: (1) Final Acts, (2) Inter-American Radio Communications Convention, (3) North American Regional Broadcasting Agreement, and (4) Inter-American Arrangement Concerning Radio Communications.

The Final Acts consisted of a group of inter-American resolutions and a set of recommendations to the International Telecommunication Conferences which convened at Cairo, Egypt, in February, 1938.

The resolutions established for the present and future Inter-American radio conferences a definite and simple plan of voting, the encouragement and facilitation of press transmissions to multiple destinations, coöperation in the measurement of frequencies of emissions of stations in other countries and dissemination of information with respect thereto, a broader application of the Safety of Life at Sea Convention, London, 1929, a recognition of the importance of the resolutions of the Inter-American Technical Aviation Conference, Lima, 1937, and the convening of a second Inter-American Radio Communications Conference at Santiago, Chile, during the first quarter of 1940, concurrently with the meeting there of the South American Regional Conference on Radio Communications.

The recommendations to the Cairo Conferences suggested to them the plan of voting established at Habana and a more extensive application in telecommunications throughout the world of the proposal for press transmissions to multiple destinations. These resolutions and recommendations were largely embodied in the Inter-American Radio Communications Convention.

The Inter-American Radio Communications Convention constitutes, it is believed, a valuable source of coöperation in the American continent. It was signed by representatives of Canada, Colombia, Cuba, Chile, the Dominican Republic, Guatemala, Haiti, Mexico, Nicaragua, Panama, Peru, Uruguay, Venezuela, and the United States of America, and by Brazil with the reservation that its provisions must not conflict with the South American Regional Radio Communications Agreement, Rio de Janeiro, 1937, nor with any other international commitments already entered into by the Brazilian Government. The only other participant in the conference, Argentina, failed to sign this convention because it was represented only by diplomatic officers stationed in Habana and it desired before adherence an opportunity for study of the convention by its technical officials.

In recognition of the rapid development of radio communications and the need for thorough international understanding with respect to them, it is recognized in the convention that future radio conferences will be necessary.

The document accordingly undertakes to establish certain procedural provisions, including the composition of the conferences, a solution of the question of voting, and internal regulations for the conduct of their deliberations. It provides that only one vote shall be had in the conferences by each state which meets the qualifications established at Montevideo in 1933 and which are as follows: (1) a permanent population, (2) a defined territory, (3) government and (4) capacity to enter into relations with other states. Countries or territories not possessing these qualifications are permitted a voice but no vote in the conferences, but agreements resulting therefrom shall be open for their adherence through the medium of their respective home governments. It is provided also that the official languages of the conferences shall be Spanish, English, Portuguese and French.

The convention further provides for the establishment of an Inter-American Radio Office which is charged with the duty of conducting the preparatory work of conferences and the work resulting from their decisions, supplying a portion of their secretariat, issuing such publications as may be established by them, and publishing and circulating technical information other than that resulting from conferences, including the exchange of data relating to the accuracy and stability of frequencies, interferences or other disturbances observed in the territories of the contracting parties, and such other studies as may be carried on, such as the propagation of waves, the general characteristics of antennae and similar problems. The Office will also arrange for the exchange of laws and regulations, treaties and general information designed for a better understanding and a raising of the standards of radio communications in the American continent and for the improvement of engineering practice.

The financial support of the Inter-American Radio Office is based upon a system of categories providing certain units in proportion to which national contributions are to be made, and in no case shall the general expenses of the office exceed the sum of \$25,000 per annum.

The convention proceeds to recognize certain general radio principles, such as the sovereign right of all nations to the use of every radio channel, the need under present conditions for regional arrangements, the establishment in the American continent of zones or regions for the control of radio communication, the establishment of frequency-measuring stations, the obligation of all commissioned aircraft to carry radio equipment, the circulation of meteorological and safety information for air traffic and aircraft guidance, radio coöperation during periods of emergency in any country, the promotion of the exchange of international cultural, educational and historical programs in the American continent, encouragement of press transmissions to multiple destinations on the basis of cost founded upon time of transmission rather than word count, retransmissions of broadcasting programs and the suppression of clandestine transmitting stations. These last-named provisions are, to a considerable extent, designed to link the

conclusions of the Habana Conference with those of the South American Regional Radio Communications Conferences of Buenos Aires, 1935, and Rio de Janeiro, 1937. There is also provided a means of arbitration of disputes among the participating states.

The North American Regional Broadcasting Agreement was signed by representatives of Canada, Cuba, the Dominican Republic, Haiti, Mexico and the United States of America. It establishes technical principles applicable throughout the North American region and is designed to accord to all participating states adequate broadcasting facilities and to eliminate international radio interference. It undertakes to establish within the standard broadcast band (which by the agreement is fixed at 550 to 1600 kc.) three principal classifications of channels, namely, clear, regional and local, the same classifications now used in the United States. The clear channels are designed to permit service over wide areas free from objectionable interference, and provision is made for the operation of so-called dominant and secondary stations which may use the same clear channel subject to restrictions of power, mileage separation and consequent avoidance of interference, with the use where necessary of directional antennae. Regional channels are intended to permit a number of stations to operate with limited power and each within a restricted area. Local channels will permit of the operation of a number of stations on each with still less power and smaller service area.

Specific assignment of frequencies is made by the convention to each class of channels. All participating states are permitted to use all regional and local channels subject to the engineering standards prescribed by the agreement, and the clear channels are to be distributed among the participating states so that there may be accommodated a maximum number of stations with a minimum of interference.

It is interesting to note that the international agreement is based primarily upon engineering fundamentals recently developed in the United States. The upper limit of power of one class of clear channel stations is not fixed in view of the insistence in this respect of one of the participating states. There is no compulsion in this regard, however, upon the United States and it is at liberty to limit the power of its own stations of this class without affecting the treaty.

The agreement is for a period of five years, but is subject to denunciation at the expiration of one year from the date of notification thereof.

The Inter-American Radio Communications Convention and the North American Regional Broadcasting Agreement require ratification by the signatory governments, the North American Regional Agreement to be effective only when ratified by Canada, Cuba, Mexico and the United States. The first country to accord ratification was Cuba, and the advice and consent of the Senate of the United States to ratification were given on June 15, 1938.

The Inter-American Arrangement Concerning Radio Communications is

a purely administrative document which seeks to effect a standardization throughout the Americas of technical matters involved in the art of radio communications, particularly with respect to allocations, tolerances, spurious emissions and interference, use and non-use of certain air calling and distress frequencies, amateurs and the receipt and transmission by them of third party messages, an international police radio system and radio aids to air navigation, all with respect to frequencies outside the standard broadcasting band. Steps are being taken to register with the Government of Cuba about July 1, 1938, United States approval of this arrangement.

The results of the First Inter-American Radio Communications Conference are notable in two respects. First, from the technical standpoint, they have established a comprehensive and definite engineering basis for the elimination of past and present irritating misunderstandings and a means for future radio coöperation in the American continent, including a channel for the full exchange of information for the benefit of all participants. Second, they have, following frank and sympathetic negotiations, created an atmosphere of understanding and mutual good will which manifested itself throughout the conference and which augurs well for future radio relations in the Americas.

HARVEY B. OTTERMAN *

* Mr. Otterman, of the Treaty Division of the Department of State, was a Technical Adviser of the American Delegation to the conference.—Ed.

CHRONICLE OF INTERNATIONAL EVENTS

FOR THE PERIOD FEBRUARY 16-MAY 15, 1938

(Including earlier events not previously noted)

WITH REFERENCES

Abbreviations: *B. I. N.*, Bulletin of International News; *C. S. Monitor*, Christian Science Monitor; *Clunet*, Journal du droit international; *Cmd.*, Great Britain, Parliamentary papers; *Cong. Rec.*, Congressional Record; *Europe*, L'Europe Nouvelle; *Ex. Agr. Ser.*, U. S. Executive Agreement Series; *G. B. Treaty Series*, Great Britain Treaty Series; *I. L. O. B.*, International Labor Office Bulletin; *L. N. M. S.*, League of Nations Monthly Summary; *L. N. O. J.*, League of Nations Official Journal; *L. N. T. S.*, League of Nations Treaty Series; *P. A. U.*, Pan American Union Bulletin; *Press Releases*, U. S. State Department; *R. A. I.*, Revue aéronautique internationale; *T. I. B.*, Treaty Information Bulletin, U. S. State Department; *U. S. T. S.*, U. S. Treaty Series.

May, 1935

- 21 ITALY—SOUTH AFRICA. Commercial agreement signed at Capetown. Text, with supplementary exchange of notes of Jan. 23, 1936: *G. B. T. S.*, No. 20 (1938), *Cmd.* 5702.

February, 1936

- 24 CZECHOSLOVAKIA—YUGOSLAVIA. Convention for the prevention of double taxation in the matter of succession duties, signed at Prague. *L. N. Inf. Sect.*, May 2, 1938 (unnumbered).

March, 1936

- 11, 14, 24/June 8 PORTUGAL—SOUTH AFRICA. Notes exchanged, modifying the agreement of Nov. 27, 1934, in regard to native labor from Mozambique. English and Portuguese texts: *G. B. T. S.*, No. 21 (1938), *Cmd.* 5703.

May, 1936

- 11/December 28, 1937 GREAT BRITAIN—PORTUGAL. Agreement effected by exchange of notes at Lisbon, regarding the boundary between Tanganyika Territory and Mozambique. *L. N. M. S.*, Feb. 1938, p. 41. English and Portuguese texts: *G. B. T. S.*, No. 14 (1938), *Cmd.* 5661.

- 29/June 15 TURKEY—UNITED STATES. Supplement to the claims agreement of Oct. 25, 1934, effected by exchange of notes: Texts: *Ex. Agr. Ser.*, No. 113.

November, 1936

- 5 BULGARIA—MEXICO. Treaty of friendship signed at Washington. *L. N. Inf. Sect.*, May 2, 1938 (unnumbered).

January, 1937

- 27 CZECHOSLOVAKIA—SOUTH AFRICA. Commercial agreement concluded at Capetown. Text: *G. B. T. S.*, No. 22 (1938), *Cmd.* 5704.
- 27 NETHERLANDS—SWITZERLAND. Convention, regarding insurance against labor accidents, signed at Berne. *L. N. Inf. Sect.*, May 2, 1938 (unnumbered).

February, 1937

- 18 ARGENTINA—CHILE. Two agreements signed, an additional protocol to the commercial treaty of 1933; a convention, effected by an exchange of notes, concerning passenger transit. *P. A. U.*, May, 1938, p. 310.

March, 1937

- 1 CANADA—GERMANY. Notes exchanged at Ottawa relating to visits by naval vessels to foreign ports. Texts: *Canada Treaty Ser.*, 1937, No. 2.
- 16 GERMANY—SOUTH AFRICA. Agreement concluded at Capetown regarding reciprocal recognition of efficiency certificates for aircraft and aircraft motors. English, Dutch and German texts: *G. B. T. S.*, No. 23 (1938), *Cmd.* 5705.
- 19 GERMANY—ITALY. Ratifications exchanged at Berlin of the convention, signed at Rome, Mar. 9, 1936, concerning the recognition and execution of judicial decisions in civil and commercial matters. Text of convention: *Rivista di diritto internazionale*, April/Sept. 1937, pp. 285-289.
- 22 GREAT BRITAIN—HUNGARY. Convention signed at Budapest relating to air navigation. Text: *Hungary*, No. 1 (1937), *Cmd.* 5535.
- 24 SOUTH AFRICA—UNITED STATES. Agreement concluded at Capetown for the reduction of non-immigrant passport visas. Text: *G. B. T. S.*, No. 24 (1938), *Cmd.* 5706.

May, 1937

- 1/7 CANADA—CZECHOSLOVAKIA. Notes exchanged at Prague, extending to Canada as from June 1, 1937, the supplementary convention signed at Prague, Feb. 15, 1935, relative to legal proceedings in civil and commercial matters. Texts of notes and convention: *Canada Treaty Ser.*, 1937, No. 5.
- 1/27 BELGIUM—CANADA. Notes exchanged at Brussels, extending to Canada, as from June 1, 1937, the supplementary convention, signed at Brussels, Nov. 4, 1932, relative to legal proceedings in civil and commercial matters. Texts of notes and convention: *Canada Treaty Ser.*, 1937, No. 4.

June, 1937

- 7/10 CANADA—UNITED STATES. Notes exchanged at Ottawa, prolonging from July 1, 1937, the agreement of Sept. 15/16, 1932, amended in 1935, concerning flights of military aircraft. Text: *Canada Treaty Ser.*, 1937, No. 8.
- 12 BRAZIL—CANADA. Notes exchanged at Ottawa constituting a commercial agreement. Texts: *Canada Treaty Ser.*, 1937, No. 6.
- 18 PORTUGAL—SOUTH AFRICA. Agreement concluded at Pretoria for air services between South Africa and Portuguese East Africa. English and Portuguese texts: *G. B. T. S.*, No. 25 (1938), *Cmd.* 5707.

July, 1937

- 13 BELGIUM—SOUTH AFRICA. Commercial agreement concluded at Pretoria. Text: *G. B. T. S.*, No. 26 (1938), *Cmd.* 5708.
- 30 CANADA—FRANCE. Notes exchanged at Paris regarding commercial relations. Texts: *Canada Treaty Ser.*, 1937, No. 12.

September, 1937

- 2 GREECE—UNITED STATES. Protocol signed at Athens interpreting Art. I of the extradition treaty of May 6, 1931. Greek and English texts: *Ex. Agr. Ser.*, No. 114.
- 28 CANADA—GUATEMALA. Notes exchanged at Guatemala constituting a commercial agreement. Texts: *Canada Treaty Ser.*, 1937, No. 17.

October, 1937

- 2 BELGIUM—FRANCE. Agreement concluded at Brussels regarding the distribution of sea-borne traffic between their ports. *Revue de droit int.*, Oct.-Dec. 1937, pp. 586-587.

- 8 RUSSIA—TURKEY. Commercial convention and regulatory agreement signed at Angora. Summary: *Revue de droit int.*, Oct.—Dec. 1937, p. 587.
- 11 GREAT BRITAIN—NORWAY. Notes exchanged at Oslo regarding documents of identity for aircraft personnel. English and Norwegian texts: *G. B. T. S.*, No. 13 (1938), *Cmd.* 5653.
- 22/27 CHILE—UNITED STATES. Agreement reached at Santiago by an exchange of notes regarding the exchange of official publications. *L. N. M. S.*, March, 1938, p. 67. Text: *Ex. Agr. Ser.*, No. 112.

November, 1937

- 5 SIAM—SWEDEN. A treaty of friendship, commerce and navigation signed. *L. N. M. S.*, March, 1938, p. 67.
- 10 GERMANY—GREAT BRITAIN. Agreement concluded at Berlin regarding the exemption from taxation of certain profits arising from air transport. English and German texts: *G. B. T. S.*, No. 12 (1938), *Cmd.* 5652.
- 11 AUSTRALIA—CZECHOSLOVAKIA. Ratifications exchanged at Canberra of the commercial treaty, effected by exchange of notes at Canberra, Aug. 3, 1936 and Prague, Aug. 19, 1936. Texts: *G. B. T. S.*, No. 9 (1938), *Cmd.* 5649.
- 13 GREAT BRITAIN—SIAM. Notes exchanged at Bangkok for the temporary continuance of rights under the treaties of July 14, 1925. Texts: *Siam*, No. 1 (1937), *Cmd.* 5607.
- 15 NORWAY—SIAM. Treaty of friendship, commerce and navigation signed at Oslo. *L. N. M. S.*, March, 1938, p. 67.
- 23 BOLIVIA—CHILE. Final act of the second session of the Mixed Commission, held at La Paz, signed. The resolutions concerned further study of the proposed commercial treaty, suppression of smuggling, creation of a tribunal of commercial arbitration, establishment of a registered parcel post service and uniform commercial legislation. *P. A. U.*, May, 1938, p. 311.
- 26 CHILE—GREAT BRITAIN. Effected a temporary commercial agreement by an exchange of notes at Santiago. Texts: *G. B. T. S.*, No. 10 (1938), *Cmd.* 5650.

December, 1937

- 3 GREAT BRITAIN—SIAM. Notes exchanged at Bangkok regarding the operation of regular air lines over Siam and Burma. Texts: *G. B. T. S.*, No. 11 (1938), *Cmd.* 5651.
- 3 ITALY—MANCHUKUO. China sent note to the League of Nations protesting Italian recognition of Manchukuo. *L. N. O. J.*, Jan. 1938, p. 11.
- 3/28 and January 24, 1938 CANADA—UNITED STATES. Arrangement effected by exchange of notes at Washington regarding reciprocal recognition of duly registered patent attorneys. Text: *Ex. Agr. Ser.*, No. 118; *Canada Treaty Ser.*, 1937, No. 19.
- 14 GREAT BRITAIN—ITALY. Notes exchanged at Rome, supplementary to the convention signed at Rome on Dec. 7, 1934, regarding the establishment of air transport lines. *L. N. M. S.*, Feb. 1938, p. 41. English and Italian texts: *G. B. T. S.*, No. 15 (1938), *Cmd.* 5670.
- 16/17 BRAZIL—UNITED STATES. Agreement effected by exchange of notes regarding abolition of charges for tourists' passport visas. *L. N. Inf. Sect.*, May 2, 1938 (un-numbered).
- 22/January 14, 1938 NETHERLANDS—NEW ZEALAND. Trade agreement effected by exchange of notes at Sydney and Wellington. *L. N. M. S.*, March, 1938, p. 67.

- 24 FRANCE—YUGOSLAVIA. Payments agreement signed at Belgrade. *Rev. int. française du droit des gens*, Jan./Feb. 1938, p. 61.
- 24 GREAT BRITAIN—ITALY. Notes exchanged at Rome modifying the agreement of Nov. 6, 1936, regarding commercial exchanges and payments. *G. B. T. S.*, No. 16 (1938), *Cmd.* 5669.
- 24 NORWAY—SWEDEN. Norway informed the League of Nations that the Conciliation Commission, set up in accordance with terms of the treaty, signed Jan. 27, 1936, has taken up its duties. Members: *L. N. O. J.*, Jan. 1938, p. 13.
- 27 INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW. The Italian Government announced its decision to denounce, effective Apr. 20, 1940, its undertaking of March 31, 1926. The Institute has been financed by the Italian Government and located at Rome. *L. N. M. S.*, Jan. 1938, p. 28.
- 29 FRANCE—POLAND. Payments agreement effected by exchange of notes. *Revue int. française du droit des gens*, Jan./Feb. 1938, p. 61.
- 31 INTERNATIONAL EDUCATIONAL CINEMATOGRAPHIC INSTITUTE. Ceased its activities. Founded by Italian Government in 1928, it had been under the authority of the League of Nations. *L. N. M. S.*, Jan. 1938, p. 28.

January, 1938

- 2 CANADA—SOUTHERN RHODESIA. The abrogation of the trade agreement, signed at Ottawa, Aug. 20, 1932, became effective. *T. I. B.*, Feb. 1938, p. 46.
- 3 ESTONIA—MEXICO. Ratifications exchanged at Tallinn of the treaty of friendship, signed at New York, Jan. 28, 1937. *T. I. B.*, Feb. 1938, p. 39.
- 4 PERMANENT COURT OF INTERNATIONAL JUSTICE. The Belgian and Spanish Governments informed the Court of their mutual agreement not to go on with the proceedings in the Borchgrave case. *L. N. M. S.*, Jan. 1938, p. 34.
- 13 CHILE—CUBA. Ratifications exchanged in Habana of the treaty of commerce and navigation, signed March 13, 1937. *P. A. U.*, April, 1938, p. 249.
- 13 ECONOMIC UNION—ESTONIA. Agreement signed between the Economic Union of Belgium and Luxemburg, and Estonia, at Tallinn, regarding commercial relations and transfers. *L. N. M. S.*, Feb. 1938, p. 41.
- 17/February 18/21 HUNGARY—NORWAY. Notes exchanged at Stockholm and Oslo concerning the reciprocal abolition of visas as regards diplomatic passports. *L. N. M. S.*, March, 1938, pp. 67-68.
- 19 ESTONIA—HUNGARY. Agreement effected by exchange of notes at Budapest regarding exemption from visa fees on passports. *L. N. M. S.*, March, 1938, p. 68.
- 22 BRAZIL—UNITED STATES. Announcement made of the establishment of two mixed committees of private trade interests to observe the course of trade between the two countries, the operation of the United States-Brazil trade agreement, and to report to their respective governments. *T. I. B.*, Jan. 1938, pp. 13-14.
- 26 PERMANENT COURT OF INTERNATIONAL JUSTICE. The Court received from the Belgian Government an application instituting proceedings against the Bulgarian Government, involving the Electricity Company of Sofia and Bulgaria. *L. N. M. S.*, Jan. 1938, p. 34. Bulgaria has nominated as judge *ad hoc* M. Papazoff. *L. N. M. S.*, March, 1938, p. 78.
- 27/March 17 CANADA—UNITED STATES. Notes exchanged at Washington regarding importation into the United States of hydro-electric power. Texts: *Press Releases*, March 26, 1938, pp. 400-409.

- 31 FRANCE—SWEDEN. Notes exchanged at Paris regarding commercial relations. *L. N. M. S.*, Feb. 1938, p. 41.

February, 1938

- 1 GREECE—SWEDEN. Agreement signed at Athens regarding commercial exchanges. *L. N. M. S.*, Feb. 1938, p. 41.
- 1 NORWAY—UNITED STATES. Supplementary extradition treaty signed at Washington. *Press Releases*, Feb. 5, 1938, p. 202; *T. I. B.*, Feb. 1938, p. 41.
- 8 NICARAGUA—UNITED STATES. Agreement to modify certain provisions of the trade agreement of Mar. 11, 1936, reached by an exchange of notes at Managua. Text of United States note: *Press Releases*, Feb. 12, 1938, pp. 249-250; *P. A. U.*, May, 1938, p. 310; *T. I. B.*, Feb. 1938, p. 48.
- 14 FINLAND—POLAND. Intellectual coöperation protocol signed. *Revue int. française du droit des gens*, Jan./Feb. 1938, p. 63.
- 15 GREAT BRITAIN—RUSSIA. Great Britain notified Russia of its decision to close the consulate in Leningrad, in accordance with the Russian policy. *B. I. N.*, March 5, 1938, p. 202.
- 16 PERMANENT COURT OF ARBITRATION. Henry L. Stimson and Michael F. Doyle were appointed to the Court, replacing John Bassett Moore and the late Newton D. Baker. *N. Y. Times*, Feb. 17, 1938, p. 5; *Press Releases*, Feb. 19, 1938, p. 267.
- 18 ESTONIA—SWEDEN. Exchanged notes at Stockholm, constituting an agreement regarding the régime applicable to the importation of Estonian meat into Sweden. *L. N. M. S.*, Feb. 1938, p. 41.
- 18 NORWAY—VENEZUELA. Commercial *modus vivendi* reached by exchange of notes at Caracas. *L. N. Inf. Sect.*, May 2, 1938 (unnumbered).
- 18-April 22 JAPAN—UNITED STATES. United States gave notice Feb. 18 it would hold Japan responsible for injuries and damages to Americans and their property by armed forces in China. Summary: *N. Y. Times*, Feb. 26, 1938, p. 1. On March 22 the United States submitted a claim of \$2,214,007.36 for property losses and damages connected with the *Panay* sinking. *N. Y. Times*, March 23, 1938, p. 1; *C. S. Monitor*, March 23, 1938, p. 3. Text: *Press Releases*, March 26, 1938, p. 410. Japan agreed on March 27 to pay the claim. *B. I. N.*, April 2, 1938, p. 310. A more fully itemized account of damages was asked on April 6, which was sent on April 18. *N. Y. Times*, April 6, 1938, p. 7; April 19, 1938, p. 10. Payment in full was made April 22. *N. Y. Times*, April 23, 1938, p. 7; *C. S. Monitor*, April 22, 1938, p. 3; *Press Releases*, April 23, 1938, p. 504.
- 19 FRANCE—JAPAN. General commercial agreement signed at Paris. *London Times*, Feb. 21, 1938, p. 13; *N. Y. Times*, Feb. 20, 1938, p. 7; *B. I. N.*, March 5, 1938, p. 197.
- 23/March 28 HUNGARY—UNITED STATES. Announcement made of Hungary's proposal to pay the original principal of its war debt, minus sums paid before suspension of payments. *C. S. Monitor*, Feb. 23, 1938, p. 1; *N. Y. Times*, Feb. 24, 1938, p. 1. President Roosevelt sent the proposal to Congress on March 28. *C. S. Monitor*, March 28, 1938, p. 1. Text of message: *Press Releases*, April 2, 1938, p. 423; *Cong. Record*, March 29, 1938, p. 5508.
- 24-May 5 SPAIN. Germany accepted on Feb. 24 a new British plan for the withdrawal of foreign combatants from Spain and the granting of belligerent rights to both sides. *N. Y. Times*, Feb. 25, 1938, p. 1; *B. I. N.*, March 5, 1938, p. 213. On March 9

France consented to re-establishment of non-intervention control of Spanish border as soon as the international commissions begin counting foreign fighters to be withdrawn from Spain. *C. S. Monitor*, March 10, 1938, p. 3; *N. Y. Times*, March 10, 1938, p. 1. On March 16 Great Britain promised naval aid to France if Italian and German forces in Spain should menace French North African communications. *N. Y. Times*, March 17, 1938, p. 1. France and Great Britain protested March 19 to the Spanish insurgents against the concentrated air raids on Barcelona as being contrary to the principles of international law. *London Times*, March 21, 1938, p. 12; *B. I. N.*, April 2, 1938, p. 305. General Franco replied on March 28. *B. I. N.*, April 2, 1938, p. 317. In notes of April 5 to Great Britain and France the Loyalist Government claimed the right to obtain war materials as a means of defense. *B. I. N.*, April 23, 1938, p. 376. The French Foreign Office announced April 7 that France and Great Britain had rejected the Spanish Government's appeal to drop the non-intervention agreement and permit it to buy arms and munitions abroad and transport them through France. *C. S. Monitor*, April 7, 1938, p. 6. The Italian Foreign Minister, Count Ciano, and the Earl of Perth, British Ambassador, exchanged notes regarding the British proposal for proportional evacuation of foreign volunteers. Texts: *N. Y. Times*, April 17, 1938, p. 28; *C. S. Monitor*, April 18, 1938, p. 5. The Republican Government protested to the British Government for "admitting the hypothesis that men and materials sent to Spain by Italy might not be withdrawn until after the close of the present conflict." *B. I. N.*, May 7, 1938, p. 425. France decided on May 5 to close again the Spanish frontier to prevent passage of men and materials into Spain as soon as two commissions arrive to supervise withdrawal of foreign volunteers. *N. Y. Times*, May 6, 1938, p. 1.

- 25 CHINA—GERMANY. Chinese Government sent protest to Germany against its recognition of Manchukuo. *B. I. N.*, March 5, 1938, p. 192; *N. Y. Times*, Feb. 25, 1938, p. 3.
- 26 DOMINICAN REPUBLIC—HAITI. Ratifications exchanged of the treaty, signed Jan. 21, 1938, concerning frontier questions and settling other differences. *L. N. Inf. Sect.*, April 19, 1938, No. 8454.
- 26 GREAT BRITAIN—SPAIN. Second note on the sinking of the steamer *Alcira* sent to Gen. Franco following Spanish note of Feb. 17. *London Times*, Feb. 28, 1938, p. 13; *B. I. N.*, March 5, 1938, pp. 204, 213.
- 27 BALKAN ENTENTE. Communiqué issued after the close of its sessions, declared that the member states intend to remain faithful to the League of Nations. It also stated that since Yugoslavia has recognized the conquest of Ethiopia, and since Rumania has decided to do so, Greece and Turkey should do likewise. The policy of non-intervention in Spain will continue. *N. Y. Times*, Feb. 28, 1938, p. 4; *London Times*, Mar. 1, 1938, p. 15; *B. I. N.*, March 5, 1938, p. 214.
- 28 DOMINICAN REPUBLIC—HAITI. Initial payment of \$250,000 indemnity for October killings of Haitians in Dominican territory made to Haiti. *N. Y. Times*, March 1, 1938, p. 35.
- 28 GREECE—NORWAY. Agreement for the regulation of goods transactions, and a payments agreement signed at Athens. *L. N. M. S.*, March, 1938, p. 67.
- 28/April 27 PALESTINE. British Government named Sir John Woodhead, Sir Alison Russell and Alexander P. Waterfield to the Palestine Commission to study the partition question. *N. Y. Times*, March 1, 1938, p. 6; *B. I. N.*, March 5, 1938, p. 204. The Commission arrived in Jerusalem on April 27. *B. I. N.*, May 7, 1938, p. 421.

March, 1938

- 1 LEAGUE OF AMERICAN NATIONS. The Dominican Republic and Colombia proposed an inter-American league. Text not made public. *C. S. Monitor*, March 1, 1938, p. 4; *N. Y. Times*, March 2, 1938, p. 1. Proposal in the form of a draft convention for an "Association of American Nations." *Washington Post*, March 11, 1938, p. 11.

1-April 26 MEXICAN OIL. The Mexican Supreme Court ruled March 1 against 17 United States and British oil companies in their wage controversy. *N. Y. Times*, March 2, 1938, p. 13; *London Times*, March 2, 1938, p. 14. On March 7 Mexico placed embargoes on company bank accounts sufficient to cover 75% of the wages due for the twelve days of the national petroleum strike of May, 1937. *N. Y. Times*, March 8, 1938, p. 9; *B. I. N.*, March 19, 1938, p. 259. The Court granted on March 8 a temporary injunction restraining the Federal Labor Board from enforcing the Supreme Court decision until the Board proves its competence. *N. Y. Times*, March 9, 1938, p. 12. On March 14 the companies refused to accept the ultimatum of the Labor Board. *N. Y. Times*, March 17, 1938, p. 1. All oil properties expropriated on March 18. *C. S. Monitor*, March 19, 1938, p. 1; *N. Y. Times*, March 19, 1938, p. 1; *B. I. N.*, April 2, 1938, p. 311. In a note on March 30 the United States asked compensation for expropriated properties. Text: *N. Y. Times*, March 31, 1938, p. 4. The Mexican note of March 31 declared it "would know how to honor its obligations." *N. Y. Times*, April 2, 1938, p. 1. Text of note and Secretary of State Hull's statement: *Press Releases*, April 2, 1938, pp. 435-436. The Mexican Government announced on April 6 that 20% of the gross receipts from sales abroad of its excess crude oil would be used toward payment for expropriated properties. *N. Y. Times*, April 7, 1938, p. 3. Great Britain demanded on April 8 prompt return of British-owned properties. *N. Y. Times*, April 9, 1938, p. 1. Text: *London Times*, April 13, 1938, p. 13. Mexico informed Great Britain in a note on April 12 that the properties of the Aguila Oil Co. would not be returned. Partial text: *C. S. Monitor*, April 14, 1938, p. 2. Text: *London Times*, April 16, 1938, p. 1; *N. Y. Times*, April 14, 1938, p. 19. Great Britain sent a second note on April 21. *C. S. Monitor*, April 22, 1938, p. 5. Text: *London Times*, April 22, 1938, p. 13. Mexico again refused on April 26 to return the properties. *N. Y. Times*, April 27, 1938, p. 15; *London Times*, April 27, 1938, p. 17; *B. I. N.*, May 7, 1938, p. 421.

3-April 1 PACIFIC ISLANDS. Announcement made in Washington on March 3 that for reasons of commercial aviation and naval strategy, the State and Navy Departments have made a study of certain islands with a view to pressing claims of ownership. *C. S. Monitor*, March 3 and 5, 1938, pp. 1, 2; *N. Y. Times*, March 5, 1938, p. 1. Formal claim made March 5 for the United States to sovereignty over Canton and Enderbury Islands in the Central Pacific Ocean and to lands first visited by Americans in Antarctica. *N. Y. Times*, March 6, 1938, pp. 1, 31. An American occupation expedition landed March 6 on Enderbury and Canton Islands. *C. S. Monitor*, March 7, 1938, p. 1. On March 9 Prime Minister Chamberlain told the House of Commons that Great Britain "reserves her right over the islands." *C. S. Monitor*, March 9, 1938, p. 1. The Department of the Interior issued on April 1 a license granting commercial air rights on Canton Island. *C. S. Monitor*, April 2, 1938, p. 1.

5 GERMANY—RUSSIA. Reached agreement to close all consulates in each other's territory. *N. Y. Times*, March 6, 1938, p. 27; *C. S. Monitor*, March 7, 1938, p. 2.

7-April 15 CZECHOSLOVAKIA—UNITED STATES. Signed a trade agreement at Washington. *Cong. Record*, March 8, 1938, p. 4030; *N. Y. Times*, March 8, 1938, p. 1.

Proclaimed by President Roosevelt on March 15. *Press Releases*, March 19, 1938, p. 370. Protocol signed on April 15. *N. Y. Times*, April 16, 1938, p. 4; *Press Releases*, April 16, 1938, p. 489.

- 11-April 2 AUSTRIAN ANNEXATION. Great Britain issued warning to Germany that invasion of Austria would damage the prospects of the Anglo-German talks. *N. Y. Times*, March 12, 1938, p. 1. Announcement made at Vienna on March 11 that German troops had crossed the border at Passau. The plebiscite, scheduled for March 13, was automatically postponed. *C. S. Monitor*, March 11, 1938, p. 1. Hitler issued on March 12 a proclamation to the German people. Text: *N. Y. Times*, March 13, 1938, p. 35. Chancellor Schuschnigg resigned March 12 following Hitler's ultimatum, being replaced by Seyss-Inquart, Nazi leader. *London Times*, March 12, 1938, p. 12; *N. Y. Times*, March 12, 1938, p. 1. Austria became part of the German Reich March 13. *N. Y. Times*, March 14, 1938, p. 1. Text of Anschluss law: p. 3; *L. N. M. S.*, March 1938, p. 62; *Press Releases*, March 19, 1938, p. 374; *Völkerbund* (Geneva), March 1938, p. 149. The German Ambassador to the United States notified the State Department on March 14 that the nation of Austria no longer existed. *N. Y. Times*, March 15, 1938, p. 2. Secretary of State Hull issued a statement March 19, tantamount to a *de facto* recognition of the Austrian annexation. Text: *N. Y. Times*, March 20, 1938, pp. 1, 35. All laws promulgated in the *Reichsgesetzblatt* after March 13 are applicable to Austria as well as to Germany. *B. I. N.*, April 2, 1938, p. 299; *London Times*, March 18, 1938, p. 15. The Holy See rebuked on April 1 the bishops of Austria for their Nazi plea in favor of the Anschluss. *N. Y. Times*, April 2, 1938, pp. 1, 6. Hungary notified Germany March 15 of its recognition of the union, being the first country to take such action. *N. Y. Times*, March 16, 1938, p. 10; *London Times*, March 17, 1938, p. 13. Mexico sent a series of observations to the League of Nations March 20 on the suppression of Austria as a separate nation. *London Times*, March 21, 1938, p. 11. Great Britain granted *de jure* recognition on April 2. *N. Y. Times*, April 3, 1938, p. 1; *C. S. Monitor*, April 4, 1938, p. 2. In notes to Germany on April 6 the United States stated it would look to Germany for payment of Austria's debts, and found itself "under the necessity as a practical measure" of closing its legation at Vienna. Summary: *C. S. Monitor*, April 6, 1938, p. 1. Texts of notes: *N. Y. Times*, April 7, 1938, p. 5; *Press Releases*, April 9, 1938, pp. 465-467. A plebiscite on April 10 gave its approval of the Anschluss. *N. Y. Times*, April 11, 1938, p. 1. Great Britain notified Germany of its decision to convert the legation at Vienna into a consulate-general. Texts of two notes: *London Times*, April 4, 1938, p. 14.
- 11 GERMANY—SOUTH AFRICA. Germany announced exchange of notes in which the Reich maintained its claim to the return of all colonies. South African Government replied that the London agreement of 1923 settled the legal status of South West Africa. *B. I. N.*, March 19, 1938, p. 249.
- 13/22 LEAGUE OF NATIONS—AUSTRIA. Austria's membership ceased on March 13 according to notification by Germany. *N. Y. Times*, March 22, 1938, p. 8. The Secretary-General replied on March 22. *N. Y. Times*, March 23, 1938, p. 6; *B. I. N.*, April 2, 1938, p. 311.
- 18 GREAT BRITAIN—ITALY. Two trade agreements signed in London, one amending the existing clearing agreement, the other replacing the commercial agreement of Nov. 6, 1936. *B. I. N.*, April 2, 1938, p. 304. English and Italian texts: *G. B. T. S.*, Nos. 18 and 19 (1938), *Cmd.* 5694-5695.
- 18-31 LITHUANIA—POLAND. Poland served ultimatum on Lithuania seeking resumption of diplomatic and consular relations, broken in October, 1920. Summary: *N. Y. Times*, March 18, 1938, p. 1. On March 19 Lithuania accepted Polish ultimatum.

- C. S. Monitor*, March 19, 1938, p. 1; *London Times*, March 21, 1938, p. 12. Text of Lithuanian note: *N. Y. Times*, March 20, 1938, pp. 1, 34. The frontier was formally opened on March 31 and envoys from the two countries presented their credentials. *N. Y. Times*, April 1, 1938, p. 11; *C. S. Monitor*, March 31, 1938, p. 1.
- 19 ALEXANDRETTA. League of Nations Council Committee finished its work and fixed July 15 as the date by which the elections must be terminated. *L. N. Inf. Sect.*, March 19, 1938, No. 8435. Text of final regulation: *L. N. Doc. C.103.M.56.1938*.
- 19 LEAGUE OF NATIONS—MEXICO. Mexico sent note protesting the seizure of Austria and the League's action in not convoking the Council, in accordance with Article X, and announced it can not accept Germany's action. *N. Y. Times*, March 20, 1938, p. 32.
- 19 LEAGUE OF NATIONS MISSION TO SOUTH AMERICA. Members of the mission sailed, seeking information in regard to the views of the various governments. *L. N. M. S.*, March, 1938, pp. 62–63.
- 19 PERU—SPAIN. A Peruvian official communiqué announced diplomatic relations with the Barcelona Government in Spain had been broken. *N. Y. Times*, March 20, 1938, p. 32.
- 21 AERIAL BOMBARDMENT. Secretary of State Hull issued statement censuring recent air raids on Spanish cities. Text: *Press Releases*, March 26, 1938, p. 396. Pope Pius made urgent representations to General Franco asking him to abandon the bombardment of open cities in Spain. *N. Y. Times*, March 24, 1938, p. 1.
- 21 EMBARGO ON ARMS TO SPAIN. Secretary of State Hull replied in a letter to Raymond L. Buell relative to revocation of the United States embargo on arms to Spain. *N. Y. Times*, March 23, 1938, p. 1. Text: p. 6. *Press Releases*, March 26, 1938, pp. 398–399.
- 22/April 20 AERIAL LEGAL EXPERTS. Appointments made of the American Section of the International Technical Committee of Aerial Legal Experts. *Press Releases*, March 26, 1938, p. 409; *T. I. B.*, March, 1938, p. 68. Members of the Advisory Committee to the American Section of the International Technical Committee of Aerial Legal Experts (CITEJA) met with the American Section of the International Committee on April 20 to discuss questions to be considered by three of the committees at sessions to open in Paris on May 23, 1938. *Press Releases*, April 23, 1938, pp. 504–505.
- 24–April 15 REFUGEES. Secretary of State Hull sent appeal on March 24 to Great Britain, France, Italy, Belgium, The Netherlands, Denmark, Sweden, Norway, Switzerland and twenty American Republics to join in a coöperative effort to facilitate emigration from Austria and Germany. Text: *Press Releases*, March 26, 1938, p. 411. Summary: *N. Y. Times*, March 25, 1938, p. 8. Italy refused the plan on March 29. *N. Y. Times*, March 30, 1938, p. 8. Summary of twenty-one replies: *Press Releases*, April 2, 1938, pp. 426–433. In its reply of April 14 Switzerland disapproved the suggestion that meetings be held there. *N. Y. Times*, April 15, 1938, p. 15. The Department of State announced a conference of more than thirty nations would assemble at Evian, France, July 6, to form an intergovernmental committee to study repatriation of political refugees from Germany and Austria. *N. Y. Times*, May 12, 1938, p. 16.
- 25 ALASKA SALMON FISHERY SITUATION. The State Department announced receipt of satisfactory assurances that Japan would take steps to prevent its nationals engaging in salmon fishing off Alaska. *C. S. Monitor*, March 26, 1938, p. 3; *N. Y. Times*, March 26, 1938, p. 1. Text and summary of United States statement of Nov. 22,

- 1937: *N. Y. Times*, March 26, 1938, p. 7; *Press Releases*, March 26, 1938, pp. 412-417.
- 26-April 22 ETHIOPIAN CONQUEST. The following nations have extended some form of recognition: Bulgaria, March 26; Belgium, March 29; Turkey and Greece, April 4; Czechoslovakia, April 19; Lithuania, April 22. *N. Y. Times*, March 27, 1938, p. 24; March 30, p. 4; *London Times*, April 5, 1938, p. 15; *N. Y. Times*, April 20, 1938, p. 1; *C. S. Monitor*, April 22, 1938, p. 4; *B. I. N.*, May 7, 1938, p. 420.
- 28 CHINA. A Japanese-sponsored government, the Reformed Government of the Republic of China, was inaugurated at Nanking. *N. Y. Times*, March 28, 1938, p. 6; *B. I. N.*, April 2, 1938, p. 288.
- 28 HOUSE, EDWARD MANDELL. War-time adviser and personal European representative of President Wilson, died in New York, aged 79 years. *C. S. Monitor*, March 28, 1938, p. 3; *N. Y. Times*, March 29, 1938, p. 1.
- 28 NONMILITARY COÖPERATION WITH AMERICAN REPUBLICS. Secretary of State Hull submitted a report to President Roosevelt recommending the enactment of legislation broadening legislative authorization to permit military and naval personnel to assist foreign governments. Text: *Press Releases*, April 9, 1938, pp. 462-465.
- 28-May 5 NORWAY—UNITED STATES. President Roosevelt sent letter to Congress recommending payment to Norway of \$5,000 in settlement of claims regarding the seizure of the *Sagatind*. *Cong. Rec.*, March 28, 1938, p. 5507; *Press Releases*, April 2, 1938, p. 425. Bill authorizing payment passed by the House of Representatives on April 18 and by the Senate on May 5. *Cong. Rec.*, April 18 and May 5, 1938, pp. 7212-7213, 8338.
- 31 LIECHTENSTEIN. The ruling prince abdicated and invested his great-nephew with the constitutional rights pertaining to the office. *London Times*, April 1, 1938, p. 15.
- 31 NAVAL ARMAMENTS. In notes to each other Great Britain, France and the United States formally announced their abandonment of the top limit of the size of battle-ships named in the 1936 Naval Treaty. *London Times*, April 2, 1938, p. 12; *B. I. N.*, April 23, 1938, p. 361. Texts: *Press Releases*, April 2, 1938, pp. 437-438.
- April, 1938
- 4 JAPAN—UNITED STATES. The United States Ambassador delivered a memorandum to the Japanese Foreign Office on the question of American nationals in China. *N. Y. Times*, April 5, 1938, p. 12.
- 4/11 JAPAN—RUSSIA. Japan protested on April 4 against alleged military assistance to China. Russia immediately denied the charge. *C. S. Monitor*, April 5, 1938, p. 1; *London Times*, April 6, 1938, p. 13; *N. Y. Times*, April 5, 1938, p. 12. Russia protested in a note of April 11 against a flight of eleven Japanese airplanes over Soviet territory near the Siberian-Manchukuo frontier. *C. S. Monitor*, April 12, 1938, p. 6; *N. Y. Times*, April 12, 1938, p. 13.
- 5-6 OSLO GROUP. The Foreign Ministers of Norway, Sweden, Denmark and Finland met in Oslo to discuss defense. *C. S. Monitor*, April 6, 1938, p. 4; *London Times*, April 6, 1938, p. 13; *B. I. N.*, April 23, 1938, p. 371.
- 11 BALKAN CONFERENCES. Two conferences met in Istanbul to consider economic and trade relations among Turkey, Greece, Rumania and Yugoslavia. *B. I. N.*, April 23, 1938, p. 378.
- 11 EGYPT—TURKEY. Ratifications exchanged at Cairo of the treaty of friendship. *B. I. N.*, April 23, 1938, p. 348.

- 11 FRANCE—PERU. France ratified the agreement on the interchange of literature, signed July 27, 1932. *N. Y. Times*, April 12, 1938, p. 9.
- 13 CHACO DISPUTE BETWEEN BOLIVIA AND PARAGUAY. Bolivia rejected proposals advanced by a 5-power neutral commission to settle the dispute. *N. Y. Times*, April 14, 1938, p. 19; *C. S. Monitor*, April 15, 1938, p. 6.
- 13 LITHUANIA—MEMEL. The Lithuanian Government refused the Memel request of April 12 for the immediate lifting of the 12-year state of war. *C. S. Monitor*, April 13, 1938, p. 1; *N. Y. Times*, April 14, 1938, p. 17.
- 14 FRANCE—ITALY. Commercial accord signed at Rome. *C. S. Monitor*, April 15, 1938, p. 4; *B. I. N.*, April 23, 1938, p. 353.
- 14 NICARAGUA—UNITED STATES. Treaty concluded at Washington, effecting a settlement of pending financial questions. *C. S. Monitor*, April 15, 1938, p. 2. Summary: *Press Releases*, April 16, 1938, pp. 488-489.
- 16/May 2 GREAT BRITAIN—ITALY. Treaty of friendship signed at Rome. Text: *N. Y. Times*, April 17, 1938, pp. 1, 31; *London Times*, April 18, 1938, p. 6. *Bon voisinage* agreement concerning relations in East Africa signed, and notes exchanged regarding Libya, Spain and Ethiopia. Texts: *London Times*, April 18, 1938, p. 6; *Cmd. 5726*; *Völkerbund* (Geneva), April 20, 1938, pp. 190-200. Treaty of friendship endorsed on May 2 by the House of Commons. *N. Y. Times*, May 3, 1938, p. 1; *London Times*, May 3, 1938, p. 16.
- 19 CANADA—UNITED STATES. In accordance with the convention signed April 15, 1935, a tribunal investigated from July 7 to Oct. 19, 1937, the claims for damages resulting from operation of the Consolidated Mining and Smelting Co. at Trail, B. C. Summary of findings: *Press Releases*, April 23, 1938, pp. 494-496.
- 21 BULGARIA—YUGOSLAVIA. Protocol signed for the removal of armed protection along the frontier. *N. Y. Times*, April 22, 1938, p. 10.
- 25/29 GREAT BRITAIN—IRELAND. Three agreements signed at London on April 25 providing for termination of trade and financial disputes, and making Ireland responsible for its own defense. *N. Y. Times*, April 26, 1938, p. 1. Texts, except for trade schedules: p. 10; *London Times*, April 26, 1938, p. 11; *Cmd. 5728*. Approved by the Dail on April 29. *N. Y. Times*, April 30, 1938, p. 7.
- 26 TREATY VIOLATIONS. Acting Secretary of State Welles, in response to the Scott resolution (H. Res. 465) asking specific information on treaty violators, advised the House Foreign Affairs Committee that the United States considered the Italian and Japanese Governments had failed to carry out obligations imposed by the Kellogg-Briand Pact, and the Nine-Power Treaty of 1922. *N. Y. Times*, April 27, 1938, p. 1. Text: *Press Releases*, April 30, 1938, pp. 511-512.
- 26/May 9 JEWISH-OWNED PROPERTY IN GERMANY. Text of decree affecting Jewish-owned property in Germany: *N. Y. Times*, April 29, 1938, p. 3. United States Ambassador Wilson delivered protest on May 9 against the decree as contrary to provisions of the treaty of friendship, signed Dec. 8, 1923. Text: *N. Y. Times*, May 12, 1938, p. 4.
- 27 COMMISSIONS OF INVESTIGATION AND CONCILIATION. Edwin D. Dickinson appointed national member for the United States of the commissions provided for in the additional protocol to the Inter-American Conciliation Convention, signed at Montevideo, Dec. 26, 1933. *Press Releases*, April 30, 1938, p. 513.
- 27 GREAT BRITAIN—POLAND. Naval treaty on the lines of the 1936 Naval Treaty of London concluded at London. *N. Y. Times*, April 28, 1938, p. 8; *London Times*, April 28, 1938, p. 13.

- 27 GREECE—TURKEY. Friendship and neutrality pact signed at Athens. *London Times*, April 28, 1938, p. 14; *B. I. N.*, May 7, 1938, p. 417.
- 27 GUATEMALA—SALVADOR. Congresses of both countries ratified the treaty fixing their boundary in accordance with the survey of a mixed commission. *N. Y. Times*, April 28, 1938, p. 6.
- 28 DENMARK—GREAT BRITAIN. Announcement made of conclusion of a trade treaty. *N. Y. Times*, April 29, 1938, p. 3.
- 29 FRANCE—GREAT BRITAIN. Communiqué issued following the conference of Premiers and Foreign Ministers relative to a military alliance and economic assistance to the Danubian countries. *C. S. Monitor*, April 29, 1938, p. 1. Text: *N. Y. Times*, April 30, 1938, p. 6; *London Times*, April 30, 1938, p. 11.
- 30 LEAGUE OF NATIONS—SWITZERLAND. Switzerland requested in a memorandum that the question of its "absolute neutrality" be placed on the agenda of the Council meeting May 9. Extracts: *N. Y. Times*, May 1, 1938, p. 32; *London Times*, May 2, 1938, p. 15.

May, 1938

- 2/6 CHINESE CUSTOMS. Great Britain and Japan agreed on final details of an arrangement whereby foreign obligations will be secured by Chinese maritime customs. *N. Y. Times*, May 3, 1938, p. 11; *London Times*, May 3, 1938, p. 15. In a note of May 6, China declared itself not bound by the terms of the agreement and reserved its full rights and freedom of action. *N. Y. Times*, May 7, 1938, p. 7; *London Times*, May 7, 1938, p. 11.
- 3 AUSTRIAN BONDS. Transfer of money due foreign holders of Austrian Government, municipal or private loans, banned, applying the German transfer moratorium of 1933 to the new German state. *N. Y. Times*, May 4, 1938, p. 18.
- 3 INTERNATIONAL DANUBE COMMISSION. Germany announced that Austria's membership in the commission ceased with its entrance into the Reich. Germany withdrew in Nov. 1936. *N. Y. Times*, May 4, 1938, p. 19.
- 4-6 LITTLE ENTENTE. At a meeting in Sinaia, Rumania, efforts of Hungary and the Little Entente to reach an understanding on the treatment of national minorities failed. An agreement was reached however on May 6 regarding Hungarian rearmament. *N. Y. Times*, May 7, 1938, p. 5.
- 5 ARGENTINA—CHILE. Announcement made of agreement to submit to arbitration the question of ownership of islands at the eastern end of Beagle Channel. Attorney-General Cummings has accepted the position of arbitrator. *Press Releases*, May 7, 1938, p. 535.
- 7 GERMANS IN CZECHOSLOVAKIA. France and Great Britain instructed their ambassadors to deliver notes to Germany and Czechoslovakia cautioning against violence in settling the claims of Sudeten Germans in Czechoslovakia. *C. S. Monitor*, May 7, 1938, p. 1; *N. Y. Times*, May 8, 1938, p. 43.
- 7 GERMANY—ITALY. Chancellor Hitler and Premier Mussolini pledged lasting friendship at Rome. Texts of addresses: *N. Y. Times*, May 8, 1938, p. 42.
- 7 GREAT BRITAIN—MEXICO. Great Britain reiterated its demand for payment of special claims arising from the Mexican revolutionary period, due since Jan. 1, 1938, under an agreement signed in 1935. *N. Y. Times*, May 8, 1938, p. 35.
- 9-14 LEAGUE OF NATIONS COUNCIL. The 101st session opened on May 9, under the presidency of M. Wilhelm Munters of Latvia. Voted to admit the Ethiopian dele-

gates to the meetings. *N. Y. Times*, May 10, 1938, p. 12. China asked on May 10 the application of Covenant provisions in giving aid to China. *C. S. Monitor*, May 10, 1938, p. 3. Ten member nations declared on May 11 in favor of recognition of the Ethiopian conquest. *C. S. Monitor*, May 12, 1938, pp. 1, 4; *N. Y. Times*, May 13, 1938, pp. 1, 14. On May 11 the Spanish delegate made plea for abandoning the policy of non-intervention in his country. *N. Y. Times*, May 12, 1938, pp. 1, 6. Reached final agreement for the establishment of a single office to aid refugees. *C. S. Monitor*, May 11, 1938, p. 1; *N. Y. Times*, May 11, 1938, p. 14. Decided that the next meeting of the Bureau of the Conference for the Reduction and Limitation of Armaments would take place at Geneva during the next ordinary session of the 1938 Assembly. *L. N. Inf. Sect.*, May 11, 1938, No. 8483. With nine abstentions, Poland and Rumania joined France and Great Britain in voting against the resolution to drop the non-intervention policy in Spain. *N. Y. Times*, May 14, 1938, p. 6. With Poland abstaining, the Council at its closing session on May 14, passed a resolution urging its members to give effect to previous recommendations in the matter of assistance to China. Voted to free Switzerland from obligation to apply League sanctions, following assurances that restoration of absolute neutrality would not interfere with the free working of the League on Swiss territory. Chile resigned its membership. *N. Y. Times*, May 15, 1938, p. 34; *C. S. Monitor*, May 16, 1938, p. 5.

- 9-11 OSLO TRADE AGREEMENT. At meetings of the Oslo Group the decision was reached that the agreement signed at The Hague in May, 1937, will not be continued in all its provisions after July 1, 1938. *N. Y. Times*, May 12, 1938, p. 3; *London Times*, May 12, 1938, p. 15. Issued lengthy communiqué on May 15. *N. Y. Times*, May 16, 1938, p. 9.
- 12 EMBARGO ON ARMS TO SPAIN. Text of Secretary of State Hull's letter to Senator Pitman on the Nye resolution (S. J. Res. 288): *N. Y. Times*, May 14, 1938, p. 6.
- 12 GERMANY—MANCHUKUO. German Foreign Office announced officially the conclusion of a treaty providing for mutual establishment of diplomatic and consular relations. *C. S. Monitor*, May 12, 1938, p. 1.
- 12 PORTUGAL—SPAIN. Portugal granted recognition to the Franco Government in Spain. *N. Y. Times*, May 12, 1938, p. 8.
- 12 RECOGNITION. Secretary of State Hull declared that the United States policy of non-recognition of conquered territory remains unchanged. *C. S. Monitor*, May 12, 1938, p. 1; *N. Y. Times*, May 13, 1938, p. 14.
- 13 GREAT BRITAIN—MEXICO. Mexico severed diplomatic relations, following British protests against expropriation of oil properties in Mexico. *C. S. Monitor*, May 14, 1938, pp. 1, 2; *N. Y. Times*, May 14, 1938, pp. 1, 4. Great Britain withdrew its envoy on May 14. *N. Y. Times*, May 15, 1938, p. 1.
- 14 PANEL OF MEDIATORS. Henry L. Stimson and Norman H. Davis named United States representatives on the panel of mediators created by the Good Offices and Mediation Treaty signed at Buenos Aires in 1936. *N. Y. Times*, May 15, 1938, p. 2.

INTERNATIONAL CONVENTIONS

- AERIAL NAVIGATION. Paris, Oct. 13, 1919. Protocol of Amendments. Paris, June 15 and Dec. 11, 1929.
Adhesion: Estonia. Jan. 1, 1938. *T. I. B.*, Jan. 1938, p. 12.
- AGRARIAN FUNDS "A." Berne, Aug. 21, 1931.
Signatures: Great Britain and Northern Ireland, France, Hungary, Italy and Switzerland. *L. N. M. S.*, Feb. 1938, p. 41.

AIR TRAFFIC. Warsaw, Oct. 12, 1929.

Adhesion: Trans-Jordan (by Great Britain). *T. I. B.*, Feb. 1938, p. 47.

Ratification deposited: Greece. Jan. 11, 1938. *T. I. B.*, March, 1938, p. 68.

AIRCRAFT ATTACHMENT. Rome, May 29, 1933.

Ratification deposited: The Netherlands. Jan. 28, 1938. *T. I. B.*, Feb. 1938, p. 45.

ARTISTIC EXHIBITIONS. Buenos Aires, Dec. 23, 1936.*Adhesions:*

Brazil. Jan. 25, 1938.

Honduras. Feb. 10, 1938. *T. I. B.*, Feb. 1938, p. 53.

Ratification deposited: Mexico. March 16, 1938. *T. I. B.*, March 1938, p. 76.

BROADCASTING. Convention and Final Act. Geneva, Sept. 23, 1936.*Ratifications deposited:*

Luxemburg. Feb. 8, 1938. *T. I. B.*, March, 1938, p. 61.

New Zealand. Jan. 27, 1938.

South Africa and Mandated Territory of South West Africa (by Great Britain). Feb. 1, 1938. *T. I. B.*, Feb. 1938, pp. 37-38.

Came into force: April 2, 1938. *L. N. Inf. Sect.*, April 2, 1938, No. 8440.

CAPITULATIONS IN EGYPT. Montreux, May 8, 1937.

Ratification deposited: The Netherlands. Jan. 22, 1938. *T. I. B.*, Feb. 1938, p. 39.

CATTLE HERDBOOKS. Rome, Oct. 14, 1936.

Ratification deposited: Czechoslovakia. Feb. 17, 1938. *T. I. B.*, March, 1938, p. 68.

CONTAGIOUS DISEASES OF ANIMALS. Geneva, Feb. 20, 1935.*Adhesions:*

Iraq. Dec. 24, 1937.

Rumania. Dec. 23, 1937. *L. N. O. J.*, Jan. 1938, p. 7; *T. I. B.*, Jan. 1938, pp. 9-10.

Came into force: March 23, 1938. *T. I. B.*, Feb. 1938, p. 43; *L. N. M. S.*, March, 1938, p. 67.

COPYRIGHT. Berne, Sept. 9, 1886. Revision, Rome, June 2, 1928.

Adhesion: Portugal. *T. I. B.*, March, 1938, p. 71.

EDUCATIONAL FILMS. Geneva, Oct. 11, 1933.

Adhesion deposited: South Africa. Jan. 4, 1938. *T. I. B.*, Jan. 1938, p. 8; *L. N. O. J.*, Jan. 1938, p. 6.

EDUCATIONAL AND PUBLICITY FILMS. Buenos Aires, Dec. 23, 1936.*Adhesions:*

Brazil. Feb. 5, 1938. *T. I. B.*, Feb. 1938, p. 40.

Honduras. Nov. 26, 1937. *T. I. B.*, March, 1938, p. 63.

EXPORT AND IMPORT OF ANIMAL PRODUCTS. Geneva, Feb. 20, 1935.

Ratification deposited: Rumania. Dec. 23, 1937. *T. I. B.*, Jan. 1938, p. 10.

FEE-CHARGING EMPLOYMENT AGENCIES. Geneva, June 29, 1933.

Ratification: Mexico. Feb. 21, 1938. *T. I. B.*, March, 1938, p. 73.

GOOD OFFICES AND MEDIATION. Buenos Aires, Dec. 23, 1936.

Adhesion: Honduras. Nov. 26, 1937. *T. I. B.*, Feb. 1938, p. 37.

Ratification deposited: Cuba. Dec. 27, 1937. *T. I. B.*, March, 1938, p. 61.

HAGUE CONVENTIONS. Nos. I-IV (1-2-3) Acts of 1899.

Ratifications deposited: Austria. Oct. 25, 1937. *T. I. B.*, Jan. 1938, p. 4.

HAGUE CONVENTIONS. Nos. I-XIII. Oct. 18, 1907.

Ratifications deposited: Austria. Oct. 25, 1937. *T. I. B.*, Jan. 1938, pp. 3-4.

HISTORY TEACHING. Geneva, Oct. 2, 1937.

Signatures:

- Afghanistan. Feb. 24, 1938. *T. I. B.*, March, 1938, p. 63.
- Chile. Jan. 6, 1938. *T. I. B.*, Jan. 1938, p. 8.
- Egypt. March 1, 1938.
- Estonia. March 8, 1938. *T. I. B.*, March, 1938, p. 63.
- The Netherlands, Netherland Indies, Surinam, Curaçao. Jan. 25, 1938.
- Norway. Feb. 5, 1938.
- South Africa. Jan. 24, 1938. *T. I. B.*, Feb. 1938, p. 41.
- Sweden. Feb. 25, 1938. *T. I. B.*, March, 1938, p. 63.

HOURS OF WORK (Glass-Bottle Works). Geneva, June 4, 1935.

Ratifications:

- France. Jan. 25, 1938. *T. I. B.*, Feb. 1938, p. 49.
- Mexico. Feb. 21, 1938. *T. I. B.*, March, 1938, p. 73.

HOURS OF WORK IN SHEET-GLASS WORKS. Geneva, June 21, 1934.

Ratification: France. Feb. 5, 1938. *T. I. B.*, March, 1938, pp. 72-73.

INDUSTRIAL PROPERTY. London, June 2, 1934.

Ratification deposited: Denmark. July 29, 1937. *T. I. B.*, Jan. 1938, p. 24.

INTER-AMERICAN ARBITRATION. Washington, Jan. 5, 1929.

Adhesion: Colombia (with reservation). Dec. 23, 1937. *T. I. B.*, Jan. 1938, p. 1.

INTER-AMERICAN CULTURAL RELATIONS. Buenos Aires, Dec. 23, 1936.

Adhesion: Brazil. Feb. 5, 1938. *T. I. B.*, Feb. 1938, p. 40.

INTER-AMERICAN RADIO COMMUNICATIONS. Havana, Dec. 13, 1937.

Text: *Revista de derecho int.*, March, 1938, pp. 106-143.

Ratification deposited: Cuba. Jan. 12, 1938. *T. I. B.*, Feb. 1938, p. 52.

INTER-AMERICAN RADIO CONVENTION. Havana, Dec. 13, 1937.

Text: *Revista de derecho int.*, Dec. 1937, pp. 327-351.

INTERCHANGE OF PUBLICATIONS. Buenos Aires, Dec. 23, 1936.

Adhesion: Brazil. Feb. 5, 1938. *T. I. B.*, Feb. 1938, p. 50.

LETTERS, ETC., OF DECLARED VALUE. Cairo, March 20, 1934.

Ratifications deposited:

- Honduras. Jan. 29, 1938.
- Portugal. Jan. 13, 1938. *T. I. B.*, Feb. 1938, pp. 49-50.

LOAD LINE CONVENTION. London, July 5, 1930. Amendment.

Adhesions:

- Brazil. Mar. 24, 1938. *T. I. B.*, March, 1938, p. 73.
- Cuba. *T. I. B.*, Feb. 1938, p. 49.
- France and Paraguay. Jan. 17, 1938. *T. I. B.*, Jan. 1938, p. 26.

MAINTENANCE, ETC., OF PEACE. Buenos Aires, Dec. 23, 1936.

Adhesion: Honduras (with reservation). Nov. 26, 1937.

Ratification deposited: Venezuela. Dec. 22, 1937. *T. I. B.*, Jan. 1938, pp. 1-2.

MARITIME BUOYAGE. Geneva, May 13, 1936.

Adhesions:

- South Africa, Mandated Territory of South West Africa. Dec. 15, 1937. *L. N. O. J.*, Jan. 1938, p. 7; *T. I. B.*, Jan. 1938, p. 26.

Ratifications:

- Great Britain. *L. N. Inf. Sect.*, Feb. 24, 1938, No. 8426.
- Yugoslavia. Dec. 11, 1937. *L. N. O. J.*, Jan. 1938, p. 5.

- MERCHANDISE TRANSPORT BY RAILWAY.** Rome, Nov. 23, 1933.
Promulgation: France. Jan. 12, 1938. *Revue int. française du droit des gens*, Jan./Feb. 1938, p. 62.
- MONEY ORDERS.** Cairo, Mar. 20, 1934.
Ratifications deposited:
Honduras. Jan. 29, 1938.
Portugal. Jan. 13, 1938. *T. I. B.*, Feb. 1938, pp. 49-50.
- MOTOR VEHICLES TAXATION.** Geneva, March 30, 1931.
Adhesions:
Straits Settlements, Federated Malay States (4). Unfederated Malay States (5). Nov. 6, 1937. *L. N. O. J.*, Jan. 1938, p. 6.
- NARCOTIC DRUG TRAFFIC.** Procès verbal, Geneva, June 26, 1936.
Signatures:
Colombia. Nov. 30, 1937.
Latvia. Dec. 13, 1937. *L. N. O. J.*, Jan. 1938, p. 8.
Ratification: Belgium (with reservation). Nov. 27, 1937. *L. N. O. J.*, Jan. 1938, p. 7.
Ratification deposited: Greece. Oct. 14, 1937. *T. I. B.*, March, 1938, p. 65.
- NIGHT WORK OF WOMEN.** Washington, Nov. 28, 1919. Revised, 1934.
Ratification: France. Jan. 25, 1938. *T. I. B.*, March, 1938, p. 73.
- NON-INTERVENTION.** Buenos Aires, Dec. 23, 1936.
Adhesion: Honduras. Nov. 26, 1937.
Ratification deposited: Venezuela. Dec. 22, 1937. *T. I. B.*, Jan. 1938, p. 3.
- NORTH AMERICAN REGIONAL BROADCASTING.** Havana, Dec. 13, 1937.
Text: *Revista de derecho int.*, March, 1938, pp. 41-105.
Ratification deposited: Cuba. Jan. 12, 1938. *T. I. B.*, Feb. 1938, p. 52.
- PAN AMERICAN HIGHWAY.** Buenos Aires, Dec. 23, 1936.
Ratification deposited: Mexico. Dec. 23, 1937. *T. I. B.*, Jan. 1938, p. 28.
- PARCEL POST.** Cairo, Mar. 20, 1934.
Ratifications deposited:
Honduras. Jan. 29, 1938.
Portugal. Jan. 13, 1938. *T. I. B.*, Feb. 1938, pp. 49-50.
- PARCEL POST.** Panama, Dec. 22, 1936.
Adhesions:
Dominican Republic. Dec. 21, 1937. *T. I. B.*, March, 1938, p. 74.
Peru. Jan. 21, 1938. *T. I. B.*, Feb. 1938, p. 50.
- PEACE ON THE AMERICAN CONTINENT.** Buenos Aires, Dec. 23, 1936.
Adhesion: Honduras (with reservation). Nov. 26, 1937. *T. I. B.*, Jan. 1938, p. 2.
- POSTAL COLLECTION ACCOUNTS.** Cairo, March 20, 1934.
Ratifications deposited:
Honduras. Jan. 29, 1938.
Portugal. Jan. 13, 1938. *T. I. B.*, Feb. 1938, pp. 49-50.
- POSTAL CONVENTION.** Cairo, March 20, 1934.
Ratifications deposited:
Honduras. Jan. 29, 1938.
Portugal. Jan. 13, 1938. *T. I. B.*, Feb. 1938, pp. 49-50.
- POSTAL SUBSCRIPTIONS TO NEWSPAPERS.** Cairo, March 20, 1934.
Ratifications deposited:
Honduras. Jan. 29, 1938.
Portugal. Jan. 13, 1938. *T. I. B.*, Feb. 1938, pp. 49-50.

POSTAL TRANSFERS. Cairo, March 20, 1934.

Ratifications deposited:

Honduras. Jan. 29, 1938.

Portugal. Jan. 13, 1938. *T. I. B.*, Feb. 1938, pp. 49-50.

POSTAL UNION OF THE AMERICAS AND SPAIN. Panama, Dec. 22, 1936.

Adhesion: Peru. Jan. 21, 1938. *T. I. B.*, Feb. 1938, p. 50.*Ratification deposited:* Venezuela. Sept. 29, 1937. *T. I. B.*, March, 1938, p. 74.

PREVENTION OF CONTROVERSIES. Buenos Aires, Dec. 23, 1936.

Ratification deposited: Cuba. Dec. 27, 1937. *T. I. B.*, March, 1938, p. 61.

PUBLIC INSTRUCTION. Buenos Aires, Dec. 23, 1936.

Adhesions:

Brazil. Feb. 5, 1938.

Honduras. Nov. 26, 1937. *T. I. B.*, Feb. 1938, p. 40.*Ratification deposited:* Mexico. March 16, 1938. *T. I. B.*, March, 1938, p. 63.

RADIO COMMUNICATIONS REGULATIONS AND PROTOCOL. Madrid, Dec. 9, 1932.

Ratification deposited: Brazil. Jan. 21, 1938. *T. I. B.*, Feb. 1938, p. 51.

SAFETY AT SEA. London, May 31, 1929.

Adhesion deposited: Greece. Feb. 20, 1938. *T. I. B.*, March, 1938, p. 66.

SANITARY CONVENTION FOR AERIAL NAVIGATION. The Hague, April 12, 1933.

Adhesion deposited: South Africa. Jan. 29, 1938. *T. I. B.*, Feb. 1938, p. 41.

SEAMEN'S ARTICLES OF AGREEMENT. Geneva, June 24, 1926.

Ratification: The Netherlands. Dec. 15, 1937. *T. I. B.*, Jan. 1938, p. 25; *L. N. O. J.*, Jan. 1938, p. 9.

SMUGGLING. Buenos Aires, June 19, 1935.

Ratification deposited: Brazil. Feb. 1, 1938. *T. I. B.*, March, 1938, p. 71.

STRAITS CONVENTION. Montreux, July 20, 1936.

Adhesion: Italy (with reservation). May 2, 1938. *B. I. N.*, May 7, 1938, p. 419.

SUBMARINES IN WAR. Procès Verbal. London, Nov. 6, 1936.

*Adhesions:*Brazil. Dec. 31, 1937. *T. I. B.*, March, 1938, p. 62.Hungary. Dec. 8, 1937. *T. I. B.*, Feb. 1938, p. 38.

Iraq. Dec. 27, 1937.

Latvia. Feb. 18, 1938.

Lithuania. Jan. 27, 1938. *T. I. B.*, March, 1938, p. 62.

Mexico. Jan. 3, 1938.

El Salvador. Nov. 24, 1937. *T. I. B.*, Feb. 1938, p. 38.

SUGAR PRODUCTION AND MARKETING. London, May 6, 1937.

Adhesion: Brazil. Jan. 26, 1938.*Ratifications:*Haiti. Dec. 29, 1937. *T. I. B.*, Feb. 1938, p. 44.

Philippine Islands. March 22, 1938.

United States (with reservation). March 22, 1938. *T. I. B.*, March, 1938, p. 67.*Ratifications deposited:*India. Jan. 13, 1938. *T. I. B.*, Feb. 1938, p. 44.Russia. Feb. 26, 1938. *T. I. B.*, March, 1938, p. 67.

TELECOMMUNICATIONS. Madrid, Dec. 9, 1932.

Ratifications:

France. March 5, 1938. *T. I. B.*, March, 1938, p. 74.

Portugal. Jan. 10, 1938.

Rumania. *T. I. B.*, Feb. 1938, p. 51.

TELEGRAPH REGULATIONS AND PROTOCOL. Madrid, Dec. 10, 1932.

Ratification deposited: Brazil. Jan. 21, 1938. *T. I. B.*, Feb. 1938, p. 51.

TRAVELERS AND BAGGAGE TRANSPORT BY RAILWAY. Rome, Nov. 23, 1933.

Promulgation: France. Jan. 12, 1938. *Revue int. française du droit des gens*, Jan./Feb. 1938, p. 62.

UNDERGROUND WORK (WOMEN) CONVENTION. Geneva, June 4, 1935.

Ratifications:

Finland. March 3, 1938. *T. I. B.*, March, 1938, p. 73.

France. Jan. 25, 1938. *T. I. B.*, Feb. 1938, p. 49.

Mexico. Feb. 21, 1938. *T. I. B.*, March, 1938, p. 73.

UNEMPLOYMENT INDEMNITY IN CASE OF LOSS OF SHIP. Genoa, July 9, 1920.

Ratifications:

Denmark (exclusive of Greenland). Feb. 15, 1938. *T. I. B.*, March, 1938, p. 72.

The Netherlands. Dec. 15, 1937. *T. I. B.*, Jan. 1938, p. 25.

WEEKLY REST IN INDUSTRY. Geneva, Nov. 17, 1921.

Ratification: Mexico. Jan. 7, 1938. *T. I. B.*, Jan. 1938, p. 25; *L. N. O. J.*, Jan. 1938, p. 9.

WHALING. Final Act. London, June 8, 1937.

Adhesion: Mexico (effective provisionally). Feb. 9, 1938. *T. I. B.*, March, 1938, pp. 71-72.

WHITE LEAD IN PAINT. Geneva, Nov. 19, 1921.

Ratification: Mexico. Jan. 7, 1938. *T. I. B.*, Jan. 1938, p. 25; *L. N. O. J.*, Jan. 1938, p. 8.

DOROTHY R. DART

IN ARBITRATION

Claim of EDWARD J. RYAN, Trustee in Bankruptcy of the INTEROCEAN
TRANSPORTATION COMPANY OF AMERICA, INCORPORATED, *vs.* THE
UNITED STATES OF AMERICA

Under Treaty Series No. 756, May 19, 1927

ARRANGEMENT EFFECTED BY EXCHANGE OF NOTES BETWEEN THE UNITED
STATES AND GREAT BRITAIN FOR THE DISPOSAL OF CERTAIN PECUNIARY
CLAIMS ARISING OUT OF THE RECENT WAR

REPORT AND DECISION OF
JUDGE JOSEPH C. HUTCHESON, JR.*

SOLE ARBITRATOR

Claim for damages for detention of the *S.S. Lisman* in a British port during the World War rejected.

The failure of the claimant to exhaust his remedies in the British prize courts is not a bar to the prosecution of his claim under the agreement of 1927 between Great Britain and the United States.

By the position claimant deliberately took in the British Prize Court that the seizure of the goods and the detention of the ship were lawful, and that he did not complain of them but only of undue delay from the failure of the Government to act promptly, claimant affirmed what he now denies and thereby prevented himself from recovery there and here upon the claim he now stands on that these acts were unlawful and constitute the basis of his claim. Consequently, all questions of contraband and of probable cause, of the validity or invalidity of Orders in Council, of the Reprisals Orders, and of the blockade measures, disappear from the case.

Claimant stands here with the only possible basis for his claim that the judgment of the Prize Court that the detention and delay was not undue, was a denial of justice. Upon the record, the arbitrator finds that the judgment of the Prize Court was just and reasonable and that there is no merit in the claim.

THE PROCEEDING

This is an arbitration proceeding commenced and prosecuted by agreement between claimant and the United States, to secure a determination as to whether the claim asserted is satisfiable, under the agreement of May, 1927, between the two Governments for the satisfaction by the United States of certain war damage claims against Great Britain. This is the diplomatic background.

In November, 1919, the Trustee's claim in the British Prize Court for damages suffered through British war measures was rejected and dismissed. An application for appeal belatedly made was, on March 9, 1920, granted, fixing the security at £350 and the time for appealing at three months. Instead of prosecuting his appeal from the judgment of the President rejecting and dismissing his claim, the Trustee allowed the time for appealing to expire, and in August, 1920, turned his efforts to securing its satisfaction as a diplomatic claim.

* United States Circuit Court of Appeals, Fifth Judicial Circuit. Decision transmitted to the Department of State by the Arbitrator, Oct. 5, 1937. Headnote inserted by the Editor.

On March 1, 1920, the application was returned by the Department of State, with certain observations as to its proper preparation, but it was never presented to the British Government nor espoused by the United States for presentation.

On May 19, 1927, by an Exchange of Notes, the United States and Great Britain effected an arrangement for the disposal of certain pecuniary claims against each Government, arising out of the World War. One of its terms was that neither Government would present any diplomatic claim or request international arbitration on behalf of any of its nationals alleging loss or damage through the war measures adopted by the other. Another was that the United States would, under named circumstances and conditions, itself satisfy such claims of its nationals against Great Britain as it deemed meritorious.

Thereafter, the claim was attentively considered by the Department in the light of the Agreement, and definitely dismissed as unfounded, in its letter of May 24, 1929, concluding as follows:—

The Department has carefully examined the record of the claim in the British Prize Court, and is of the opinion that neither the proceedings in that court, nor the detention of the vessel under the attending circumstances, constitutes proper grounds for reclamation.

The claim being further pressed, was again rejected by Department letter of November, 1933.

In 1934, after further extensive discussion, claimant and the Department agreed: that claimant would furnish the Department with a complete statement of his case, and the Department would reply; that briefs would then be exchanged, and in case the Department and claimant could not reach an agreement on the merits of the claim, it would be referred for arbitration to a sole arbitrator.

No agreement on the merits having been reached, and the parties having agreed upon and selected an arbitrator, the matter now stands for decision and award before him, under an Agreement for Arbitration, couched in the broadest terms.

By it, without limitation upon, or direction of any kind as to, the exercise of his powers, the parties submit to the arbitrament, and the final and irrevocable decision of the Arbitrator, all questions, whether of substance or of procedure, arising under the Agreement. A preliminary statement is therefore in order, not only generally, as to the function and duties of the Arbitrator, the methods and processes by which they are to be sustained and discharged, the scope and sweep of the inquiry into and the search for the facts and principles upon which the decision will depend, but also specifically as to the nature and grounds of the questions for decision, and the sources of their answering.

This may be briefly and adequately made by saying that this is an arbitration, not a mediation, the end sought not conciliation, but a determina-

tion according to law. In this proceeding therefore the function and duties of the Arbitrator are those of the judge, not those of the mediator; the methods and processes of decision judicial, not mediatorial.¹ The scope and sweep of the inquiry and search, into the facts and the law, must therefore be as wide and as free as, but no wider nor freer than, judicial methods and processes permit and enjoin.

Since the wrongs complained of are charged not against the United States, but against Great Britain, and the claimant must therefore stand or fall by whether the claim is satisfiable by the United States under the 1927 arrangement between the two Governments, the nature and grounds of the questions for decision, together with the sources of their answering, are to be sought in and determined by the 1927 Exchange of Notes, and the full facts of complainant's claim, including of course the greatly important Prize Court proceedings. These, in turn, are to be read, examined, and interpreted in the light of the applicable principles of international law, as that law existed in 1915, when the acts complained of are alleged to have transpired, the wrongs complained of to have been inflicted, and the claim, if ever, arose.

THE EXCHANGE OF NOTES

By the Exchange of Notes the Governments agreed:

(1) That, with exceptions not material here, neither would claim against the other for war supplies furnished, services rendered, or damages sustained, all such accounts to be regarded as closed and settled.

(2) That "neither will present any diplomatic claim or request international arbitration on behalf of any national alleging loss or damage through the war measures adopted by the other, any such national to be referred for remedy to the appropriate judicial or administrative tribunal of the Government against which the claim is alleged to lie, and the decision of such tribunal, or of the appellate tribunal, if any, to be regarded as the final settlement of such claim," it being understood that the British Prize Courts shall remain open, and the Government of the United States will use its best endeavors to secure in its own tribunals, to British nationals having claims, the same rights and remedies which may be enjoyed by American nationals, in British tribunals, under similar circumstances.

(3) That the judicial position of neither Government is prejudiced by the Agreement, each Government reserving full right to take the position it may deem appropriate with respect to the legality or illegality under international law of measures giving rise to claims referred to in the Agreement.

(4) That the Government of the United States realizes that the effect of the Agreement is to save to the United States certain sums of money, and

¹ *The Paquete Habana*, 175 U. S. 677; Moore, Int. Law Digest, Sec. 1069; " 'Arbitration' as a Term of International Law," T. W. Balch, 15 Columbia Law Review, p. 590; Private Law Sources, and Analogies of International Law, Lauterpacht, Chap. 3, pp. 60-71.

that it will regard the net amount saved to it thereby as intended for the satisfaction of those claims of American nationals for loss or damage, through war measures, "which the Government of the United States regards as meritorious, and (a) in which the claimants have exhausted their legal remedies in British courts; or (b) in which no legal remedy is open to them, or (c) in respect of which, for other reasons, the equitable construction of the present agreement calls for a settlement."

(5) That the United States will recommend such action by Congress as will insure the utilization for the purpose just mentioned, of the sums saved to the United States under the provisions of the Agreement.

The effect of these provisions was to work an accord and satisfaction, and to completely close the books except as therein specified, as to claims of the Governments against each other, so that neither should thereafter make claim against the other for war damages, either on its own account or on behalf of its nationals.

As to these claims, with the exceptions noted in it, the Agreement constituted an accord and satisfaction. As to the claims of the nationals of each Government to satisfaction by the other of war damage claims against it, full access to prize courts and similar municipal tribunals, and the full enjoyment of the remedies afforded by them, was reserved and assured. As to the claims of American nationals, not only was full resort to British Prize Courts reserved to them, but in addition, the effect of the Agreement was to provide that those remedies having been exhausted without success, the United States, having relieved Great Britain from accountability to her therefor, would stand answerable for, and would satisfy, in Great Britain's stead, all claims for which, but for the Agreement, Great Britain would be answerable by international law.

The intent and purpose, and therefore the effect of the Agreement, is quite obvious. It was, while doing away with diplomatic representations by the United States as to, and international arbitration of, war claims against Great Britain on behalf of American nationals, to preserve to such nationals the full substance of their claims. This was accomplished first, by not releasing Great Britain from, but holding her strictly to, accountability in the British Prize Courts. Second, the remedies in these courts having been exhausted without success, the United States were substituted for Great Britain as respondents, and made answerable in Great Britain's stead for all claims for which, but for the 1927 Agreement, Great Britain would, the prize proceedings notwithstanding, be liable by international law. The Agreement thus left Great Britain still liable to satisfy all claims adjudicated against her in her Prize Courts. It released her from, and made the United States liable in her stead for, such claims as, notwithstanding exoneration in her Prize Courts, Great Britain would have been answerable for under international law, through diplomatic representation or arbitration. Thus the Agreement draws and maintains the distinction between Great Britain's

liability to respond in Prize Court proceedings, to awards in favor of American nationals claiming for themselves,² and her diplomatic answerability to the American Government for claims for wrongs done to the nation through injury to its nationals.³

Thus, too, in providing for the presentation against the United States of an international "as if" claim, in which the United States should stand in Great Britain's stead, the Agreement not only saves to American nationals their rights against Great Britain in her Prize Courts, but if their claims are well founded in international law, it also saves to them in substance and effect, their espousal by the United States as international claims. For though the Agreement does restrictively provide that the "net amount saved" will be regarded as intended for the satisfaction of claims of American nationals," *which the Government of the United States regards as meritorious*" and "*in which the claimants have exhausted their legal remedies in British courts*" (italics mine), by its provision for and insistence upon an equitable construction of the Agreement in the consideration and disposition of the "as if" claims it thus authorizes, it assures to those claiming that their claims will be disposed of not upon formal and technical considerations, but upon those of substantial justice, and that if a claim has substance, no merely formal failure to precisely and literally comply with the Agreement terms, will defeat it.

By the Agreement, in short, upon considerations deemed sufficient, the Government of the United States (1) completely releases Great Britain from answerability to it, as well on claims due it for loss to its nationals as on claims for loss, debt, or damage due directly to itself; (2) holds her to full answerability to American nationals in British Prize Courts; (3) holds itself as to war claims of its nationals who, having real, not illusory remedies in the British Prize Courts, have exhausted them, answerable in Great Britain's stead to the same extent, but no further, than Great Britain would have been answerable upon such claims, but for the 1927 Agreement.

So apprehended, the Agreement is consistent with itself, and with national honor and fair dealing. So apprehended, it is consistent with the generally recognized view and practice of international law, that when local remedies are really, not merely apparently, available in the courts of the nation claimed against, these should be first exhausted, and resort had to diplomatic representation or arbitration only where the local proceedings have resulted in a denial of justice according to international law.

The Arbitrator is of the opinion therefore, that the provision for satisfac-

² In such instances, the claim presented, the obligation adjudicated, is in legal cognizance not a governmental, but an individual claim; the amount claimed is owed not to a government but to the individual claiming.

³ Claims of this kind, though they take their substance from, and are concentered in, particular injuries to individuals, are in legal cognizance not individual, but national claims, the amounts claimed are owed by the government claimed against not to individuals, but to the government claiming.

tion of claims "which the Government of the United States regards as meritorious" binds the United States to regard as meritorious claims which are in fact and in law so, and the provision that the Agreement shall apply to claims "in which the claimants have exhausted their legal remedies in British courts" must be interpreted equitably, as not requiring a vain and foolish thing. Particularly must it be interpreted as not requiring a claimant to avail himself of and exhaust remedies in the Prize Courts, when, by a settled course of decision, those remedies have been, as to a particular claim rendered illusory, and it is known in advance that an appeal to or from decisions in them, would be fruitless and futile.

The Arbitrator is of the opinion, on the other hand, that since the United States agreed to apply the sums saved by the settlement with Great Britain to those claims alone which had been denied satisfaction in the British Prize Courts, a claimant who has not pursued Great Britain there to the exhaustion of his remedies, is without standing to press a claim against the United States under the 1927 Agreement unless, by showing that such pursuit would inevitably have been vain and fruitless, he can explain and excuse his failure to do so. In short, a claimant, to have standing under that Agreement must show clearly and affirmatively (a) that he has exhausted his remedies in the British Prize Courts, and (b) that the complaint he makes is supported by principles of international law, neglected, disregarded, or violated in those courts; or (c) he must show that though he has not exhausted his remedies there, he did not do so because the remedies offered were not real, but illusory ones, and it would have been vain and foolish to have pursued them.

Thus, though claimant's failure to pursue his remedies against Great Britain to exhaustion in the British courts, by appealing from the adverse decision in prize of the President, is *prima facie* a bar to his right to prosecute his claim, it is open to claimant to show that he did not do so because the settled course of decision in those courts had already predetermined the judgment on appeal, and that if he had appealed, he would inevitably have stood as he stands now, with judgment in prize against him.

The Arbitrator, then, rejects as untenable the extreme positions claimant and respondent respectively take as to the effect of the provision for the exhaustion of remedies. On respondent's part, it is insisted that, because claimant having, without, as required by the Agreement, exhausting his remedies in the British courts by appealing from the adverse decision, resorted to diplomatic efforts, he is without standing to claim under it, while claimant urges that the Agreement provision for the exhaustion of remedies in British courts should be wholly disregarded, the question submitted to arbitration, examined as though that provision did not exist. Rejecting both positions, the Arbitrator proceeds to an examination of the questions the arbitration raises, in the light of all the facts, including of course, the Prize Court proceedings, and of the law applicable to the facts.

THE FACTS

(1) The Interocean Transportation Company was organized in and under the laws of the State of New York, in January, 1915. Its capital stock of \$5,000, divided into five hundred shares of the value of \$10 each, was issued to Hyman Epstein, a naturalized citizen residing in New York, who on June 5 of that year transferred 498 shares to his wife, and one share to his daughter.

(2) On April 18, 1915, the company entered into a twelve months charter party with the Shawmut Steamship Company of Boston, Massachusetts, for the hire at \$7,500 a month, each payable in advance, of the *Lisman* and three other vessels, the *Seaconnet*, the *Penobscot* and the *Harper*, and the payment of provisions, wages, etc. To protect itself in the payment of the charter hire and other payments, and in the carrying out of the charter terms, the Shawmut Company required a deposit as to each vessel, of \$20,000 to be made before its sailing, and to be maintained, from which the owner might draw, after a default of five days, any amount due it. It reserved, too, the option of canceling the charter of any vessel for the charterer's default in any of its obligations, as to that vessel. The *Lisman* and the *Seaconnet* were to be and were delivered in April. As to the *Penobscot* and the *Harper*, which were to be delivered in May, the record is silent as to whether they were ever delivered, and as to any voyages they made.

The record is most meager as to how the company, with its small capitalization, undertook or expected to finance its business. The record merely shows that considerable sums, in excess of \$500,000, were deposited in and withdrawn from various New York banks, but for what account or for what purpose used, there is no clear showing. The record also shows borrowings on promissory notes between April and July, 1915, amounting to \$52,000. Part of these borrowings were for financing and operating the *Seaconnet*, the record showing the formation of a small holding company, the assignment of the charter to it under an operating agreement with Interocean, and the borrowing of \$10,000 for that purpose. Too, the affidavit of Epstein, filed with the claim, shows that the company was operating on a shoestring, and very close to the wind; that of the \$35,000 freight money received for the *Lisman's* first voyage, \$25,000 was paid to the Shawmut Steamship Company, \$15,000 of this was for two months hire, viz.: from April 22nd to June 22nd, and \$10,000 was deposited as part of the \$20,000 security required by the charter party, payment of the remaining \$10,000 being deferred upon the company's giving a promissory note for it; that the company looked to the \$25,000 which it was to secure as freight money for the return cargo to pay the charter hire which was to fall due on the 22nd of June; that claimants were therefore compelled to delay the payment of the charter hire, and in August, the owners, proceeding under the terms of the charter party, withdrew the ship from the charter and took possession of it.

(3) The *Lisman* was delivered to the Interocean Transportation Company on April 22, 1915, at Pier No. 3, North River, New York.⁴

(4) The Declaration of London, Order in Council, August, 1914, as modified by the Order of October 29, 1914, the contraband proclamations of August, September, October and December, 1914, and of March, 1915, and the reprisals Order in Council of March 11, 1915, being then in force, and the British Government being actively engaged in carrying out its program of preventing shipments of contraband and other goods from reaching Germany, the Interocean Company took precautions to avoid contravening British regulations, practices and arrangements relating to goods destined to Rotterdam and other neutral ports in countries adjacent to Germany. Among these arrangements and practices, formal and informal, was a requirement that goods, especially of contraband, destined to Holland must, in order to insure their not reaching Germany, be consigned with its prior consent, to the Netherlands Overseas Trust, which, at least at first, would take consignments of contraband only.⁵ Another was that ships be loaded under the inspection of the British Consul General.

(5) The Interocean Company therefore paid \$365 for a consular inspection and certificate that everything was in order, and on May 22, 1915, cleared from New York with a cargo of a general nature destined a part to London, a part to Rotterdam. 1,000 barrels of phosphate of soda of the Rotterdam cargo was consigned to John Otten and Zoon; 4,172 bags of coffee, to Paul Ledeboer, Amsterdam; 5,267 dry hides to Schmoll, Fils and Company, Rotterdam; 86 bales of tobacco, and 36,110 oak staves to Verburgh and Zoon, while the balance of the Rotterdam cargo, some absolute, the rest conditional contraband, was consigned to the Netherlands Overseas Trust,⁶ without, however, prior arrangement with that company, and therefore without its knowledge and consent.

(6) In addition to the usual bill of lading provisions exempting the carrier from liability for losses due to arrest, restraint, capture, seizure, detention or interference by any power, ruler or people, the bill of lading contained provisions authorizing the master at his discretion, in case of war, etc., which would make it unsafe to proceed on or continue the voyage, to abandon the voyage and unload the cargo at any port, at the expense of, and without

⁴ On April 27, 1915, it was duly registered with Charles Smith as master, and the Philadelphia Trust Deposit and Insurance Company Trustee, as owner. The Shawmut Company was, however, in 1915 in control of the *Lisman* and its sister ships, and was, in fact, the real owner. The significance of the registry in the name of the Philadelphia Trust Safe Deposit and Insurance Company is that this company was on the list of banks and banking agencies which were remitting to enemy countries, and the point is made that this registry made the ownership and control of the *Lisman* sufficiently obscure to be a matter of concern to the British Government at the time the vessel cleared from New York.

⁵ Foreign Relations, Supp., 1915, pp. 269-270-271, 273; Claimant's Memorial, p. 46; Foreign Relations, Supp., 1914, pp. 269-270, 1915, p. 138.

⁶ Claimant's Annex, p. 123.

responsibility to, the shippers, all charges on account of such action to be paid by the shipper, consignee, or assigns, and to be a lien upon the goods.

(7) The vessel arrived at the West India Dock in London at midnight on June 8, and on June 9 began discharging its London cargo. On June 11 the cargo list was examined by the Contraband Committee, and the customs authorities were instructed to discharge 1,000 barrels of phosphate of soda. On June 12 the phosphate of soda was discharged and placed in the Prize Court, and the captain was notified that certain of the goods consigned to others than the Netherlands Overseas Trust, to-wit, the coffee, tobacco and staves, all on the contraband list, must be either discharged or reconsigned to the Trust, before his steamer could clear.

(8) On June 9 the company appealed to the Department of State for assistance. On June 16 the items ordered discharged or reconsigned being still on board, but the London cargo not having been unloaded, the captain applied for, but was refused, clearance. Negotiations then and thereafter on foot for reconsignment to the Trust failed, in part because of the Trust's general unwillingness at that time, to give guarantees to the British Government for cargo carried on other than Dutch steamers, but in part because, though the balance of the cargo had been consigned to the Trust, this had been done without its knowledge or consent, and the Trust was unwilling to accept reconsignment of the contraband without a guarantee in the form of a deposit of 100,000 guilders (about \$40,000) that the *Lisman* would not take the cargo to Germany.

(9) Continuing to discharge its London cargo, the ship accomplished this on June 19, but in the meantime complaining that the detention of the *Lisman* for want of clearance papers was causing it a loss of \$2,000 a day, the company through diplomatic channels and otherwise, undertook to obtain the ship's release. Among other things, the company on June 22, took up the question of its right to discharge and the cost of transshipping the cargo, and on June 24 it was advised that under the bill of lading it could discharge the cargo at the risk and expense of the cargo owners. From that time forward the owners of the ship pursued a changing and vacillating policy. On June 25 the agent was ordered to transship; on the following day this order was countermanded with the advice that "conditions required the *Lisman* to go to Rotterdam."

(10) While the master had been notified as early as June 12 that he could not get a clearance unless he would discharge or consign to the Trust certain items of contraband in his cargo, no action was taken while they were on board to seize them, or put them in the Prize Court. On June 30 the company sought permission to have the vessel take the interdicted items to Rotterdam, unload their other cargo there, and return with them to New York, but on July 2 it instructed its London agent to discharge all cargo and store it at the disposal of the consignees, subject to the payment of pro rata expenses, including demurrage at \$2,000 per day. On July 3 the ship had

partly discharged the coffee, staves and tobacco. On the 8th the turpentine, tanning extract, hides, coffee, staves and tobacco were seized for the Prize Court. The discharge of these items being completed on July 8, the *Lisman* departed on July 9 for Greenhithe, where it was to load a return cargo.

(11) On July 14 the company countermanded all previous instructions as to claims against the cargo, and ordered all cargo liens released.

On July 20 the company, in a letter to its London solicitors requesting them to make claim for damages for the detention of the *Lisman*, thus stated their claim:

As a result of being forced to unload the Rotterdam cargo at London, we lost the friendship of our shippers who have since refused to deliver freight to us at a great loss. Our losses, demurrage \$2,000 per day for each day from the time we were ordered to remove phosphate, tobacco, oak staves and coffee should be claimed from the British Government, traveling expenses of our representative, our attorneys fees, all amounting to about \$5,000, are to be added to the claim. Also we had arranged another outward cargo, having expected her here July 1, and were forced to hand over the cargo to other steamship companies at a loss.

Copy of this letter, including a full set of papers on both the *Seaconnet* and the *Lisman*, both of which had sailed about the same time, and both of which had been detained in British ports because of contraband on board believed to be destined to the enemy,⁷ were on the same day sent to the United States Consul General at London.

By July 23 the *Lisman* had loaded a cargo for New York, and had obtained clearance. On August 9 she arrived at Boston, and the charter hire being still in default, the charter was canceled and the use and control of the ship was taken by the Shawmut Company for failure of the Interocean Company to meet the payments under the charter party.

While these things were transpiring with regard to the *Lisman*, the *Seaconnet* was also in difficulties. Clearing from New York with a general cargo for Christiania, Copenhagen and Gothenburg, she was taken off her course on June 14 and detained at Kirkwall from June 16 to 19, and docked at North Shields on June 21. Her discharging and the reloading of her cargo was completed on July 5. Clearance was granted on July 8, and the ship left North Shields July 9.⁸ On September 27, 1915, the Interocean Company was adjudicated an involuntary bankrupt. The bankruptcy proceed-

⁷ Claimant's Memorial, p. 69, its Annex, 42; cf. *The Seaconnet*, Lloyd's List Law Reports, Vol. 2, p. 260.

⁸ The claim in the Prize Court on account of this detention as reported in Lloyd's List Law Reports, Vol. 2, p. 260, was a claim for \$3,700 a day for 27 days undue detention. It appeared that 900 tons of the cargo discharged at North Shields were, upon the admission of counsel for claimants, contraband destined for Germany. It was found that there was no undue detention and the claim was dismissed with costs. The record does not show what finally became of the *Seaconnet*. It does show that on September 27, 1915, the Interocean Transportation Company, charterer of the *Lisman* and the *Seaconnet*, was adjudicated an involuntary bankrupt.

ings, because, no doubt, of this undisposed of claim, its main, if not its sole asset, have been since pending.

(12) IN THE BRITISH PRIZE COURT

(A) THE PRELIMINARY PROCEEDINGS

On July 29, 1915, Waltons & Co., as solicitors for claimants, entered an appearance in the prize proceedings for the owners of the *Lisman*, for "damages for detention and discharging expenses." On May 1, 1916, the claim of the company was filed "for costs, expenses, losses, damages and demurrage which have arisen, and shall or may arise, by reason of the seizure and detention of the ship, and of the discharge of the cargo, and for a declaration that the claimants are entitled to compensation in respect thereof." The grounds of the claim are—(1) the ship was a neutral ship, and was engaged in carrying cargo from a neutral port to a British port, and a neutral port, for delivery there. (2) That the cargo was not liable to capture, seizure, detention or condemnation. (3) That the part destined for Holland was consigned in the bill of lading to named consignees there. (4) That it was loaded under the supervision of inspectors appointed by the British Consul General at New York, and affidavits were given to claimants by all the shippers that the goods were intended to be used in Holland only, and not to be re-exported. (5) That the cargo consigned to Holland was neutral property, and of neutral origin, and had no enemy destination. (6) That the ship was properly documented. (7) It was unduly detained. (8) The claim for damages was for the loss of the use of the vessel, in the loss of large profits which it would have earned but for the seizure, discharge and detention, and the benefit of a part of the charter which was cancelled by the owners of the ship. There was a prayer for damages, demurrage, and compensation for their losses, but nowhere in the record does it appear what amount was claimed, or what items made it up. It does appear, however, from *Lloyd's List Law Reports* of March 9, 1920, Vol. 2, p. 397, on application for the allowance of the right to appeal that there was claimed for the detention a very large sum, involving an amount of some \$600,000. On December 17, 1916, the Trustee filed an affidavit setting forth a statement of the facts upon which he based his claim.

On April 30, 1918, and on December 4, 1918, affidavits of Post and Bloch were filed in support of the claim. These affidavits alleged that the company's credit had been seriously impaired by the detention, because of notice that the ship could not be placed on berth when expected, and the shippers thought that all of the ships operated by the company might be detained. These affidavits further declared that the company relied upon freight to be collected on account of the various commitments above referred to, to pay its operating expenses; that it had full freight commitments for three outward voyages, the first planned for July 1, the second for August 15, and the third for October 1, 1915. On June 21 and July 10 and 18 affidavits of

British agents setting forth the facts relating to the investigation of the cargo, the seizure, and efforts made to effect the desired reconsignment, were made and filed. Other affidavits were filed in that year, but the case did not come up for hearing until November, 1919.

(B) THE HEARING IN THE PRIZE COURT

As reported in *Lloyd's List Law Reports*, Vol. 1, pp. 455 *et seq.*, the following significant facts are shown.

(1) This was a claim against the Crown by the owners of the *Lisman* for damages, for detention of the ship owing to the seizure of its cargo. (2) On November 18, 1919, Mr. Balloch, instructed by Messrs. Waltons & Co., for the claimants, stated the contention of the complainants as follows:

The seizure took place in London, in June, 1915, and the complaint of the claimants was not that there was not reasonable cause for seizure, or for requiring the goods to be discharged, but that there was undue delay on the part of the Crown in taking the steps they were entitled to take as belligerents. Some of the goods were contraband, and some were not, and the latter were dealt with under the Reprisals Order of Feb. 11, 1915. There were two writs. One concerned 1,000 barrels of phosphate of soda, shipped by a chemical company, which were not contraband. They came within the Reprisals Order and there was no claim for condemnation. The second writ dealt with turpentine, tanning extracts, hides and coffee, some of which were contraband, and oak staves and tobacco, which were not.

Mr. Balloch further said, that the claim was for thirty-two days; that one had to recognize that it would have taken about nine days to discharge the cargo, hence there was at least twenty-three days delay.

(3) On November 19 Mr. Balloch, after drawing the attention of the President to, and discussing the filed affidavits which were material to the case, thus summarized his claim.

The Crown, as a belligerent, had a right to require the non-contraband goods to be discharged if they were enemy property, or had an enemy destination under the Reprisals Order of March 11, 1915. Under that Order no penalty was imposed on the ship. It was not regarded as committing any wrong in carrying goods with an enemy destination if they were not contraband. With regard to conditional contraband, the Crown also had the right to require the goods to be discharged and to seize them as prize. With regard to the ship, the ship was not a wrong-doer *quo ad* the carriage of contraband, unless it were shown the ship had knowledge of the guilty character of the particular goods. If that be shown, the ship was subject to confiscation for carrying contraband with knowledge. That was not asserted in this case, and no proceedings were taken against the ship, so that the ship was entitled to be regarded as an innocent party in this transaction. The goods were liable partly to be dealt with under the Reprisals Order, and partly to be dealt with as contraband.

It was no part of the claimants' case that the action of the British

authorities was unreasonable. No claim for costs and damages would lie against them for improper seizure.

The position was this: True, the Crown had a right to seize and require these goods to be discharged if there were reasonable suspicion; but that suspicion and that right to discharge arose from the goods, and the goods alone. The shipowner was not concerned with that, and if the Crown sought to exercise belligerent rights, the Crown must do so with every regard to the interests of the innocent shipowner, and claimants' case was that the Crown or the Contraband Committee, with the knowledge possessed by June 11, ought to have made up their minds as between themselves and the owners of the goods, what they were going to do.

The Crown did wrong to detain the ship while negotiations were going on and efforts were being made to decide on the best course to adopt.

(4) Mr. Dunlop, for the Crown, noted that it was now admitted that the Crown had reasonable ground for their action, and in fact, it was abundantly clear that but for the measures taken by the British Government and by the Netherlands Overseas Trust, these goods would have reached Germany. With the exception of the staves and the tobacco, all the goods were contraband.

Mr. Dunlop also denied admitting that the ship or goods were innocent, but on the contrary, he thought the evidence showed that there was ground to suspect that if the vessel went to Rotterdam, it might go to Germany. That the Crown and the Netherlands Trust had not believed the real destination was Rotterdam. He called attention to the fact that four of the parcels were not consigned to the Trust, and the rest of them though consigned to the Trust, were so consigned without its knowledge or consent. That the Crown was not liable unless there had been undue delay in the sense that there had been delay which the exercise of reasonable care could have avoided.

(5) Mr. Balloch, in reply, said he did not say that the authorities were not justified in dealing with the cargo even though the goods were released, but what he did say was that there was undue delay. "Mr. Dunlop," said he, "in referring to the claim in the present case, said the claimants had abandoned the first six grounds of their action. He (Mr. Balloch) quarreled with that statement entirely; he had not abandoned any of those grounds."

He insisted that the claim was but this: that until interfered with by the Crown, it was the duty of the ship to proceed with its cargo; that there was restraint by the Crown, but that it was exercised not straightforwardly and at once, as it should have been, but in a vacillating, uncertain manner, causing undue delay to the ship while waiting for the Crown to make up its mind whether it would seize the goods or let them go forward.

(c) THE PRIZE COURT JUDGMENT

In giving judgment the President, following claimants' own statement of their case, stated it as a claim for undue delay, in relation to the seizure and

detention of various parcels of goods. In the course of rendering his judgment he said:

There is no doubt about the principle which is to be applied here. Wrongful capture may be the cause for an award of damages; wrongful detention may be the cause for an award of damages by the Prize Court, and any wrongful or vexatious act in the course of the exercise of belligerent rights or seizure or detention may give cause for such award.

And again—

It is conceded with regard to the phosphates and the other four parcels of goods, that there was good cause for action on the part of his Majesty's Government. That disposes of any question of there being any wrongful seizure or wrongful detention. But it is said that the Government ought to have acted with a degree of dispatch with which they did not act.

Then, reviewing the claim for undue delay in the light of the whole record, he concluded that it was unfounded, and so concluding dismissed the application for it.

The Damages Claimed

While, as already noted, no itemized statement of the claim in the Prize Court appears in the record, it does appear that large claims were made there, aggregating \$600,000, and there is the affidavit of Post filed in that court in April, 1915, that there was a loss of freight for three outward voyages of \$65,000 for each voyage. In 1920, in the claim filed with the Department, the losses claimed were \$622,871.68. This claim was supported by the affidavit of the Trustee Leventritt, and by an affidavit of Epstein, substantially to the same effect. It was also supported in part by the affidavit of Post of May 12, 1921, that the *Lisman* had three outward bound commitments of \$65,000 for each outward trip. Itemized, the claim was:

(1) 32 days demurrage	\$ 43,871.68
(2) Extra expenses incurred in London	9,000.00
(3) Loss of 3 cargoes and return cargoes	255,000.00
(4) Loss of 3 further outward and 3 further homeward cargoes . . .	315,000.00
	<hr/>
	\$622,871.68

As the claim is presented in the Memorial in 1934, the total is now placed at \$1,218,269.68, with interest at 6% from 1915. This total is itemized as follows:

(a) Loss of use for three outward bound trips at \$165,000 per trip under contracts, less charter hire and expenses (including return)	\$431,113.20
Loss amounting to difference between charter hire and market price of charter for months following cargoes booked	162,500.00
Loss of return cargo from Rotterdam under agreement, and two probable cargoes	75,000.00
Disbursements during detention	12,156.48
	<hr/>
(b) Loss through the inability to exercise right of option to purchase the <i>Lisman</i> at \$225,000	\$537,500.00

In support of all of these items but the last, claimant submits the affidavits of Epstein, Leventritt and Bloch, and a supplementary affidavit of Post, executed in 1934, in which he states that his previous affidavits fixing the commitments for outward-bound freight at \$65,000 were incorrect; that the amount should have been placed at \$165,000. No further explanation is made of the discrepancies in the two accounts, no further reconciliation of them is attempted.

In support of the last item claimant submits the affidavits of Stafford and Avrutis, former officers of the company, made by them in 1934, that in 1915 it had the option to purchase the *Lisman* at \$225,000, and affidavit as to its sale in the year following for \$762,500.

Claimant's Contentions

His admissions in the course of the judicial proceedings in the British Prize Court, that the Crown had a right to seize the goods and require their discharge, that it was no part of the claim that the action of the British authorities in seizing the goods and detaining the ship was in itself unreasonable, and that no claim lay against the Crown except for undue delay, are completely ignored by claimant. His reliance is put here on the wholly inconsistent contention that, the seizure of the goods, and the detention of the ship, were wrongful *ab initio*, an unlawful attack upon neutral commerce, in violation of the law of nations, as set forth in the Declaration of London. His legal position that all the acts of the British Government, during the World War, of which he sweepingly complains, were in violation of international law, seems to be based upon the premise that the London Declaration, though made up of "compromises and mutual concessions," and not to be binding until adopted by those proposing it, and then only as a whole, "was expressive of the view of the nations in 1909 as to the controlling rules of international law" (Claimant's Memorial, p. 13),⁹ and was therefore binding upon neutrals and belligerents alike, and the measure of their respective rights and obligations during the World War.¹⁰

Grounding himself on the Declaration of Paris that a neutral flag covers enemy goods, except contraband of war, and that a blockade to be binding must be effective, and on the Declaration of London in effect discountenancing the doctrine of continuous voyage as to conditional contraband bound to

⁹ Cf. Pyke, *Law of Contraband of War*, Chap. XIII, p. 166; *International Law and the Great War*, Phillipson, Chap. XVIII, pp. 327-9; *Neutrality, its History, Economics and Law*, Vol. III, *The World War Period*, p. 8 (Columbia University Press).

¹⁰ It may be noted here that its adoption was opposed by Great Britain, that the proposal the United States made in August, 1914, that the Declaration be adopted, was not accepted, and that on October 22, 1914, the Government of the United States advised the British Government that it had withdrawn its suggestion that the Declaration of London be adopted as a temporary code of naval warfare, and that "this Government will insist that the rights and duties of the United States and its citizens in the present war be defined by the existing rules of international law, and the treaties of the United States, irrespective of the Declaration of London." *United States Foreign Relations, 1914, Supp.*, pp. 256-7-8.

a neutral port, he roundly rates the British practices of rationing neutral countries; her unprecedented employment of measures for long range or paper blockade, extending in fact, to neutral ports; her reprisals measures; her extension to unprecedented lengths as to absolute, and in violation of the London Declaration as to conditional contraband, of the doctrine of continuous voyage by carriage over land; the sweeping extension by successive Orders in Council of the contraband lists; and finally, the abandonment altogether of the distinction between absolute and conditional contraband. In short, in no manner confining himself to the question for decision here, whether his proof makes out a case of the actual denial to him of the justice which was his due by international law, claimant presents his case largely on the basis of the theoretic or abstract denial of neutral rights inherent in the British position and war measures. He presents it, in short, as though he stood in the lists, representing neutrality, champion of neutral rights in general, opposed by the United States, representing Great Britain, champion of belligerent rights in general.¹¹

Thus, though the case here is not one of search and seizure on the high seas, but of detention in a port to which the ship had voluntarily come, with full knowledge of and in purported voluntary compliance with British Orders in Council, including the March, 1915, Reprisal Order, he brings into review the question raised sharply by the United States while still a neutral, of the binding force of the old practice of preliminary search at sea, and the illegality of the new one of bringing into port for search.¹² Thus, too, though there is no procedural question here of condemning or acquitting the ship in the Prize Court on her papers and evidence alone as against subjecting her to further search to make a case for condemnation against her, he makes an issue of the binding force of the old procedure, of action on the ship's evidence without resort to that of the captor, and of the unlawfulness of the new one under the changed rules, 1915-1920, of action on evidence obtained by the captors on further search and inquiry, for the purpose of getting up a case.¹³

For it must be always kept in mind that the action taken here was based on an examination of the cargo lists while the ship was in the port of London, and not at all upon a seizure at sea, and a taking into port for a rummaging search of the vessel. It must be borne in mind too, that there was never any thought or question here of detaining the ship in order to get up a case to condemn either ship or goods, but only to prevent contraband with a suspected enemy destination, from getting into Germany.

It must be borne in mind, too, that when the ship, unable to give the guarantee required by the N.O.T. as a condition of accepting consignments, that she would not proceed to Germany, took the alternative of unloading the offending goods, she was at once given her clearance.

¹¹ Cf. Millis, *Road to War—America, 1914-17*, pp. 82-89.

¹² Cf. *Neutrality*, Vol. I, *The Origins*, Chap. 6.

¹³ *Neutrality*, Vol. I, *The Origins*, Chap. 7.

Examined apart from the indictment he brings against Great Britain's war measures in general, claimant's contentions as to the specific wrongs inflicted upon, and the specific damages suffered by him, seem to be (1) that in order to frustrate her voyage, the ship, after unloading in a British port, was unlawfully refused a clearance to proceed to Rotterdam, a neutral port. (2) That by dilly-dallying and shilly-shallying, the British Government not only frustrated the voyage, but caused an undue detention and delay of the ship in the port of London, and (3) that the frustration of the going and the delay of the returning voyage proximately caused the loss of outward bound freight already engaged, and of outward and inward bound freight to be reasonably expected, together with the loss of the value of the charter and of the option to buy the ship.

In support of his first contention, that the ship's voyage was deliberately frustrated, claimant points as evidence of collaboration to that end by the British Government and the N.O.T. to the condition imposed by the Government on the one hand, that the N.O.T. accept consignment of the offending goods, and the refusal of the N.O.T. on the other to do so, except upon the exaction of a bond, heavier than the ship could make, that it would not proceed to Germany. Arguing that these measures were not taken as war measures, in the legitimate exercise of belligerent rights, but as wholly unjustified and illegal economic measures,¹⁴ in the interest of British and Dutch shipping and trade, claimant points to the enormous increase of Dutch and British business brought about by the War.

Arguing further for the illegality of the measures taken against the goods and ship without regard to whether they were in reality war measures in defense of national existence, or merely economic measures in furtherance of national trade, the point is made that the ship's destination was a neutral port, the questioned goods were consigned to merchants in that port, and though contraband in their nature there was no sufficient evidence of enemy destination to furnish probable cause for the detention of the ship or the seizure of the goods.

In support of claimant's second point, that assuming probable cause for the initial detention, there was undue delay on the part of the Government in working the matter out, claimant argues that the whole policy and procedure of the British Government was one of delay. Instead of at once taking the positive and definite position that the goods must be unloaded, or fixing some alternative with which claimant could comply, the British Government took no formal steps to seize the goods until July, and though refusing to give a clearance, was all along holding out to the ship that arrangements might be made for the completion of her voyage.

On the issue of damages, claimant insists that his proof by affidavit is

¹⁴ Cf. *Neutrality*, Vol. II, The Napoleonic Period, Chap. II, Chap. XIV; *Neutrality*, Vol. IV, Today and Tomorrow, Chap. II; Seymour, *American Diplomacy during the World War*, p. 43.

sufficient to show not only direct damage by way of disbursements during, and of demurrage for the time of, the detention, but also equally direct damage for the loss of, outward and homeward cargoes, of the charter party, and of the option to buy the ship, and that all these losses occurred as the result of the action of the British Government in frustrating and delaying the *Lisman's* trial voyage.

Upon the precise question confronting him here, whether having gone into the Prize Court upon an admission, that because of the contraband nature of the goods, and the circumstances surrounding the shipment, the seizure of the goods and the detention of the ship was upon probable cause and rightful, and that the claim was one for delay only, and having lost on that contention, claimant can, under the 1927 Agreement, put forward and maintain here the entirely inconsistent claim that the seizure of the goods and the detention of the ship were unlawful from the beginning, claimant presents little of force or bearing. Indeed, he contents himself as to the whole prize proceedings with asserting that his going into the Prize Court was ill-advised, and that in view of the position taken by the United States while a neutral, that it would not consider British Prize Court decisions binding on it, because, though professing to be declaratory, they were really in derogation of international law, mere decisions of municipal courts emanating from and controlled by the Crown, it ought not now to invoke those proceedings as a defense to his claim.

Finally, on the head of the Prize Court proceedings, he argues (1) that generally the rule requiring primary resort to local tribunals is more honored in the breach than in the observance, especially in latter day arbitrations. (2) That the settled course of British Prize Court decisions justifies the view of the United States while a neutral, that that court was an agency of British belligerent pretensions, rather than of international justice, and (3) that for these reasons, the whole Prize Court proceedings, including his admissions in them, may be ignored.

CONTENTIONS OF THE UNITED STATES

The Government of the United States refuses to take up claimant's gage as champion of neutral rights in general, and American neutral rights in particular, and to enter the lists in the character assigned to it by claimant as defender of belligerent rights in general, and British belligerent rights in particular. It insists it still champions the freedom of the seas, and the rights of neutral traders thereon; still maintains that there are limits to belligerent pretensions, areas of rights for neutral traders, withdrawn from belligerent activities, areas created and protected by international law. It especially insists that it did not, when it became a belligerent,¹⁵ it does not now, abandon its position that unlawful belligerent interference with the

¹⁵ "United States and the Rights of Neutrals, 1917-1918," Am. Jour. Int. Law, January, 1937, Alice M. Morrissey; United States Foreign Relations, 1917, Supp., p. 865 and note; Claimant's Annex 155.

activities of its nationals as neutral traders during the World War, must be compensated for. It points out that in the May, 1927, Agreement it expressly announced its continued adherence to that view, and by that Agreement it undertook to satisfy claims of American nationals, injured by British war measures taken in contravention of their rights as neutral traders. It vigorously insists, however, that the contentions, and their discussion, must be kept within the compass of the case in hand, and must bear upon and elucidate the precise questions for decision here. It particularly insists, therefore, that though heard *de novo* and unaffected by the Prize Court action, the facts of the case at bar as the record presents them, do not disclose any violation of neutral rights, upon which a diplomatic claim could be sustained, the case may not be examined or viewed in that way. It must be viewed as in fact it is, as one in which a claimant under the 1927 Agreement, having taken a firm position against Great Britain in her courts and lost on that position, may not now, the United States standing in her stead, reopen the whole matter by taking a wholly inconsistent position. Insisting in short, that claimant's general positions, that during the World War Great Britain made belligerent contentions, and adopted belligerent practices, which violated neutral rights, are purely academic ones, it urges that claimant's real case, as it stands on the record and the Agreement, is a hopeless one. For it requires claimant to now deny, when the claim is for satisfaction by the United States, what he formerly affirmed when it was for satisfaction by Great Britain, that the seizure of the goods and the initial detention of the ship were lawful, and that the sole claim was for delay.

Thus, the United States urges, claimant finds himself faced, not with the ordinary difficulty which confronts one who undertakes to present for the first time in arbitration, a claim which he did not present to the appropriate local tribunal of the nation claimed against, but with the extraordinary, indeed, the insuperable difficulty of seeking, under an Agreement which requires the claim to be first presented against, and if possible collected from Great Britain in her courts, to recover against the United States, upon a position which, by his solemn admissions in the Prize Court, he prevented himself from recovering on there.

In addition, the United States insists that the claim is without merit and claimant cannot prevail, because (1) he did not, by appeal to the Privy Council, exhaust the remedies available in the British Courts. (2) The decision of the Prize Court, in denying damages, was not a denial of justice under international law, because (a) the fact was, that the seizure of the goods and the detention of the ship was lawful, because done under British municipal law while the ship was in the port of London, to which it had voluntarily come, and because of contraband on board suspected on probable cause, of an enemy destination. (b) It was solemnly admitted by claimant in the British Court that the seizure and the original detention was lawful; (c) on the whole proof it is quite clear that the finding of no undue delay

in the detention of the vessel was a wholly justified one, and (d) if there was undue delay, it was, under all the circumstances, so slight and the damage legally flowing from it so small, as to be negligible from the standpoint of an international claim.

Finally, on the issue of damages, it takes the position that if any recoverable damage was shown, it was only for a few days demurrage at a figure based on the proven earning power of the ship at that time, and not on what ships earned in the later years of the War.

As to the huge amounts now claimed for loss of cargoes outward and homeward bound, the loss of the charter party and of the option to buy the ship, the United States insists that the record does not support the claims either as to the fact of their having resulted from the detention complained of, or as to the quantum of the damages claimed.

Pointing to the inconsistency between the claim, that, at the time the charter was forfeited, the freights earned and to be earned, the charter and the option to purchase were of a very great value, and the record showing that the forfeiture occurred because of claimant's inability to pay the small amount which would have kept the charter alive, the United States argues that the damage claims are preposterous.

Pointing, too, to the small capital and sketchy financial arrangements the company had made, it insists that it was the company's inadequate provision for financing its venture under the conditions then obtaining, and not the mere circumstance of a delay in the port of London, which was the proximate cause of its failure to keep financially afloat, and that to lay the retirement from business and consequent bankruptcy of the company to the fact alone of the *Lisman's* detention, is fantastic and unreasonable.

To claimant's position that the frustration of its first voyage lost it its customers because of their fear that the ship would again be stopped, the United States replies that at that time, under the British Orders in Council, there was a general interference with and stoppage of neutral carriers, the ships of the Interocean Company no more than others, and the evidence does not support the claim that the freight consignments were cancelled because of that fear.

More, there is nothing, except the affidavits of Post, contradictory of each other and unsupported by any papers, that any outward freight was actually booked at any price, while the actual earnings of the first outward voyage and the undisputed testimony of Bloch, the company's agent in London, that there was very little return cargo available, make it clear that there is no basis in the record for the award as damages, of any of the great sums claimed for freight.

THE DECISION

It might be expected that the Arbitrator, newly come to the house of international law, would stand hesitant and confused upon the threshold, un-

willing to enter. Hesitant and confused, indeed, discouraged and dismayed by the apparent uncertainty and fluidity of opinion as to, and therefore of, the law itself upon the highly controversial questions claimant and respondent raise, as to where belligerent pretensions end, and neutral rights begin. Especially might it be expected that because of his long accustomedness to and observance of the common law practice of precedent following, the Arbitrator might find himself, for want of binding precedents, lost in the maze of opinion and assertion of those who, having no authority by international mandate, either to bind or loose, freely and without reserve, attempt to do both.

But such expectations would spring from, and be grounded on, an opinion and view as to the fact and the desirability of the fixity and certainty of law, which the Arbitrator does not share.

One of those who has long believed that in "the glorious uncertainty of law", its ever changing content under the steady pressure of the changing life it serves, its continuous, though slow, progression from the actual to the ideal, is to be found its greatest source of strength,¹⁶ the Arbitrator has stepped confidently over the threshold into a new wonderland of law, fascinated equally by "the glorious uncertainty" of international law, the delicacy and precision of its formal adjustments, and by the greatness of its unquestioned testimony to the fact that not force, but just opinion, is at last the source of law, at least with lawminded nations and peoples, and particularly with the United States and Great Britain.

Accustomed, in the decision of municipal law cases, to regarding precedents as guides to, and not obstructions of, just decision, as mere applications of the principles upon which such decisions rest, the Arbitrator has not been greatly disturbed by the lack of precise and binding precedent. The general underlying principles upon which the decision must turn seem to him to have been clearly enough laid down and expounded. What differences in viewpoint and contradictions in opinion there are as to the matters put forward here seem to him to inhere not in the statement of the underlying principles, but in their attempted application by belligerents and neutrals alike during the stress and strain of the Great War.

In order that claimant's position, and the relevance and force of his arguments in support of it, might be certainly known and understood, and the principles upon which the decision should finally rest might be correctly apprehended, the Arbitrator has, before attempting to define the precise issues for his determination, taken the greatest care to examine the texts claimant and respondent cite, with many others, bearing upon the validity under international law, of British war measures and war activities in general. In the light of these writings the Arbitrator has examined and considered all the British Orders in Council, including particularly those

¹⁶ *Law as Liberator*, p. 135 (Hutcheson, Foundation Press, Inc.); "The Judgment Intuitive," C.L.Q. April, 1929.

creating presumptions as to, and throwing upon neutrals the burden of proving, innocent destination, the practices of the British Navy and the decisions of British Prize Courts applying the doctrine of continuous voyage to shipments to neutral ports, in connection with the policies of rationing neutral countries, of blockade and of reprisals. In order, too, to obtain a perspective from which to view claimant's contentions and respondent's defenses, particularly as to the static or changing character of international law as applied to belligerent and neutral pretensions, he has considered and examined at some length writings on the origins of neutrality, as international law knows it, and the rights and duties inherent in that conception, not only from the standpoint of those who insist upon its continued recognition and furtherance as essential, both to national integrity and international amity, but from the standpoint of those who greatly questioning whether neutrality as thus conceived is not a complete misnomer, and but a cover for economic exploitation and profiteering out of war, on the part of those fortunate enough not to be drawn into it, advocate in lieu of it a policy of collective security, or of neutral embargoes on munitions and war supplies.¹⁷

He has considered these latter writings in their bearing upon the contention that the so-called rights of neutral traders have no moral, but only a strictly legal basis in convention and custom, and should therefore at least be confined within the limits of situations already settled and established, and not extended by analogy to situations either new or extraordinary.

Swinging now to one side, now to the other as he read Adams,¹⁸ Trimble,¹⁹ Garner,²⁰ Jaffe,²¹ Baty,²² Moore,²³ Pyke,²⁴ James,²⁵ Phillipson,²⁶ Hyde,²⁷

¹⁷ "The Principles Underlying Contraband and Blockade," Montmorency, Grotius Society, 1916, Vol. II (Sweet & Maxwell, Ltd.).

Neutrality, its History, Economics and Law, Vols. 1-2-3-4, Columbia University Press, 1936.

United States Neutrality Act 1935, as amended in 1936, and reenacted in 1937. The discussion of it by Garner, *Am. Jour. Int. Law*, July, 1937, p. 385; Proceedings of the Society of International Law, April 29 to May 1, 1937.

"Neutrality and Collective Security," Harris Foundation Lectures, 1936. (University of Chicago Press.)

¹⁸ "Growth of Belligerent Rights over Neutral Trade," *Penn. Law Review*, Vol. 68, pp. 20-49.

¹⁹ "Violations of Maritime Law by the Allied Powers during the World War," *Am. Jour. Int. Law*, Vol. 24, p. 79.

²⁰ *Prize Law during the World War* (Macmillan), p. 26.

²¹ *Judicial Aspects of Foreign Relations*, Harvard Studies in Administrative Law, Vol. 6.

²² "Neglected Fundamentals of Prize Law," 30 *Yale Law Rev.*, Vol. 3; "Prize Law and Modern Conditions," *Am. Jour. Int. Law*, Vol. 25, p. 625.

²³ *International Law and some Current Illusions* (Macmillan).

²⁴ "The Kim Case," *Law Quar. Rev.*, Vol. 32, p. 50; *The Law of Contraband of War* (Oxford Press, 1915).

²⁵ "Modern Developments of the Law of Prize," *Pa. Law Rev.*, Vol. 75, p. 505.

²⁶ *International Law and the Great War*.

²⁷ *International Law chiefly as Interpreted and Applied by the United States*.

Oppenheim,²⁸ Yntema,²⁹ Borchard,³⁰ Pilotti,³¹ and many others, the Arbitrator found himself greatly engaged by and concerned with the problems they discuss. Particularly was he interested in the question whether the decisions of prize courts are really municipal law decisions and therefore without authority as expositions of international law, as some say, or international law decisions³² as the British courts and those of the United States say they are.

He was greatly interested, too, in considering to what extent the concession of the Privy Council in the *Zamora*³³ that Orders in Council are presumptively valid, and their holding in the *Stigstadt*³⁴ and the *Leonora*³⁵ that the 1915-1917 Reprisals Orders were valid, impair their position taken in the *Zamora*, that international law is their rule and guide.³⁶

But interesting as these questions are to examine and consider, the case for arbitration, as the record presents it, does not bring them up for decision. The Reprisals Order of 1917 was not in existence when the detention in question occurred, and while that of 1915 was, it is not claimed that any delay or damage was caused by the prompt seizure and unloading of the phosphates under that order, before the London cargo had been discharged. Neither are there any questions here of changes in procedure in the Prize Courts³⁷ or of a rummaging search of the vessel for evidence, or of condemnation on captor's evidence, for no condemnation was had or sought of either ship or cargo. As to all of the other questions involved in the general indictment claimant brings against British war measures and activities, the case as made by the record is such that they may not be considered *in vacuo*, but only as they arise and are important in the precise case the record makes, a case in which the proceedings in the Prize Court, and especially claimant's position and admissions there, loom large and formidable.

Indeed, the United States, upon the authority of numerous citations, insists (1) that the claimant's failure to appeal from the President's judgment is of itself fatal to his claim; (2) that if the failure to appeal has not altogether concluded claimant, his action and position in the Prize Court has cut him off from any claim here, except that the judgment in that court that there was no undue delay, was a denial of justice. It particularly insists that he is

²⁸ International Law, Vol. II, Part 3, Neutrality.

²⁹ "Retaliation and Neutral Rights, The Leonora," Mich. Law Rev., Vol. 17, p. 564.

³⁰ "International Law of War since the War," Iowa Law Rev., Vol. 19, p. 165.

³¹ "Plurality or Unity of Juridical Orders," Iowa Law Rev., Vol. 19, p. 245.

³² Cf. "British Prize Courts and International Law," British Year Book of International Law, 1921, p. 21; "Development of German Prize Law," Columbia Law Rev., Vol. 18, 503, at pp. 508-511.

³³ 4 Lloyd's 1, App. Cases, Vol. II, p. 77.

³⁴ App. Cases, 1919, p. 279.

³⁵ App. Cases, 1919, p. 974.

³⁶ Garner, Prize Law since the World War; Pyke, "The Law of the Prize Court," Law Quarterly Rev., Vol. 32, p. 144.

³⁷ Cf. Tiverton, Prize Law (Butterworth & Co., 1914).

precluded from denying now what he admitted then, that the goods were rightfully seized, the ship rightfully detained, and the sole question was one of delay.

Claimant on his part argues that neither generally, nor under the particular circumstances here, was the failure to appeal of itself a bar. He vigorously denies too that the concessions he made in the Prize Court, as to the rightfulness of the seizure and detention bar him now from asserting the contrary.

As has already been stated, the Arbitrator agrees with claimant that the mere failure of claimant to appeal, under the 1927 Agreement, is not a bar to the prosecution of this claim. None the less, the Agreement of 1927, the undisputed facts of this case, especially claimant's action, and the positions he took, in the Prize Court, have brought the questions for decision here within the narrowest compass, and it is within that compass that their consideration and decision must be confined. Under that Agreement, for claimant to have any standing here, he must have shown with the certainty and definiteness which the circumstances of his case, and the position in which he stands, require, that though he did not exhaust his remedies in the British Prize Courts he did earnestly present there the claim he now makes; that the judgment against him there was a denial of justice under established principles of international law; that because of the uniform course of British decision, an affirmance of the judgment against him was inevitable; and that the United States has therefore not been prejudiced by his failure to take an appeal.

This is so because, since the United States has agreed with Great Britain not to present any diplomatic claims against her, the 1927 Agreement is claimant's sole reliance, and that Agreement prevents his coming to the United States for satisfaction until after he has done everything reasonably within his power to compel Great Britain to answer to the claim. And further, it requires him to show that in his efforts against Great Britain he met with a denial of justice, as that term is understood in international law.

So situated, claimant is under another, a heavier compulsion than that imposed by international law in favor of a Government claimed against diplomatically, that the remedies in its courts should be first exhausted. He is under the additional, the more binding compulsion in favor of the United States whose provision for settlement he seeks to avail of, to show, in accordance with that provision, that he has done everything reasonably within his power to first obtain satisfaction from British sources of the claim he now asserts.

When the claim is viewed in this light, it is seen at once that by the position he deliberately took in the British Prize Court, that the seizure of the goods and the detention of the ship were lawful, and that he did not complain of them, but only of undue delay from the failure of the Government to act promptly, claimant affirmed what he now denies, and thereby pre-

vented himself from recovering there or here upon the claim he now stands on, that these acts were unlawful, and constitute the basis of his claim.

So viewed, claimant stands here with only one possible basis for his claim, that is, that the judgment of the Prize Court that the detention and delay was not undue, was a denial of justice; that it clearly appears from the course of appellate decisions in prize that that decision would inevitably have been affirmed, and that therefore the United States has taken no injury from his failure to appeal.

So viewed, all questions of contraband and of probable cause, of the validity or invalidity of Orders in Council, of the Reprisals Orders, and of the blockade measures, disappear from the case.

So viewed, the questions now sought to be raised, (1) whether the British measures under which the seizure and detention were carried out were in accordance with or violative of international law; (2) whether the contraband on board, or any part of it, was in fact destined to the enemy, or whether in fact, there was probable cause for the seizure and detention, pass out of the case.

There remain for decision only (1) whether claimant has shown that any of the damages claimed were in fact, the result of the undue delay he claimed for in the Prize Court, and (2) whether he has shown that in the finding and judgment, that there was no undue delay, there was a denial of the justice that was his by international law.

Upon the first question it may not be doubted that if the detention of the *Lisman* was unduly delayed, claimant should be awarded a reasonable sum for the items of demurrage and expenses during that delay. Equally may it not be doubted that none of the other items of damage are in any event recoverable.

Wholly apart from the vagueness and insufficiency of the proof of loss on account of the option to purchase, the record showing no claim on that account until nearly twenty years had elapsed, and no proof then of the existence of the option, but the affidavits of two former officers, it is quite clear that proof of legal connection between the detention and the loss of the option is wholly wanting.

This is true, too, of the loss of the charter party, and of the loss of freights on hypothetical future voyages. The whole gravamen of the complaint here, that because of the ship's detention, the ship had lost face, and shippers were afraid to book freight upon it, is shown to be without foundation, by the fact, affirmed by claimant, of the immediate rechartering of the ship, at a higher charter rate, and its sale in the following year for a large sum. It is shown to be without foundation, too, by the showing in the record and in the official documents of which the Arbitrator takes knowledge, that there was general interference with all neutral shipping, not merely with the *Lisman*, and that this condition, increasing as the war went on, was the very cause of the unprecedented demand for ships, and the great rise in freights, upon

which claimant largely bases his demand for the loss, as profits, of huge freights to be earned. By claiming \$165,000. per outward trip for future freights, in the face of only \$35,000 actually received for the first voyage, claimant affirms the fact that the ship would have been in great demand, and thus refutes his claim that its reputation as a carrier was ruined by the detention, its opportunity to carry freight in future, completely destroyed.

Of course claimant does not mean to claim what the judgment of the Prize Court in part implies, but claimant has all along denied, that the Interocean Company was engaged with its shippers, in a concerted enterprise to get contraband into Germany, and that by the seizure and detention this enterprise was broken up. Such a position might logically, though of course it would not legally, tend to support the claim for damages on the ground that the detention, by breaking up the concert, had caused the losses claimed. If, however, as claimant vigorously maintains, it was free from collusion with its shippers, and innocently carried contraband with an enemy destination, the seizure of the contraband and the detention of the ship could not have destroyed the reputation, either of the ship, or of the company, and the Arbitrator finds no basis in the record for a finding that the company was formed for, or deliberately engaged in, the enterprise of running contraband.

It is quite plain that the damage he claims in loss of freights, loss of charter, and loss of purchase option, if actually suffered by the company, accrued to it not because of the specific detention complained of, but because of its inadequate financing. It is quite plain, too, that at best for claimant, if these losses were even remotely caused by British action, they were caused not by the detention, but by the state of war, and the interaction of the measures taken by all the belligerents in support of their pretensions, in its general sweep and course. For such damages, thus vaguely placed and identified, no international reparation claim will lie. For it is as necessary between nations as it is between individuals, where damages are claimed, that the claimed losses be traced not remotely, but proximately to the specific acts complained of.

The opinion of Judge Parker, in War Risk Insurance Claims ³⁸ is a notable and distinguished contribution to the law on this subject. The Arbitrator contents himself, on this phase of the claim, with referring to and approving it.

It may well be that on a vastly greater and more justly balanced scale than that of human justice, all the losses and all the gains of all the neutral traders from the war ³⁹ might be measured out, and a balance struck between them and the nations, singly or as a whole, responsible for the net loss, but the Arbitrator has no such scales. The only balance available to him is a legal one, which can weigh out only the specific damage reasonably and

³⁸ Mixed Claims Commission, Consolidated Edition of Decisions and Opinions, 1925-8 p. 33 *et seq.*

³⁹ Neutrality, Vol. 2, The Napoleonic Period, particularly Part 2.

proximately resulting from the wrong complained of, the undue detention of the ship.

Putting aside altogether then, the impeachment of its verity arising out of the unreasonable character of the claim now made, of \$165,000 per voyage outward bound, in face of the twice earlier stated one of \$65,000 per voyage, and the fact of \$35,000 actually earned on the first voyage; and out of the claim of \$25,000 for freight for the first return voyage, in face of the uncontradicted evidence of Bloch that there was no return freight available at Rotterdam, and little in London; putting aside, too, the insufficiency of the proof as to the specific amounts claimed, all of the items claimed, except those for demurrage and expenses, must be rejected out of hand, as speculative and remote, and as having no possible causal relation in law to the undue delay complained of.

It remains only, considering the claim as one for demurrage at a reasonable allowance per day, and for necessary expenses while unduly detained, to examine how it stands upon the point claimant must rest his case on here, that the judgment of the Prize Court, that the detention was not unduly prolonged by the fault of the British Government in not acting promptly, was a denial of justice under international law.

If claimant could stand here upon his claim for a denial of justice on the ground he put forward in his memorial and briefs, that the seizure and detention were unlawful, because based upon the Orders in Council, and not upon international law, and that the Prize Court, in holding them lawful, gave effect to municipal law and regulations in violation of the law of nations, his task would not be so difficult his burden so overwhelming. But he cannot stand so. The burden he carries here is not that of showing that any specific principle of international law was violated by the judgment. His burden is to show that the finding of fact that there was no undue delay, was without credible evidence to support it.

For undoubted as is the right of a government to press a diplomatic claim against another, although the subject matter of it has already been decided adversely to its national in a Prize Court, it is equally undoubted that the judgments of prize tribunals import verity, and that where there is no legal principle at issue, but only the matter of a fact finding, the heaviest sort of burden rests upon the claiming government to overcome the presumption of verity which attaches to the solemn decisions of municipal tribunals having jurisdiction. Drawing on municipal law analogies, just as the verdict in a common law case will not be overturned where there is any evidence to support it, and just as a fact finding of a legislature, or of an administrative board or tribunal, its creatures, will not be disturbed unless it has no basis in reasonable thinking, so a denial of justice as to findings of fact in prize proceedings will not be found unless the findings are wholly without evidence to support them; that is, unless they are such that reasonable and impartial minds could not draw them upon the record.

Tested by this rule, claimant's case does indeed appear a hopeless one.

For starting with the admission of a lawful seizure on probable cause, of contraband apparently destined to the enemy, the case made by claimant shows a vigorous, straightforward, and definite course of action on the part of the British Government to prevent those goods from reaching Germany, and nothing more. It shows that this effect was accomplished by prompt notice to the ship, before its London cargo was unloaded, that the offending goods must be unloaded or reconsigned with its consent, to the N.O.T. From this position the Government never varied. At no time did it proceed vindictively or oppressively against the ship or the cargo, to condemn or punish it in the Prize Court. On the contrary, its position all along was that if given adequate assurance that the contraband goods, apparently destined for, would not proceed to, Germany, the clearance asked for would be granted. When this assurance was at last furnished by an unloading of the goods, clearance was immediately granted.

According to the record, the Government was at all times willing, indeed, anxious to facilitate both ship and cargo in taking the easiest way out. It was the contention of the Crown in the Prize Court, that what difficulty and delay there was, was not on the part of the British Government in making up its mind to act. It was at first, on the part of the ship and the N.O.T. in not being able to come to an agreement for the reconsignment, and afterwards, on the part of the ship in not being able to make up its mind whether to unload or to re consign. What difficulty and delay there was, the Crown contended, was not on the part of the British Government in making up its mind. It had immediately and definitely given claimant the option of one of two courses, and it never varied from this position.

True, claimant contended otherwise, but under the facts as the record presents them, both in the Prize Court proceedings and here, it would be impossible to say that reasonable and impartial minds could not have concluded as the President did, that the Crown ought to be exonerated from charges of delay, impossible to say that the finding exonerating it was a denial of justice. Indeed, it appears to the Arbitrator that, conceding as claimant did in the Prize Court, the right of the Crown to require the unloading of the goods and the detention of the ship until this was done, a finding exonerating the Crown of actionable fault in the premises was the only reasonable finding warranted by the record.

Though, therefore, the United States cannot, because the judgment would inevitably have been affirmed, complain of claimant's failure to appeal, neither can the claimant complain of the judgment, for its affirmance would have followed not because of a settled course of wrong decision, but because it was, upon the record made, a just and reasonable judgment.

Upon the case as a whole, it is the opinion of the Arbitrator that there is no merit in the claim, and that it should be

Rejected

JOS. C. HUTCHESON, JR.

Sole Arbitrator

BOOK REVIEWS AND NOTES*

Derecho Internacional Publico. By Antonio S. de Bustamante y Sirven. Tomo IV. Habana: Carasa y Cia, 1937. pp. 618. Index.

This is the fourth volume of the monumental work in Spanish on International Public Law of this distinguished world scholar and jurist. The volume has been given the title of *Derecho Internacional Publico Penal*. After recognizing the view more familiar to English-speaking lawyers denying the validity of penal law as a part of the law of nations, the author supports the continental usage of the term to cover that important category of international law which deals with the acts and omissions of states as international juristic persons which have come to be considered delictual breaches of the duties which they owe each other and each other's nationals and their property.

Whether one subscribes to the Austinian conception of sovereignty which admits of no recognition on the part of a state of any legal liability to external punitive action or not, still it has to be recognized that as a factual matter such action actually takes place in practice. Sanctions and the situations which bring them into operation under certain circumstances are treated by the author under the usual headings of boycott, retorsion, reprisal, and the other well-known accepted headings which describe punitive actions which increase in scope and severity until they finally reach the supreme sanction of war.

Judge Bustamante carries the development and history of sanctions into the field of international collective action under regional treaties and the Covenant of the League of Nations. Whether the unkept obligations of international collective action against an aggressor nation may bring about a change in the form of the Covenant of the League, the author does not prophesy, but it is evident that in his opinion the practice of "honoring" a treaty law by the breach thereof rather than by its observance does not change the law itself. One concludes the same thing in this respect as applied to the obligation of international law in the conduct of war and maintenance of neutrality from reading the concluding chapters which cover these phases of international law.

Like the author's previous volumes, the present volume has been written with great care as to detail, citations and documentation, and carries clearly and convincingly the author's illuminating analysis of this most controversial and uncertain division of international law.

Professor Fenwick's most interesting reviews in this JOURNAL of Goulé's translation in French of this and previous volumes¹ illustrate the value of

* The JOURNAL assumes no responsibility for the views expressed in book reviews and notes.—Ed.

¹ Vol. 31 (1937), pp. 368, 750.

carrying Judge Bustamante's great Spanish contribution into the different languages, and it is to be hoped that his forthcoming final volume on Procedural Law will be followed by the translation of the entire work of all five volumes into English and the other languages for the convenience and assistance of those interested in international public law of all countries whether as specialists or as general readers.

H. MILTON COLVIN

International Law. By L. Oppenheim. Vol. I. Peace. 5th ed. Edited by H. Lauterpacht. New York and London: Longmans, Green & Co., 1937. pp. lvi, 819. Index. \$16.00; 45s.

As pointed out in the review of Volume II of this treatise,¹ published in 1935, the development of international law and the large volume of literature on this branch of legal science produced in the past decade, justify a new edition of Oppenheim's *International Law*. As in the case of Volume II, Professor Lauterpacht followed the policy of previous editors in retaining the form and organization of the original work and adhering largely to the author's method of presentation. The primary purpose of a new edition of treatises of this nature is of course to bring it up to date. This part of the Editor's task has been discharged by Professor Lauterpacht with the thoroughness, care and precision which are characteristic of his recognized scholarship. The bibliographical references preceding each subdivision, as well as the footnotes, now include the pertinent books, articles and documentations published up to July 1937, and it is obvious that few important contributions to international law—whether in the form of state action, judicial pronouncement or literature—escaped the Editor's attention. The table of cases cited and discussed, which occupied seven pages in Professor McNair's fourth edition, now requires nine pages.² Besides bibliography and footnotes, Professor Lauterpacht has also made significant changes in the text itself, either by adding entirely new sections³ or by rewriting so substantially sections contained in earlier editions that they may, for all practical purposes, be considered to represent his own rather than the author's views or those of previous editors.⁴ These new or mainly new sections are enumerated in the Preface⁵ and fall into two distinct categories: (1) additions of new⁶ or amplifications of old sections,⁷ neces-

¹ This JOURNAL, Vol. 30 (1936), p. 560.

² It is interesting to note that in the 2d edition—the last one prepared by Oppenheim himself—the table of cases occupied barely two pages.

³ I.e., §§ 13a, 19a, 19b, 21, 29a, 29b, 29c, 29d, 37a, 71a, 75bb, 75g, 75h, 75i, 94bb, 116a, 127a, 133d, 155aa, 155d, 162a, 167dd, 167u, 285a, 310a, 337a, 340gg, 554a, 571a.

⁴ §§ 7, 19, 21a, 33-37, 51, 59, 70, 75b, 94d, 106-107, 130, 167d, 167h, 167o, 197, 197f, 241a, 313, 499, 503.

⁵ Pp. VI-VII.

⁶ E.g., Decisions of Tribunals (§ 19a) and Writings of Authors (§ 19b) as Sources of International Law; Universal and Regional International Law (§ 29a); So-called American International Law (§ 29b); So-called Anglo-American and Continental Schools of International Law (§ 29c); National Conceptions of International Law (§ 29d); Recognition of Insurgency

sitated by recent development in international law; (2) additions⁸ or changes⁹ which represent or reflect Professor Lauterpacht's conception of international law when it differs from that of the author or of previous editors. With respect to changes and additions falling in the second category, it may be remarked that the Editor frequently (though not always) indicates that his views differ from those expressed in earlier editions. It is to be noted that many of Dr. Lauterpacht's views differing from those of the author or previous editors are traceable to and bear the imprint of the exaggerated importance which he attributes to the League of Nations Covenant and, particularly, to the General Pact for the Renunciation of War.¹⁰ This exaggerated view of the Editor is occasionally manifest even in sections in which only minor modifications were made. For instance, the assertion that the allocation of a permanent seat on the Council of the League to certain states gave a legal basis to the distinction between "great" and "small" Powers, seems somewhat far-fetched.¹¹ On the other hand, some of the changes represent great improvement over earlier editions. Among these may be mentioned the excellent analysis of the limits and prospects of codification in the light of the Hague Codification Conference of 1930.¹²

From the technical point of view, the greatest improvement is the printing of section numbers on the top of each page. A very unfortunate misprint occurs on p. 56¹³ where, instead of Nationality, Neutrality is enumerated as first of several topics reported to the League by its special committee to be ripe for codification.

(§ 75g); Recognition of New Territorial Titles (§ 75h); The Legal Nature of the British Commonwealth (§ 94bb); Subversive Activities against Foreign States (§ 127a); Japanese Invasion of Manchuria (§ 133d); Abuse of Rights (§ 155a); Regulation of Whaling (§ 285a); The Hague Codification Conference (§ 310a); The Proposed Convention against Terrorism (§ 337a); Organized Alliances (§ 571a).

⁷ *E.g.*, General Principles of Law as a Source of International Law (§ 19; see also § 19c); Codification of International Law (§§ 33-37); Different types of Mandates (§ 94d); the Status of Vatican City (§§ 106-107); the Bosphorus and the Dardanelles (§ 197); Wireless Communications (§ 197f); Regulation of Statelessness by Treaty (§ 313).

⁸ Persons other than States Subjects of International Law (§ 13a); The Monistic Doctrine (§ 21); The Legal Nature of Recognition of States (§ 71a); The Legal Nature of Recognition of Governments (§ 75bb); Obligations of non-Recognition (§ 75i); State Equality and International Organization (§ 116a); The Covenant of the League as a System of Legal Obligations (§ 167u).

⁹ *E.g.*, The "Family of Nations" a Community (§ 7); The Law of Nations as Part of Municipal Law (§ 21a); The Problem of Sovereignty in the 20th Century (§ 70); What Acts of Self-Preservation are Excused (§ 130); Reconsideration of Treaties and International Conditions (§ 167o); Renunciation of War and Title by Conquest (§ 241a); Effect of Coercion of a State or its Representative [*i.e.*, on the validity of treaties] (§ 499); Treaties Inconsistent with Former Treaty Obligations (§ 503).

¹⁰ See, *e.g.*, §§ 75i, 116a, 130, 241a, 499.

¹¹ § 116, p. 225.

¹² § 37.

¹³ Also in note (2) on p. 57.

Despite additions to text and considerable expansion of bibliography and footnotes, the size of the volume has not been increased, due, partly, to the use of a somewhat smaller (but still convenient) type and, partly, to the substantial shortening of some sections in the earlier editions.¹⁴

FRANCIS DEÁK

Canada and the Law of Nations. By Norman MacKenzie and Lionel H. Laing. Toronto: Ryerson Press; New Haven: Yale University Press, 1938. pp. xxxviii, 567. Index. \$6.00.

This is apparently the first casebook on international law by Canadian editors—the one a professor at the University of Toronto, the other a professor at William and Mary College. An effort is made to present in convenient form the “nature and content of the Canadian contribution to the law of nations.” The problems of Canada in international law have grown very largely out of her relations to the United States and therefore we should expect the cases to hinge on these relations. The decisions of Canadian courts, including appeals to the Judicial Committee of the Privy Council, make up the bulk of the book. There are included some decisions of American courts affecting Canada or Canadians, and seven decisions of international tribunals, namely, the Hague Court and the American-British Claims Commission of 1910, also relating to United States-Canadian questions. Each case is preceded by a brief headnote.

The Canadian case material is, as yet, sparse in respect of certain topics in international law, for many questions involving important phases of international law have not come, as yet, before the Canadian courts. This accounts for the lack of balance or completeness of the volume as an exposition of international law. The volume is divided into seven sections entitled Canada, an International Entity; Jurisdiction over Territory; Status of Indians; Individuals in International Law; International Rights and Duties; Private International Law, and War and its Effects. The section on Jurisdiction over Territory covers discovery, boundaries, accretion, servitudes, territorial waters, adjacent high seas, immunity from jurisdiction, and transfer of territory. The section on Individuals in International Law includes naturalization, domicile, disabilities and rights of aliens, exclusion and deportation of aliens, and extradition. Treaties and responsibility are treated under International Rights and Duties. Under War is treated declaration, treason and sedition, enemy status, trading with the enemy, alien enemies, enemy property, prize courts, effect on treaties, neutral duties, neutral rights, and unneutral service. These headings indicate the somewhat limited scope of the work due to the paucity of cases. Apparently for the

¹⁴ *E.g.*, a single footnote [p. 80, note (1)] was substituted for §§ 44–50c containing a survey of the principal events of diplomatic history from 1648 to 1928, which occupied thirty pages in the 4th edition.

same reason there are no discussions and references as to other cases in footnotes.

The theory of the authors is that a cohesive statement of a national contribution to international law may constitute a sounder approach to a study of the subject than do some of the more comprehensive but fragmentary collections from the whole case field. There are difficulties on both sides. A national casebook is apt to present a national attitude as to certain topics of international law, perhaps dictated by national interests and laws, and therefore may be somewhat misleading as a guide to general principles. On the other hand, a comprehensive volume cannot contain enough cases sufficiently to cover the field without being too cumbersome, and in such a work the difficulty as to national cases also presents itself. It is believed, however, that a series of national casebooks would not only present material now practically unavailable in collected form to students and lawyers, but by comparison blaze the way to a broader conception of the principles of international law.

LESTER H. WOOLSEY

International Legislation. A Collection of the Texts of Multipartite International Instruments of General Interest. Edited by Manley O. Hudson, with the collaboration of Ruth E. Bacon. Washington: Carnegie Endowment for International Peace, 1937. Vol. VI, 1932-1934. pp. xlii, 986. Index. \$4.00.

This is the sixth volume of a notable series the idea of which originated in the fertile mind of its distinguished editor and the publication of which was begun in 1931. The preceding volumes were reviewed in earlier issues of this JOURNAL (Vol. 26, p. 435, and Vol. 31, p. 158). The present volume contains the texts of some 150 multipartite instruments opened for signature or promulgated during the period from January 1, 1932, to December 31, 1934. Of these, 43 are designated as "conventions," 30 as "protocols," 26 as "agreements," 21 as "rules" or "regulations," 7 as "declarations," 5 as "arrangements," 4 as "treaties," and the others by various names. Why some are given one name and others, not essentially different in character or purpose, are designated by other titles it is not always possible to determine. Unsigned drafts, with the exception of those adopted by the International Labor Conference which though subject to ratification are never signed, are not included in the collection.

While the rule followed in the editing of the previous volumes, of including in the collection instruments which had not come into force at the time of publication was followed in the present volume, it happens that in fact only 28 of those included had not entered into force. It is of course possible that all of them sooner or later may yet come into effect.

The size of the present volume and the number of texts which it contains show that although the state of international affairs may have been somewhat disturbed during the two-year period covered, the process of interna-

tional legislation went steadily on with little evidence of abatement. The subject matter dealt with by this "legislation" covers a wide range: political, technical, economic, social, sanitary, etc. Among the more important texts contained in the present volume may be mentioned: the Anti-War Treaty of Non-Aggression and Conciliation, signed at Rio de Janeiro on October 10, 1933; the Sanitary Convention for Aërial Navigation, signed at The Hague April 12, 1933; the Telecommunication Convention, signed at Madrid December 9, 1932, together with elaborate radio, telegraph and telephone regulations of the same date; the European Broadcasting Convention, signed at Lucerne, June 19, 1933; the Universal Postal Convention, signed at Cairo, March 20, 1934, along with various "regulations," "provisions," "agreements," and "arrangements" of the same date; the agreements concerning German and non-German reparations, signed at Lausanne, July 7 and 9, 1932; the Conventions on Nationality signed at Montevideo, December 26, 1933; and various labor conventions adopted at Geneva, June 29, 1932.

The general plan of the earlier volumes in respect to arrangement, language of the texts, character of the editor's notes, bibliographical apparatus, etc., has been followed in the editing of the present volume. What the reviewer said of the usefulness of the earlier volumes of the series and of the careful and scholarly manner in which the learned editor executed his task can be equally reaffirmed of the present volume. It is to be hoped that the series will be continued in the future, and, of course, by the present editor.

JAMES WILFORD GARNER

International Law Situations, with Solutions and Notes. Naval War College, 1936. Washington: Govt. Printing Office, 1937. pp. viii, 144. Index. 15¢.

This publication from the Naval War College covers, according to the prefatory remarks of Rear Admiral C. P. Snyder, the President, "topics upon which opinion has been changing, particularly since 1920," and which were the subject of discussion by members of the senior class of 1937. The publication, as in the case of preceding volumes, was prepared by Professor George Grafton Wilson.

The topics discussed are (1) Insurrection, belligerency, statehood; (2) Visit by and internment of aircraft; and (3) Neutrality, 1914-36. Certain conclusions in relation to each of these topics are entitled to consideration, such as those with reference to the non-recognition of the belligerency or statehood of insurgents. In this connection it is stated (pp. 32-33) that "prior to the recognition of the belligerency or statehood of insurgents by the parent state, non-recognizing states though admitting the fact of insurrection and accommodating themselves thereto might be regarded as assuming an unfriendly attitude toward the parent state if they accorded to the insurgents the full rights of belligerents." It is not declared, however, that

the propriety of such action is dependent, in point of law, upon the prior according of recognition by the parent state. In discussing the matter of visit and search by aircraft, there is consideration of the work of the Commission of Jurists upon the revision of the rules of warfare at The Hague, 1922-23. The views of the several delegations at the conference there assembled are noted. In relation to the neutrality legislation of the United States revealed in the Joint Resolution of February 29, 1936, it is declared (p. 135) that the enactment "embodied a nationalistic policy in many respects divergent from the prior policy of the United States and from the generally accepted doctrines of international law," and it is added that "the change in 1935-36 to a doctrine for the most part nationalistic has placed nationals of the United States under restrictions beyond those imposed by international law."

The views and conclusions expressed by the War College in its annual publications are always of great interest; and those set forth in this latest publication are no exception in that regard.

CHARLES CHENEY HYDE

International Transfers of Territory in Europe. With names of the affected political subdivisions as of 1910-1914 and the present. Prepared by Sophia Saucerman, Assistant Geographer, Department of State. Department of State, Publication No. 1003. Washington: Govt. Printing Office, 1937. pp. vi, 244. Index. 6 Plates. \$1.25.

This highly useful book, prepared with meticulous care, must be welcomed by the geographically minded group of those who profess interest in international law and relations. The material is presented in four parts. Part I concerns countries (other than the Balkan countries) existing in 1914 that have since lost territory (Austria, Hungary, Bosnia-Hercegovina, Germany and Russia); Part II, countries existing in 1914 that have since acquired territory (Austria, Belgium, Denmark, France, Italy, Rumania, and countries of the Balkan Peninsula); Part III, countries established since 1914 (Czechoslovakia, Danzig, Estonia, Finland, Latvia, Lithuania, Poland and Yugoslavia); and Part IV, the countries of the Balkan Peninsula. Forty-two pages are given over to an index of names of places, in which letters in foreign languages are modified by diacritical marks. "Transliteration of the Russian alphabet is in accordance with the Russian transliteration table adopted by the United States Board on Geographical Names" (p. 201). "Maps drawn from manuscript maps prepared by the author and from published maps illustrate the textual and tabular material" (p. iii).

Save with respect to Danzig, Finland, and the Balkan countries, the author has made no comment on methods of transfer, and has not discussed instruments that registered the acquisition or loss of territory, or the modes by which changes of sovereignty were wrought. Such matters have been of less concern to a geographer than the ascertainment and portrayal of the facts of territorial changes, and the descriptions and consequences thereof.

The book comprises chiefly an elaborate series of tabular statements, eighteen in all. For each country existing in 1914 that has since lost territory, there is a table summarizing in detail the former and existing distribution of territory; and this is followed by a second and more elaborate table of analysis of distribution before and after the transfer. Much the same method is followed with reference to Czechoslovakia and Poland, in the matter of summaries and analysis, analytical comparisons being made between the territory of Czechoslovakia in 1930 and the former sovereignty and political divisions, and between the territory of Poland in 1932 and the former sovereignty and political divisions. There are tabular analyses of the territory of Danzig, Estonia, Latvia, and Lithuania. As the author declares (p. iii), the treatment of the countries of the Balkan Peninsula "is concerned primarily with changes in international boundaries and does not include detailed data on the political subdivisions concerned in the territorial transfers incident to the changes in boundaries."

An interesting feature of Part I is the data whereby the reader may at a glance ascertain the percentage of territory left to the sovereignty of certain countries after transfers (resulting in most part from consequences of the World War). Thus, it is seen that Austria retained 26.63% of its domain as of 1910; Hungary 28.6%; and Germany (not including the Saar Basin territory) 86.59%. The author sets forth the data on which the tables have been based. The Department of State is to be congratulated on the book, and is to be thanked for enabling the author to make public the result of her researches.

CHARLES CHENEY HYDE

At the Paris Peace Conference. By James T. Shotwell. New York: Macmillan Co., 1937. pp. xii, 444. Index. \$4.00.

To appreciate the problems facing the negotiators of the peace settlement, it is not enough to rely upon documentary sources. The play of personalities is the living history that gives flesh to agreements and conditions. Thus one welcomes an addition to the volumes of memoirs of those present at the negotiations, and because of Professor Shotwell's duties as Historian and Librarian, and particularly because of his rôle in negotiating the Labor sections, he was in an advantageous position for observation. Now at the distance of nearly two decades he can look with retrospect as he does in his first five chapters and conclude that, imperfect as was the settlement, it was about as good as was possible to secure under the circumstances.

This retrospective treatment is not limited to the introductory chapters, for in this narrative based upon his diary, he inserts explanatory material in parentheses. However the book is essentially a personal diary, and that gives it both a freshness and a human touch. One must be patient, therefore, if it appears that life in Paris was too often a round of luncheons and dinners with friends, for such patience may be rewarded by the amusing account of

the dinner with the Poles, or, more picturesquely, the dinners with the Maharajah of Bikaner and Aga Khan, or the one with His Highness Emir Feisal and Colonel Lawrence. The latter apparently impressed Professor Shotwell deeply, for this strange young Englishman in true character repeatedly appears unexpectedly in the narrative.

It is interesting to observe how "the Inquiry" starting from a research organization was gradually engaged in the more responsible work of shaping the actual terms of the treaty, although Professor Shotwell feels that at times they were not so much subordinated as ignored, then only to find themselves suddenly pushed into prominence in negotiation. It is his conclusion too that the American organization was inadequate as compared with the superior co-ordination practiced by the British.

Dr. Shotwell's main contribution was in the field of the International Labor Organization, and his preoccupation with these problems explains why so often he is uninformed of the progress of the general peace settlement, which must come to him as hearsay. The durability of the Labor sections, however, as compared with other parts of the Peace Settlement, must today give Dr. Shotwell much personal satisfaction. Undoubtedly his rôle was important and the compromises he secured significant.

That the task of creating favorable public reception of the negotiation was not easy is indicated in the author's severe castigation of American journalists, whom he accuses of creating such a current of feeling against what the American delegation had done as to obscure public understanding. At one place he mentions a cable he prepared to head off anti-Canadian feeling among American labor leaders. There is no indication in the diary at this point, but this reviewer is acquainted with evidence in unpublished Canadian memoranda that Secretary Lansing himself endorsed this anti-Canadian point of view which the Canadian Prime Minister met with a sharp rejoinder transmitted through Mr. Lloyd George.

It was an interesting six months at Paris, and Professor Shotwell has succeeded in re-creating it for his readers.

LIONEL H. LAING

Gustav Stresemann. His Diaries, Letters, and Papers. Vol. II. Edited and translated by Eric Sutton. New York: Macmillan Co., 1937. pp. xx, 549. Glossary of names. \$6.50.

This is the second volume of a series of three, which must be regarded as one of the most important sources for the understanding, not alone of German post-War diplomacy, but also of the diplomacy of the European political system as conventionalized in the Locarno Pact, and as institutionalized in the League of Nations. The volume also covers authoritatively the evacuation by the Allied Powers of German occupied territory, the German presidential elections following the death of Ebert, and the interesting attitudes of Stresemann toward the personal and presidential qualities of Ebert and Hin-

denburg. The relations of Germany toward the Powers of Europe, on the basis of bilateral negotiations and engagements, are also set forth. The book deals, in the main, with the years 1925-26.

Part I deals generally with Locarno, and covers specifically the fate of the Cologne zone, the transition of policy from Ebert to Hindenburg, the security pact, negotiations as revealed in Stresemann's Locarno diary, the final conflict at Locarno, and resulting disarmament and evacuation. Stresemann's initiative in Europe is ably described by the editor, and the significance of Locarno to Germany and to Europe is clearly set forth.

Part II reveals those forces with which Stresemann had to deal and fight, both within and without Germany. It sets forth comprehensively the subject of German development, the transition of events from the second Luther Cabinet to Marx, and an account of the political parties of Germany. In addition, Stresemann's intellectual and literary interests are indicated, illustrating the fact that great public men are judged by their collateral and private interests and activities as well as by their public achievements and failures. Stresemann is represented as a man and as a fighter. As a man, the words of Goethe, "Born to See, Set to Watch," seem to describe his character and life. Engrossed in the desperate fight for German independence and autonomy, this activity was grounded nevertheless on a certain spiritual optimism, a burning patriotism, and a deep desire for release from the rush of public affairs, in order that he might view the passing scene in the light of ethical principles and spiritual detachment. The lack of internal unity in Germany made his rôle in world affairs difficult, and it was his task to supply, in confronting the world, that unity in his direction of foreign policy. His papers reveal an acute understanding of the principle that a country's foreign policy is essentially a mirror of its domestic institutions.

Part III, in covering the relations between Germany and the Powers, details German foreign policy after Locarno, the relations between Germany, on the one hand, and Italy, Russia and Poland, on the other, and closes with a description of Germany's entry into the League. The adjustment of conflicts and the improvement of mutual relations constitute the main purpose of this section of the book. The German foreign policy was, to the Germans, a progressive movement from Versailles to freedom. Following Locarno, the struggle against the Treaty of Versailles was renewed. The only question was the degree and the tempo of the struggle for release. Without surrendering any essential principle of his country's demand, Stresemann would secure the release by progressive, but nevertheless definite and stated intervals, and in coöperation with the organized forces for peace. To him, the Powers, when dealing with Germany through Versailles, used their feet, and when dealing with Germany through the League and Locarno, used their heads. It was a struggle, and in part a losing one, to persuade the nations to allow head to prevail over feet. To one who was present in September 1926 when Germany was admitted to the League of Nations, and when

Stresemann was enthusiastically received as the representative of Germany, the question naturally arises as to what the course of Europe and the world might have been had Stresemann succeeded in convincing the Germans of the need of more deliberate movements and more coöperative action, and in convincing the Powers of the necessity of a more rapid and more abundant application of the principles of Geneva and Locarno to the German situation, and less of the punitive principles of Versailles. One thing is sure, the failure cannot be charged against Stresemann.

The preface by the editor is a careful analysis and appraisal of Stresemann's foreign policy. The book is challenging in the information it reveals. The work of Mr. Sutton is an admirable piece of editorial execution and interpretation.

CHARLES E. MARTIN

Bolívar and the Political Thought of the Spanish American Revolution.

By Víctor Andrés Belaunde. Baltimore: Johns Hopkins Press, 1938. pp. xxiv, 451. Index. \$3.50.

Most people in the United States think of Simon Bolívar only as the dashing hero to whose victorious sword six nations directly, and virtually the whole of the Southern continent indirectly, owe their independence. Bolívar, however, was more than a warrior: he was a veritable creator of nations and as such he had to be a law-giver, an administrator, and an organizer of constitutional life in the former Spanish colonies. As a political genius he left a deep imprint in international law. Bolívar was the first ruler in the world to take effective steps for the organization of a league of nations, for the establishment of a permanent tribunal of international justice, for the adoption, by multilateral treaty, of mediation, conciliation and arbitration as means of settling controversies between states. The Congress he assembled at Panama City in 1826 contained the embryo of all these institutions. Furthermore, he enunciated the principle of *uti possidetis* as the basis for the settlement of all boundary disputes among the new republics, and he deserves credit for his decided stand against the slave trade and the practice of privateering.

The publication of the erudite volume of Dr. Belaunde is a distinct service to the English-reading public and especially to the student of Latin American affairs, who will now be able better to appreciate the greatness of the soul and the genius of the South American Liberator. There is no more intense drama than the life of Bolívar as a founder of nations. A liberal and a republican at heart, he sacrificed his life, his fortune, his personal happiness to the cause of political independence, only to find in the end of his glorious career that the peoples he had liberated, devoid of a democratic tradition, showed themselves unable to use their freedom in a wise and orderly manner, and went from oppression into anarchy, from the absolutism of the crown into the arbitrary rule of the military *caudillos*. He sought to give strength and stability to the new governments and to preserve the unity of Great

Colombia, the magnificent commonwealth he created in the territories that are today the Republics of Venezuela, Panama, Colombia and Ecuador. In his heroic struggle against the distintegrating forces he encountered, Bolívar passed from the most idealistic conceptions of republican government into such extremes as the semi-monarchical Bolivian constitution and the dictatorship of 1828. Dr. Belaunde gives a vivid narrative and a scholarly analysis of the transformation and evolution of Bolívar's political thought, from the early days of the revolution, when he acted as a radical aiming at the destruction of the Spanish régime, until the time when he reached the sad conclusion that dictatorship was the only instrument with which unity, order and stability could be preserved. Beginning with the background of the colonial political structure, the author unfolds the whole panorama of the formation of the Hispanic nationalities of the New World and recounts an ideological tragedy which confirms Bolívar as the most self-denying of all great leaders of armies and peoples.

R. J. ALFARO

The Study of International Relations in the United States. Survey for 1937.

By Edith E. Ware. New York: Columbia University Press, 1938. pp. xxviii, 540. Index. \$3.50.

This is an impressive compendium of information, published for the American National Committee on International Intellectual Coöperation. It follows the *Survey for 1934* and undertakes to bring up to date the material presented in that volume. There are chapters on Foundations and Councils Encouraging and Planning Research, Research, The Study of International Relations within Formal Education, Extra-Curricular Activities Promoting Interest in International Relations and Peace, Latin-American Relations, Canadian-American Relations, Relations of the Pacific Area, Adult Education in International Relations, Adult Education for Peace within Religious Organizations, Methods of Adult Education in International Relations, Channels of Contact, and International Associations.

Proceeding from the belief that the study of international relations involves the study of all relations (p. 38), and finding that there are overlappings of disciplines in the study of international affairs (pp. 109, 114), the author presents in convenient summary form the nature and work of a multitude of agencies. In general, the account is descriptive rather than critical, although there is some evaluation (as at pp. 307, 356, 371, 377n, 396) and occasional indication of the reaction to effort of some of the agencies (as at pp. 364, 392, 393). An idealistic tone appears in references to such things as "disarmament of the heart which has been defined as peace" (p. 148), "social well-being through international understanding" (p. 370), and the impossibility of liberty without peace (p. 459). At the same time the author is evidently not under illusions as to what has actually been accomplished, as will be illustrated by the suggestion that "real understanding of the peoples of Hispanic America is something yet to be achieved" (p.

215). Perhaps all will not agree with the statement that an understanding of the phenomenon presented by half a dozen intellectual renaissances (now in progress in as many geographical regions of the world) is "the most important intellectual problem of this generation" (p. 243), but this should not detract from the great value of a careful explanation of the organizations and methods through which it is sought to facilitate such an understanding.

For teachers of international law and relations, special interest will attach to facts brought out in regard to administration of the doctorate in international relations (especially at pp. 76, 241), to the present situation with respect to coördination of studies and research in such a field as that of Far Eastern affairs (p. 282), and to the author's conviction that "more and more thoroughgoing adult education in international relations in the United States is essential . . ." (p. 330). The volume as a whole should be a handbook of very great usefulness to all who have an interest in the progress of international mindedness and the methods through which its promotion is sought.

ROBERT R. WILSON

Die Rechtslage deutscher Staatsangehöriger im Ausland. By H. Emmerich and John Rothschild. Haarlem: H. D. Tjeenk Willink & Zoon N. V., 1937. pp. xx, 356. Index.

As a consequence of the political developments of the last five years, emigration from Germany has assumed unprecedented proportions and has created a refugee problem of international significance. The volume under review is concerned, not so much with the bearing of the refugee problem upon international relations, but instead deals with the multitude of legal questions facing the individual German emigrant in his attempts to liquidate his existing interests in Germany and to settle in a new country. In addition to a broad exposition of the relevant German legal provisions, the authors consider the laws of Switzerland, Austria, Czechoslovakia, France, Belgium, Italy, Netherlands, and Great Britain, discussing in detail the rules of all of those countries governing conflicts of laws. The authors deal also with the legal provisions regulating international investments and restricting aliens, as well as with the tax laws of the various countries in their application to foreigners. Finally, the book contains a treatment of the German foreign exchange laws and a comparison of the nationality, passport, and extradition laws of the countries indicated.

The abundance of the problems covered of course necessitated a somewhat cursory discussion of some of the intricate questions. In order to avoid an involved presentation of the rules, the authors have deliberately omitted almost all citations and the entire "scientific apparatus." It seems, however, that this lack materially decreases the practical usefulness of the volume. On the other hand, the value of the book is substantially enhanced by numerous discussions of hypothetical situations and by practical suggestions

concerning the advisability of certain legal forms, having regard to the conflict rules, tax provisions and other laws of the different countries.

Presenting a useful guide to international lawyers advising German emigrants, the authors also have succeeded in collecting extensive material which may prove valuable for future, more penetrating, investigations of the broader problems of international law involved, such as the problem of international limitations of the municipal taxing authority of the states and the question of the recognition of foreign exchange restrictions in other countries. The volume, likewise, furnishes a useful basis for comparative studies in the field of private international law. It is hoped that the authors will supplement their work by adding a consideration of American law.

SIDNEY B. JACOBY

The Private International Law of Succession in England, America and Germany. By Walter Breslauer. London: Sweet & Maxwell, Ltd., 1937. pp. xxx, 339. Index. £1. 1s.

This is a practical treatise written by a German lawyer whose field of activity has been transferred to London, England, where he has made a special study of the Anglo-American conflict of laws relating to the law of succession. In thorough-going German fashion he takes up all questions that may present themselves in the winding-up of an estate upon death, stating the solution given to each problem by English, American and German law. In Part I the author deals with various preliminary matters, such as the conflict of classification, the problem of *renvoi*, domicile and nationality. Part II is devoted to intestate succession, including marriage and divorce as preliminary questions, and legitimacy, legitimation and adoption. Part III covers the subject of testamentary succession, Part IV that of administration, Part V that of jurisdiction in the matter of succession, and Part VI that of death duties. Various tables are given in an appendix.

The lawyer with an international practice will find the work under consideration of the greatest utility as a handbook and ready guide. It is the only work of its kind in English and is written with a full comprehension of the statutory provisions relating to the subject and the English, American and German decisions. It is of great interest also to the student of comparative law, for it furnishes a realistic insight into the *modus operandi* of the German system as contrasted with the Anglo-American. As the German law, so far as legal theory is concerned, is a fair representative of continental law with its doctrine of universal succession and administration by the "heir"—there being no fixed concept of administration in the sense of the Anglo-American law—the treatise serves as a general introduction to the study of the comparative law of conflicts with respect to decedents' estates. The work fills a real need. Its execution is most praiseworthy.

ERNEST G. LORENZEN

Private International Law. By G. C. Cheshire. (2d. ed.) New York and London: Oxford University Press, 1938. pp. lxxii, 692. Index. \$8.50.

Dr. Cheshire's excellent treatise on the English system of Private International Law, first published in 1935, now appears in a second edition. The text has been revised and new matter added amounting to somewhat over one hundred pages. The author has been courageous enough to change his opinion upon several important topics. The present reviewer, while admiring the courage of the author, is not always in accord with respect to the results reached. Thus, Dr. Cheshire, influenced by the contemporary French jurist, Arminjon, now believes that "the theory of acquired rights is fallacious and of little profit to one who seeks the true basis of English Private International Law" (p. 86). But the examples which the author gives (pp. 87-89) do not represent cases in which a right has been completely perfected in the foreign jurisdiction. The acquisition of the right was in itself a question to be determined because of a conflict of laws. It seems to the reviewer that there was no need for a categorical repudiation of the principle of vested or acquired rights which is deeply rooted in our jurisprudence. The author might well have contented himself with entering a *caveat* against applying the principle to cases where the acquisition of a right is in itself dependent upon the solution of a conflict of laws.

The present edition contains a more extended discussion of the so-called "doctrine" of classification or qualification. This comes to us from the jurists of continental Europe, where rules of conflict are laid down in specific legislation in some of the more recent codes. Accordingly, the application of the rules of conflict are there, more than with us, dependent upon the use of particular terms. It is true that a parallel problem is not unknown to English and American law, especially where the rule depends upon fixed distinctions, such as between form and substance, or between substance and procedure. Such problems are solved by what an English or an American judge would refer to as interpretation. Dr. Cheshire's discussion itself shows how an incidental question can be easily made to appear extraordinarily complicated by the use of terms and methods of approach familiar to continental European jurists rather than to our own. The doctrine of *renvoi* has likewise come to us from abroad, unfortunately at a time when it was still in a transitional stage in the countries in which it was first applied. Accordingly, the English decisions are not always reconcilable. Dr. Cheshire has recently edited a monograph by the late Dr. Mendelssohn-Bartholdy (reviewed in this JOURNAL, January, 1938, p. 218), elucidating certain recent decisions of the English courts upon this question. The opinions there expressed are also generally followed in the present volume.

ARTHUR K. KUHN

La Lettre de Change et le Billet à Ordre. Notions générales. Questions non réglées dans la loi uniforme. Loi uniforme. Conflits de Lois. By P. Arminjon and P. Carry. Paris: Librairie Dalloz, 1938. pp. 664. Index.

The greater part of this book is devoted to a critical analysis of the rules contained in the three international conventions relating to bills of exchange and promissory notes signed at Geneva on June 7, 1930. The authors have endeavored to set forth the effect of the uniform law adopted by the conventions upon the laws of France, Germany and Switzerland. Accordingly, the book represents a comparison of the laws of these three countries upon the subject of bills and notes, and a discussion of the conflict-of-laws rules agreed upon by the third of the Geneva conventions. The authors have occasion to refer to the British Bills of Exchange Act of 1882, to which the American Uniform Negotiable Instruments Law is closely related. They point out that the British law is more complete than the uniform law contained in the conventions, and regret that the Geneva Conference did not lean more heavily upon the British legislation. If they had done so, the eventual unification of the two great systems would have been made easier of accomplishment (p. 211).

The part relating to the conflict of laws is of particular interest. At first it might appear inconsistent to enter into a convention covering the conflict of laws simultaneously with conventions intended to unify the law upon a particular subject. However, the limited nature of the subjects covered by unification, together with the fact that the Anglo-American jurisdictions were not likely to adhere to the unified law, made necessary the adoption of a conventional system of conflict of laws. The authors sharply criticize Art. 10 of the Convention upon the Conflict of Laws. This article permits the contracting states to refuse to apply the provisions of the convention to any engagements entered into outside the territory of any of the contracting states; and also to refuse to apply a law which would otherwise be applicable, but which does not happen to be the law of any of the contracting states. The authors point out that these reservations are directly contradictory of the main purpose of the convention, which was to unify the law of bills and notes.

The authors set forth their own interpretation of the various provisions of the convention on the conflicts of law relating to capacity, the form of the instrument, imperfections and irregularities, defenses resulting from nullity and the law applicable to the engagements of the various parties to bills and notes. A short chapter is devoted to the difficult problems raised by the obligation to provide cover (*provision*) as required by legislation following the French Code of Commerce. The convention does not specifically provide for the controlling law, although it does say (Art. 4, par. 2) that the effects produced by the signatures of persons other than the acceptor of a bill of exchange or drawer of a promissory note are determined by the law of the country upon the territory of which the signatures have been given. The authors do not consider that this provision should be applicable to the

obligation to provide cover. They hold that it should be the law which governs the obligation of the drawee to the drawer which must determine whether the obligation is susceptible of constituting a cover, whether it ought to exist at the date of the drawing of the bill, and whether the drawee is thereby obligated to accept (p. 511). These and many other problems are discussed with considerable force of logic but nowhere are sufficient authorities presented to draw definite conclusions. The entire subject-matter is doubtless too recent to expect a background of jurisprudence. The authors have at any rate raised the issues and given their own interpretation of the applications of the various provisions of the conventions, and for this they are entitled to much commendation.

The provisions of the three conventions are given in the appendix, together with a list of the countries, eighteen in all, which have adopted all three.

ARTHUR K. KUHN

Le contrôle de l'application des conventions internationales du travail. By Jean Zarras. Paris: Recueil Sirey, 1937. pp. iv, 386. Fr. 70.

This work, written in French by the director of the Ministry of Labor in Athens, and published under the auspices of the Institute of Comparative Law of the University of Paris, is by far the most complete and exhaustive juridical study on the problem of the control of the application of international labor conventions. The first part of the book gives an introduction on the International Labor Organization. Up to now a real International Labor Code has been enacted: 58 draft treaties, 49 recommendations; 740 ratifications by 45 states. But whereas in the first period particular emphasis was laid on the greatest possible number of ratifications, it is being more and more recognized that it is full and adequate *application* of the ratified conventions on which the importance of the Geneva institution depends. In the second part the author treats the binding character of the ratifications, and is therefore opposed to ratifications by states which, by the very nature of the convention in question, are in no position ever to apply them ("empty" ratifications), and more so to ratifications given simply as a token of sympathy (ratifications "in principle"). Ratification creates the legal obligation to apply the ratified conventions, by bringing the national legislation into harmony with the conventions, and by carrying out in fact this national legislation. Effective application presupposes national and international control.

After a survey of the history of international control in this field, the author deals in the third part with problems, hitherto neglected by doctrine, those of mutual control: annual reports of the members, according to a questionnaire, determined by the Governing Body; the Director of the International Labor Office has to present a résumé of these reports to the next session of the Conference. The resolutions of 1925 and 1926 have further created a Commission of Experts for the application of the conventions and

a Commission of the Conference for the same purpose. There is no doubt that at the present time mutual control forms the most important part of the whole control system.

The last part analyzes in detail the juridical control: (1) Representations to the International Labor Office against a state which has failed to execute a convention it has ratified, representations—a very important innovation—made by an industrial association of employers or of workers; only four such cases have come up in practice up to now. (2) Complaints, made either by a member-state against a member-state, or by the Governing Body *ex officio*, or—another important innovation—in consequence of the complaint made by a representative of the Conference. (3) Appeal to the Permanent Court of International Justice, which may even decree sanctions, although these sanctions are not binding upon the members, but only optional.

The book is based on a full knowledge of the whole relevant literature and on a thorough study of the materials of the International Labor Organization, many of which are unpublished and have been used by the author in mimeographed form in Geneva. This thorough juridical analysis is not only the most exhaustive study on its special question, but by taking care to relate this particular problem to the broad issues, the author has also made a contribution to the study of the progressive development of international law as a whole.

JOSEF L. KUNZ

China and the World War. By Thomas Edward LaFargue. Stanford University: Stanford University Press, 1937. pp. x, 278. Index. \$3.25.

So many books have of late appeared dealing with the international relations of China, it might be thought difficult to find a place for a new and valuable work within this field. However, the present volume is concerned with a subject which, hitherto, has not been satisfactorily treated, and it deals with it in an objective and scholarly manner. In order to give an explanation of the part played by China in the Great War, the author has found it necessary to describe conditions and events in China. He thus throws considerable light upon domestic conditions in that country during the period covered. For example, there is a full discussion of the background of the Twenty-One Demands and of the negotiations and agreements which resulted from those demands. Also, there is an account of the various factional controversies in China.

A most interesting account is given of the correspondence between Japan and Great Britain growing out of Japan's wish to enter the war in order that she might secure certain advantages which she desired, and of Great Britain's anxiety that, if Japan did enter the war against Germany, she should confine her activities within a limited field. Neither nation showed itself much concerned about the rights of China as a neutral. In this correspondence, Japan appeared almost as pleading that Great Britain should declare that the Anglo-Japanese Alliance applied to the situation.

The matter of China's entrance into the war upon the side of the Allies, and what she should do after entering, are dealt with at length, and the picture presented is a sorry one for all concerned. Those in political power in China were dominated by the desire to obtain advantages for themselves or for the factions they represented, and Great Britain and France were primarily concerned with the commercial and other benefits that would accrue to themselves by a thorough rooting out of German business enterprises and connections in China. M. LaFargue concludes his chapter dealing with this subject with the following statement which deserves to be quoted: "China's declaration of war, which was hailed as her entrance into the family of nations as an equal, was followed by added humiliations rather than by the treatment due to a comrade in arms. Perhaps no nation entered the war on the Allied side and then did less to help win it, but then no nation was drawn into the war for such trivial reasons as was China. To drive out of China a thousand German traders and missionaries and their families was not a reason of which the white man could be proud for dragging into a white man's quarrel the Chinese nation."

The last two chapters of the book, except for a short conclusion, deal with the part played by China at the Paris Peace Conference. The situation created by the Japanese occupation of the Province of Shantung provided the chief subject of discussion, though China's delegation sought vainly to have other and broader issues decided.

In his concluding chapter is shown the dissatisfaction, voiced most vigorously by students, felt by the Chinese people at the empty results for China of the Paris Conference. M. LaFargue closes his work with the following significant observation: "Largely through Allied propaganda which, toward the end of the war, was a potent agency for spreading the ideals of modern national democracy throughout the length and breadth of China, the Chinese people began to imbibe Western political ideology. The success of the student movement on Peking in shaking loose the grip of the Military leaders upon the Government struck a new note in Chinese history. Public opinion at last had shaken the seats of the mighty."

It is almost ungracious to make any criticism of so excellent a book, but the reviewer will register his surprise that the author, in his discussion of the Lansing-Ishii notes, makes no mention of the important fact, revealed in Secretary Lansing's *War Memoirs*, that, at the time the notes were signed, Lansing made it a condition that Ishii, in a statement that was to remain unpublished, should have his Government promise that it would refrain from taking advantage of conditions in China in order to seek any special rights or privileges which would abridge the rights of subjects or citizens of other friendly states. This undertaking by Japan, it may be noted, later appeared in almost exactly the same words in paragraph 4 of Article One of the Washington Conference Nine-Power Treaty. However, it was not until the *Lansing Memoirs* appeared in 1935, that the original source of this com-

mitment, now to be made by all the signers of the treaty, was made known. In the Washington Conference the provision made its appearance, without explanation of its source, in a report made by a committee of which Senator Root was chairman. The Japanese delegation of course could raise no objection to it because they must have known that their Government was already committed to it. It may be further observed that it is possible to argue that Japan was willing to have the statement made in April, 1923, that the Lansing-Ishii correspondence was to be regarded by both the American and Japanese Governments "as cancelled and of no further force or effect" because, were this not done, the American Government, in pursuance of a resolution adopted by the Washington Conference which pledged the participating Powers to furnish "a list of all treaties, conventions, exchange of notes, or other international agreements which they may have with China, or with any other Power or Powers in relation to China, which they may deem to be in force and upon which they may desire to rely" would be compelled to make public that Japan had made this commitment. Ishii, though he deals at length in his *Diplomatic Commentaries* with the notes he signed jointly with Lansing, maintains a discreet silence regarding the secret protocol.

W. W. WILLOUGHBY

Japan Over Asia. By William Henry Chamberlin. Boston: Little, Brown & Co., 1937. pp. xii, 395. Illustrated. Index. \$3.50.

The Far East Comes Nearer. By Hessel Tiltman. Philadelphia: J. B. Lippincott Co., 1937. Illustrated. pp. 357. Index. \$3.00.

These two books can well be reviewed together since they cover much the same ground in much the same manner and are in substantial agreement as to the interpretations to be given to the facts discussed. Moreover, they both illustrate the fact that it is by competent newspaper correspondents and traveled journalists that the world is furnished with the most illuminating accounts of what is happening in the field of foreign affairs. Mr. Chamberlin, for years observer in Russia for the *Christian Science Monitor*, and, since 1935, serving the same paper in Tokyo, is known by his volumes *Soviet Russia* and *Russia's Iron Age*. Mr. Tiltman has been a newspaper editor and foreign correspondent, and is the author of a considerable number of volumes. Among these have been two, prepared in collaboration with Mr. P. T. Etherton, which have dealt with topics covered in the present volumes and entitled, respectively, *Japan: Mistress of the Pacific*, and *Manchuria: The Cockpit of Asia*.

Both authors, though outspoken when dealing with errors of policy or with guilt of wrongdoing, impress the reviewer as free from bias, whether against Japan or in favor of China or any other country. Both books have for their purpose the interpretation of recent events in the Far East rather than a narration of them, and yet both seek to supply, and do supply, facts

sufficient to support their conclusions. Both books make it plain that, in the Far East, history's scroll, as it is now unrolling, reveals the progress of a great tragedy. China is seeking to reconstruct herself politically, economically and culturally, but is being checked and dismembered by Japan. Japan, despite her great achievements of the last fifty years, finds herself beset by domestic conditions which are alarming, and is held so tightly in the grip of the General Staffs of her armed forces, that she is committed to policies upon the mainland of Asia which, almost inevitably, will lead to disaster to herself whatever military successes her armies may achieve.

The reviewer wishes that space would permit him to give in more detail the illuminating observations to be found in these two excellent volumes. As it is, however, one quotation from each of them will have to serve as examples. "In Japan," says Mr. Tiltman, "the army is the custodian of external interests and the repository of national ideals." Is it possible to give a more concise and adequate explanation of the dominance enjoyed by the military arm in Japan? Almost everyone asks why it is that the Japanese are so hostile to communism, at least in its Russian form. Here is Mr. Chamberlin's explanation. "Communism is a blatant challenge to everything that is held sacred in the traditional Japanese morality: reverence for the Emperor, filial piety, paternal relationships in industry, emphasis on a spiritual rather than a materialistic interpretation of life."

W. W. WILLOUGHBY

Britain in Europe, 1789-1914. By R. W. Seton-Watson. New York: Macmillan Co.; Cambridge: University Press, 1937. pp. x, 716. Index. \$9.00.

While the author has not made exhaustive use of the original sources and while he lacks the diplomatic style of Albert Sorel, the present volume nonetheless is perhaps the best survey of British foreign policy we have. Its only competitor is the three-volume *Cambridge History of British Foreign Policy*, a work which suffered from its multiplicity of authors and a rather formal point of view. Professor Seton-Watson's volume has the advantage of continuity, and the result is a volume which is particularly useful in helping the reader to understand the contradictions and the vagaries of British policy at the present time.

Originally it was the intention of the author to limit this work to the period from 1822 to 1874, the larger part of the volume being devoted to this period. Nevertheless it has been filled out by an admirable prologue, beginning with Wolsey, often described as Britain's first great Foreign Minister, and an epilogue ending with the World War. Professor Seton-Watson summarizes his survey by saying that at the close of the Victorian period surprisingly little change had taken place in British policy since the days of Napoleon. "Britain's hybrid position as part of Europe, and yet in some respects outside it, served as a natural stimulus to overseas commercial and

political development—trade following the flag—and to reliance upon a strong navy. . . . As a logical consequence of this outlook she tended to favour a balance of power and to look askance at any Power which seemed to be aiming at hegemony in Europe. For her the real test was whether that Power sought to add naval to military superiority. To possess an infinitely stronger army than the British did not necessarily constitute a danger or prevent friendship; to supplement this by decisive naval power meant to endanger, in the most literal sense, the very existence of the Empire and the independence of these islands." A policy of isolation from the Continent, however, was "always the surest way of endangering British overseas interests."

Britain's policy, this record shows, has seldom looked very far ahead, and has often been inconsistent. During the struggle with Napoleon, British statesmanship indicated many of the qualities recently displayed in the less crucial struggles with Hitler and Mussolini. "They show that a blend of hesitation, detachment and ignorance do not necessarily spell degeneracy, and that the very men who showed such extreme reluctance to take the fateful plunge could develop a stubborn staying power, an elasticity of resistance, such as outweighed countless blunders and miscalculations, and simply refused to accept failure." One of the most interesting parts of the book is the account of Palmerston's foreign policy. He believed not only in the protection of British material interests abroad, but in the export of liberal institutions. Palmerston would not have enjoyed the recent spectacle of the British democracy taking the lead in denying to the loyalist government of Spain the right to buy arms, in the name of non-intervention.

RAYMOND L. BUELL

The World Crisis. New York: Longmans, Green & Co., 1938. pp. xii, 385. Index. \$4.00.

This volume consists of a series of papers by members of the faculty of the Graduate Institute of International Studies in Geneva, published in celebration of the tenth anniversary of the founding of the Institute. The papers are grouped into three sections dealing with political and historical, legal, and economic problems.

The section on political and historical problems includes contributions by Paul Mantoux, W. E. Rappard, Maurice Bourquin, G. Ferrero, and P. B. Potter. Ferrero's "Forms of War and International Anarchy" and Potter's "Present Crisis in International Organization" probably make the most original approaches to an understanding of this aspect of the present crisis. Mantoux contributes a detailed account of what the League of Nations did in the conflict between Poland and Lithuania over the Vilna district in 1920, and discusses the opportunities lost by the League to establish its supremacy in the early years in matters affecting the peace of the world.

Among the more legalistic approaches, the papers of Hans Kelsen, "The

Separation of the Covenant of the League of Nations from the Peace Treaties," and of Paul Guggenheim, "Legal and Political Conflicts in the League of Nations," are most concerned with immediately vital problems. Kelsen argues convincingly for separation of the treaties and Covenant, not on the usual political grounds, but in terms of the confusion inherent in the present legal status of those articles, vaguely called "the Covenant," which are found in four different treaties of peace. The other two papers in this section are: "Civil War and International Law," by Hans Wehberg, and "The Arbitral Tribunal of Upper Silesia," by Georges Kaeckenbeeck.

The third section on economic problems includes a general approach by Wilhelm Roepke ("International Economics in a Changing World"), and three discussions of more specific issues: "The Disintegration of the International Division of Labour," by L. v. Mises, "Peaceful Change and Raw Materials," by John B. Whitton, and "Monetary Internationalism and Its Crisis," by Michael A. Heilperin. Among these, that of v. Mises places emphasis on a much neglected aspect of international economic relations.

The nature and format of a *Jubiläumsschrift* of this kind places limitations of space and scope upon its authors which make a complete analysis of any phase of the present crisis impossible. Nor is it the fault of the contributors that the essential facts concerning present world conditions are already generally known. Yet one cannot help wondering whether the time has not come when more attention should be given to specific formulas which will permit the application of the findings of scholars to the practical solution of the present crisis. At any rate, one may hope that at the close of its second decade the Graduate Institute of International Studies will be able to look back upon a record as enviable as is that of its first ten years and yet with more prospect that its combined wisdom will be applied.

WALTER H. C. LAVES

BRIEFER NOTICES

The Settlement of Canadian-American Disputes. By P. E. Corbett. (New Haven: Yale University Press; Toronto: Ryerson Press, 1937. pp. viii, 134. Index. \$2.50.) Dean Corbett's stimulating essay, one of the studies of Canadian-American relations sponsored by the Division of Economics and History of the Carnegie Endowment for International Peace, is intended to demonstrate "the common social utility of the methods employed and results achieved in Canadian-American arbitration." Four of its six principal chapters are devoted to a remarkably clear and admirably balanced, though all too brief account of "all the conflicts between the British Crown and the United States which have been primarily concerned with the territorial or other interests of Canada." They deal respectively with boundaries, fisheries, inland waterways and miscellaneous claims. The author's pleasantly concise style enables him to find space not only for statements of the issues but for glimpses of a number of the commissioners, for references to national attitudes and to salient aspects of procedure and for personal comments upon awards. The number of instances of considerable or extreme tension is surprising; that the issues have yielded to arbitral procedure is represented as

in part due to the efficacy of that procedure, in part to the insistent will to peace of the peoples concerned. Following the examination of cases, there is a treatment of significant categories of law involved and it is here that Dean Corbett makes his principal contribution. The essay is concluded with a description of existing machinery of settlement, in connection with which the author urges the establishment of a standing Canadian-American tribunal of comprehensive and obligatory jurisdiction. HAROLD S. QUIGLEY

La Conférence panaméricaine pour la consolidation de la paix et le nouveau Panaméricanisme. By J. M. Yepes. (Brussels: *Extrait de la Revue de Droit international et de Législation Comparée*, 1937. pp. 477 to 544, and 745 to 785.) Standard-bearer of Pan Americanism in Europe is the distinguished Colombian jurist and writer, Dr. J. M. Yepes, who for the last ten years has been publishing in French a number of important volumes and monographs concerning the international life of the Western hemisphere, thus continuing the work initiated more than a quarter of a century ago by the eminent Chilean internationalist, Dr. Alejandro Alvarez. On the results of the Buenos Aires Peace Conference Dr. Yepes has contributed three works. The first two deal with "The American Conception of Peace" and the interpretation of "The True Monroe Doctrine" as manifested at that momentous assembly of the republics of the New World. The last one is a substantial and comprehensive treatise on the broad subject indicated by the above title. The first part constitutes a background of the main exposition of the achievements of the conference. The second part deals with the problems of the organization of peace, including the proposed creation of an American Court of International Justice, the questions of Neutrality, Limitation of Armaments, and the Codification of International Law, the Economic Problems, Intellectual Coöperation in America, and the proposed League or Association of American Nations. Dr. Yepes develops his subject in his usual scholarly and perspicacious manner, to reach conclusions which clearly show, in spite of its shortcomings, the profound political significance and the great psychological value of the Buenos Aires parley.

RICARDO J. ALFARO

Das System der politischen Staatsverträge seit 1918. By Paul Barandon. (Stuttgart: W. Kohlhammer, 1937. pp. xii, 250. Rm. 16.) This volume is one of the series of monographs constituting the *Handbuch des Völkerrechts* which, since the death of Dr. Fritz Stier-Somlo, is edited by Dr. G. A. Walz of the University of Breslau. It forms the second part of the fourth volume which bears the general title *Völkerrecht und internationales politisches Staatensystem*. In it Herr Barandon has not set forth a mere collection of the titles or texts of post-war political treaties; rather he has produced a critical and historical analysis of the background, provisions, interrelationships, effects and failures of those treaties. He has, in short, written a post-war world history in terms of its political treaties. Defining political treaties as those which directly concern the existence and permanence of the state, or which relate to war or peace, Herr Barandon classifies such treaties under three main heads and devotes one part of his book to each. Part I deals with treaties concerning the termination of war (*Kriegsabschlussverträge*), both those terminating the World War and those since concluded between Colombia and Peru and between Bolivia and Paraguay. Part II is devoted to treaties concerning the creation, recognition, transfer and limitation of statehood or state sovereignty (*Staatshoheit*). Therein are considered *inter*

alia the treaties or treaty provisions dealing with the transfer of territories and creation of new states after the war; treaties creating mandates, protectorates, condominiums, and servitudes; treaties limiting the freedom of the state in dealing with its minorities, finances, armaments, etc. Finally in Part III are discussed treaties regulating the foreign policy of states. These include treaties for the prevention of war (non-aggression, outlawry of war, peaceful settlement, etc.), treaties envisaging war (neutrality, guarantee, alliance), and treaties regulating war itself. Any book dealing with post-war international political affairs coming out of Germany today can be expected, wherever Germany is concerned, to emphasize Germany's mistreatment at the hands of the victors, to glorify Hitler, and to repeat well-known "justifications" for Germany's "termination" of various treaty obligations. Barandon has not avoided this. Where Germany is not directly in question, however, his scholarship appears to be above reproach, and his book, taken as a whole, is a useful contribution.

VALENTINE JOBST III

'Iraq. A Study in Political Development. By Philip Willard Ireland. (New York: Macmillan Co., 1938. pp. 510. \$3.75.) This study forms an excellent basis for understanding some of the current changes going on in Asia Minor. The well chosen documentation makes available the background for many movements in Turkish Arabia. The strategic importance of this area as regards the Persian Gulf and India has long been recognized, and, of course, Great Britain did not readily sacrifice the many years of trade dominance and the more recent source of essential oil supply at a time when world affairs were so unsettled. Dr. Ireland in a factual presentation shows the importance of the practical and flexible interpretation and administration of the many instruments which have originated in London. Not all of President Wilson's proposals have been realized in the Turkish area, and the difficulties of a plebiscite among peoples unaccustomed to voting, dominated by racial and religious antipathies, have been evident. The post-war disposition of the key area of 'Iraq, after the country had passed through different periods of political organization, still remains a problem. As a mandate, and under Faisal and Ghāzi, the kingly administration has not been uniform, and cabinet changes have been frequent. Apparently it was not long before those in government positions began to realize the financial possibilities of public office. Fourteen pages of appendices, a comprehensive statement of sources and bibliography, and a good index add to the value of this careful study.

G. G. W.

A History of the League of Nations. By John I. Knudson. (Atlanta: Turner E. Smith & Co., 1938. pp. vi, 445. Index. \$3.00.) Professor Knudson's volume is not so much an historical account as it is one of description of the League, of what it has done, "and how it has done it." The book is divided into four parts. In the first the emphasis is on the League as a political institution. Two chapters describe its origin and its organization. A third reviews each of the disputes which League organs have attempted to settle. Sanctions, other than public opinion, as a feature of the Covenant system, are summarily considered in connection with the Ethiopian affair. Public opinion, however, is separately considered as a "moral" sanction. Such political questions as that of armaments reduction, and the administration of the mandates and minorities régimes, and of the Saar and Danzig, are also brought within this section. The second part, under the head of

International Legislation, is devoted to description of the non-political activities of the League and the work of the technical organizations. It is concluded with a chapter on the coöperation of the United States with the League. Part three, "Semi-League Organizations," contains a description of the work of the International Labor Organization and the Permanent Court. It has a concluding chapter on the future of the League. Part four consists of four appendices. While the book gives, adequately for the beginning student and the general reader, a general description of the work done by the League, its principal value is in its revelation, unnecessary for the specialist, of the fact that League activities are much broader than those generally reported in the press. The emphasis is thus on the fact that the League continues as an important international institution even though it is being pictured at present as moribund. This is an especially important emphasis at the present moment. The volume, however, loses somewhat in appeal because of lack of care in proof reading and because of obscurity of expression.

HAROLD M. VINACKE

Pope Pius XI and World Affairs. By William Teeling. (New York: Frederick A. Stokes Co., 1937. pp. viii, 312. Index. \$2.50.) In this sprightly written book, the author, an English journalist and Catholic with exceptional contacts with the Vatican, has attempted to show "the position of the Catholic Church in most of the major countries of the world, and to lay special stress on the British Empire and the United States." Although it is a rather complete life of the present Pope, the emphasis is laid on "the political side of the Pope's life and the influence of the Vatican." In fact, it was published in England under the title, "The Pope in Politics." With regard to the Pope's position on the Italo-Ethiopian question, the author remarks that "The Pope when a prisoner was powerless, but still seemed to have the moral strength of a prisoner. The independent Pope was still just as powerless, but as an independent sovereign more was expected of him." He deplores the close link of the Vatican with Fascism since the Lateran Agreements of 1929. The relations of the Pope with Germany, Spain, the United States and other countries are discussed, if not adequately, at least thought-provokingly, in separate chapters. The author is refreshingly frank in his discussion, appraisal and criticism, in some instances unduly sharp, of the activities of the Pope in world affairs. However, a tendency toward preconceived ideas, an unwarranted assurance and a certain lack of knowledge concerning many of the matters which he presumes to discuss weaken the force of much that he says.

HERBERT WRIGHT

Die Völkerrechtliche Stellung der Internationalen Kanäle. By Heinrich Rheinstrom. (Budapest: Révai, 1937. pp. 75.) This study, based on the author's 1906 Würzburger dissertation *Die Kanäle von Suez und Panama*, reexamines the position in international law of "international" canals. A brief but scholarly discussion of the relevant law and treaties, of decisions and conventions, of the arguments and proposals advanced for and against freedom of navigation on, or internationalization of, these canals, acknowledges hesitatingly the principle of territorial sovereignty and concludes rightly that international law at present does not contain a positive rule affirming a right to innocent passage to vessels of all flags through such interoceanic waterways as the Panama, Suez, or Kiel Canals.

GEORGE MANNER

The purpose of Henri Labouret's *Le Cameroun* (Paris: Paul Hartmann, 1937. pp. viii, 259. Fr. 20) is to describe as fully as possible in an objective fashion the present situation in the Cameroons under French mandate. It was found impossible to compare the political and economic situation of the territory in 1913 and in 1935. Chief emphasis is laid upon the evolution of the native populations since 1922. Chapters cover the geography of the country, the system of native government, education and legal system, agricultural policy and measures taken to promote public health. Another section covers the physical equipment of the territory, such as ports, railroads, European colonization, mining, commerce, and public finance. The book is a report to the Conference of International Studies held at Paris in 1937. For his facts, Professor Labouret has relied upon publications of the League of Nations, other public documents, and a visit of six months to the country. He reaches several general conclusions: (1) The spirit of continuity of the administration; (2) the emphasis upon administering the territory "en bons pères de familles," avoiding public debt, and encouraging agricultural development under native ownership of the land. The book is of interest primarily as an aspect of international control of imperialism and of experiment in colonial administration over primitive peoples.

CHESNEY HILL

Dr. Vittorio Favilli, in his monograph, *L'Organizzazione Internazionale del Lavoro nel Diritto Internazionale* (Pisa: U. Giardini, 1937. pp. 91. L. 8), to which Dr. G. E. di Palma Castiglione, formerly Chief of Division and sometime Deputy Director of the International Labor Office, has contributed a brief commendatory preface, has given Italian readers a succinct but clear analysis of the legal characteristics and significance in international relations of the I. L. O. as an institution. Chapter I with admirable lucidity insists on its autonomy within its own sphere of competency despite the somewhat complex way in which it is related to and makes use of the machinery of the League of Nations and other international institutions. With ample citation of sources, Dr. Favilli resolves this question in favor of complete autonomy, legally speaking. In the second chapter, the author points out how membership is acquired and lost in both institutions (I. L. O. and L. of N.), and he describes in the third chapter the juridical nature of the I. L. O. as a union of states, but an administrative union, upon which he postulates an interesting interpretation of the juridical character of its conventions. An excellent bibliography and the French text of the Constitution of the I. L. O., which he relies upon for the most part in his legal argument, with, however, frequent references to the equally authoritative English text, concludes this valuable monograph.

S. M. LINDSAY

Political Handbook of the World, 1938. Edited by Walter H. Mallory. (New York: Published by Harper & Bros. for the Council on Foreign Relations, 1938. pp. vi, 210. \$2.50.) By its annual issuance since 1928 this handbook has been accorded a standard place on reference shelves. It is designed to present the political party structure of the various countries (72 are fully noticed and 8 noted) and the political complexion of leading newspapers and periodicals. The practical character of the volume would not be lost if the Union of Soviet Socialist Republics appeared under its own name instead of "Russia" and the United Kingdom ceased to be "Great Britain" in accordance with the Statute of Westminster. It would be handy if the accurate name of each government were inserted for each country, for

it is as useful to know that Switzerland is a confederation as that South Africa is a union. Cabinet members of governments are named usually with relation to their party membership. It would be enlightening and useful to many if the cabinets were tabulated so that the technical composition of governments as well as their personnel would be evident. The dates of cabinet appointments are given only for the cabinets in office at press time; where a cabinet has been in and out of office since the last edition, a note of the fact would enhance the reference value of the Handbook.

DENYS P. MYERS

Die "common allegiance" als Beschränkung der völkerrechtlichen Handlungsfähigkeit der britischen Dominien. By Walter Schmid. (Berlin: Verlag für Staatswissenschaften u. Geschichte, 1938. pp. xii, 82. Rm. 5.60.) The conclusions reached in this excellent essay are based upon a theoretical interpretation of the common allegiance to the Crown upon which neither the jurists nor the statesmen of the Commonwealth are agreed. This allegiance, according to Dr. Schmid, makes a constitutional union which is one in war and peace. It means that the Dominions have no right to declare war, peace or neutrality, make treaties of military alliance, or secede. Yet the admission that "there is no government with power to bind the whole Commonwealth" reveals the weakness of the fundamental assumption, and the subsequent argument fails to convince.

P. E. CORBETT

The Foreign Laws of Marriage and Divorce. Part I. The Countries of the European Continent. By Herman Cohn. (Tel-Aviv: Palestine Publishing Co., 1937. pp. viii, 263. Index. 18 s.) This interesting compilation of the laws governing marriage and divorce on the European continent is a real contribution to the literature available in the field of comparative law. The laws of 28 countries are compiled and arranged under similar headings so that legal divergencies and congruities are readily seen. In the main the selections are arranged according to (1) sources of the law, (2) prohibited marriages, (3) solemnization of marriages, (4) effects of marriage, (5) property relations in marriage, (6) nullity of marriages, (7) dissolution of marriage, and (8) private international law. In each case reference is given to the sources from which the materials are drawn so that they can be traced or kept up to date without difficulty. An effort has been made throughout the book to translate as accurately as possible so that one approaches having here a handbook embodying the specific terminology of the foreign laws. Although the compilation was intended for the use of lawyers in facilitating the giving of advice relative to remedies under particular national laws, it is a convenient and ready reference for the student and scholar in the field of international law and comparative law. A second part is in preparation which will contain the marriage laws of the non-European countries, and a third volume will be devoted to religious laws and rites of marriage and divorce. Both of these volumes may be looked forward to with interest.

CATHERYN SECKLER-HUDSON

Patriotism, Nationalism and the Brotherhood of Man. A Report of the Committee on National Attitudes. By Carlton J. H. Hayes. (Washington: Catholic Assn. for International Peace, 1937. pp. 48. 10¢.) In this report, Professor Hayes analyzes some fundamental problems at the base of the structure of international relations. He defines true patriotism and discusses nationalism in its various aspects. He distinguishes the natural or

historic from the perverted interpretation which makes of nationalism a religion. He points out how all religions are everywhere assailed by the extreme form of nationalism. "In Europe and America, it is Christianity and Judaism which suffer. But in Turkey and Persia it is Islam also, and in the Far East it is Buddhism" (p. 19). He believes that the rampant extreme nationalism of the contemporary age is in large part a result of "conscious education and purposeful propaganda" (p. 41). The extremes of the right and of the left are equally destructive of religion and both incite to violence and armed conflict. The report points out the error of certain present-day racial theories. "Biologically, there is no German or Slavic race, no Irish or Jewish race. There is a white race, a black race, a yellow race. There is a long-headed race and a round-headed race" (p. 11). It lays emphasis upon the fact that traditional Christian teaching of the essential unity of mankind is confirmed by the latest findings of the biological and anthropological sciences. Although the report is written candidly as a discourse of Catholic churchmen, its humanitarian outlook in many ways transcends all sectarianism.

ARTHUR K. KUHN

Germany's Colonial Problem. By G. Kurt Johannsen and H. H. Kraft. (London: Thornton Butterworth, Ltd., 1937. pp. 96. 3s. 6d.) Anyone who wants a concise statement of the German arguments for the return of German colonies will find it in this little book—where he also will find the confused thinking, the not infrequent misstatements of fact, and the emotional irritation which appear so often in the German discussion of this subject. The authors begin by dragging out the old exploded arguments that colonies are necessary as an outlet for population, as markets, and as sources of raw materials. Apparently, they have completely overlooked the demonstration of the fallacy of these arguments which has been given in recent years in the analysis of the actual colonial record made by others and in my *Balance Sheets of Imperialism*. In discussing the moral and psychological aspects of Germany's claim to the return of her colonies, the authors are on somewhat surer ground. There is no reason seriously to question the statement that an injustice was done to Germany, both in depriving her of her colonies, and in the statements which were made as to why these regions were taken away. The real animus in the German demand for the return of colonies is stated frankly and understandably enough in the remark of the authors: "The appropriation of the colonies and the exclusion of the German people from the colonial sphere constitute an insult to them which must be withdrawn on grounds of morality. The German desire for the return of the colonies forms part of Germany's demand for equality of status in general" (pp. 33-34). Why can't the Germans say that that is what they want and stop confusing the issue with talk about economic desirability of colonies? The book adds nothing of importance to the literature on colonies.

GROVER CLARK

Wem hat Deutschland seine Kolonien aufgrund des Versailler Diktats überlassen? By Harro Brenner. (Bonn and Berlin: Ferd. Dümmlers Verlag, 1938. pp. 99. Rm. 4.05.) The title indicates the thesis. It is that the Allied and Associated Powers in the dictated peace of Versailles despoiled Germany of her colonies, and that Germany surrendered sovereignty over them to the victors and not to the League of Nations. Using French, English, and German works as source material, the author traces the formulation of Articles 22, 118, 119 and the following of the Treaty of Versailles. After

dealing with the question of sovereignty in the mandates, the division of the mandates, and the termination of mandates, the author presents the German legal point of view. It is that the principles and rules governing the mandate system have been violated by the victorious Powers and hence the former German colonies should revert to Germany. The foreword states that the view is rapidly gaining favor that an over-populated country, which is poor in raw materials, requires colonial territory in order to live.

Die Verwaltungsorganisation der Kolonien in tropischen Afrika. By Wilhelm Wengler. (München and Leipzig: Duncker & Humblot, 1937. pp. 62. Rm. 2.80.) This is number two in a series of short works dealing with the international law of colonies (*Kolonialrecht*) prepared by the *Akademie für Deutsches Recht*. The author, who is a Referent in the Institute for Public International Law at the University of Berlin, traces the bases for colonial administration in the colonies of England, France, Italy, and Belgium located in tropical Africa. The five chapters deal with: legislation for the colonies; institutions for administering colonies located within the mother country; European institutions of administration located in the colonies; the share of the natives in the administration; and the financial and economic administration of the colonies. The work is thorough, scholarly, and on the whole objective. Only one serious criticism arises: Why was a treatment of the Portuguese colonies omitted?

THORSTEN V. KALIJARVI

War Losses to a Neutral. An Analysis of the Cost to the United States of Cash and Carry, Neutrality Embargoes, Economic Sanctions, and Other Policies in the Far Eastern Conflict. By Eugene Staley. (New York: League of Nations Assn., 1937. pp. 78. 25¢.) The general title of this valuable pamphlet is not fully descriptive of the contents, although the subtitle is adequate. The author, well known for his work in the field of economics and international relations, analyzes the policy of the United States in the present or probable future situation in the Far East. After a clear and concise summary of our trade relations with and investments in China and Japan, he appraises nine possible policies of the United States, from "old fashioned" defense of neutral rights to full participation in international sanctions. The reader is never in doubt that the latter policy is the one favored by Professor Staley. A brief section is then devoted to a study of general war costs to a neutral, with emphasis on the effects of post-war dislocations and the sense of insecurity. There is a convenient summary at the end. It is a provocative pamphlet, an admirable basis for an evening's discussion. The reviewer would like to debate numerous of the author's conclusions. It is an illuminating pamphlet, packed full of useful information, presented in simple, readable form. It represents the kind of study which should have been made by the Government on a larger scale before the Neutrality Acts of 1935-1937 were enacted.

International Loans and the Conflict of Laws. A Comparative Survey of Recent Cases. By Martin Domke. (The Grotius Society. London: Sweet & Maxwell, Ltd., 1937. pp. 21. 2s. 6d.) This reprint of a paper read before The Grotius Society on July 1, 1937, contains an analysis of the decisions of courts in various countries on the gold clause in bonds and other contracts for loans. Particular attention is paid to the Joint Resolution of the Congress of the United States, June 5, 1933. The author stresses as important the construction of the gold clause as a gold value clause. He urges that when national legislation abolishing gold clauses or restricting currency is adopted, it should not be made applicable to international loans.

In the interest of creditors of international loans, he pleads for uniformity of judicial interpretations. He looks for useful results from the studies inaugurated by the League of Nations.

PHILIP C. JESSUP

Germany Since 1918. By Frederick L. Schuman. (New York: Henry Holt & Co., 1937. pp. xii, 128. Index. \$1.00.) In this slender volume the author of *International Politics* gives us a brilliant survey of the transition of Germany from the constitutional monarchy of the old régime to the Weimar Republic and from the Republic to the totalitarian state of the present Nazi Government. The story, though compressed within a hundred pages, is presented with sufficient detail to make informative as well as exceedingly interesting reading. Nowhere else has the reviewer found more acute judgments upon the men and the events of this period of political confusion and economic distress. The chapter on "The Republic without Republicans" explains lucidly the reasons for the failure of the Weimar Constitution. The chapter on "The Demise of Democracy" makes clear the forces within Germany that were slowly setting the stage for the triumph of the National Socialists, whose principles are set forth in the last chapter on "The Totalitarian State." While Professor Schuman writes from the point of view of a "Liberal," he makes every effort to state the case fairly for the Nazi régime. The Berkshire Studies in European History have more than justified themselves by this latest addition to their list.

Relatorio sobre os Trabalhos da 1ª, 2ª e 4ª comissões da Conferencia Interamericana de Consolidação da Paz. By Hildebrando Accioly. (Rio de Janeiro: Imprensa Nacional, 1937. pp. 84.) Dr. Accioly is well known to American scholars, not only as former Counselor to the Brazilian Embassy in Washington and as delegate of Brazil at the Sixth International Conference of American States and at the Inter-American Conference for the Maintenance of Peace held at Buenos Aires in 1936, but as the author of a valuable treatise on International Public Law. His report to the Minister of Foreign Affairs on the work of the first, second and fourth committees of the Buenos Aires Conference will therefore find a hearing outside the national circle of Brazilian readers. In summary form Dr. Accioly surveys the work of the committees, taking the several problems seriatim and showing how they were handled in committees and subcommittees. Special stress is laid upon the problem of the coördination of peace agreements; the maintenance of peace, including the elaboration of an original Brazilian draft treaty; non-intervention; the declaration of principles of inter-American solidarity, to which one of the Brazilian delegates gave such valuable support; the Brazilian draft treaty to reinforce the means of preventing war between American states; the several projects relating to neutrality, including the coördinating treaty submitted by the United States; and the problem of the elimination of force in the collection of contract debts, to the discussions of which Dr. Accioly himself contributed so helpfully. An appendix contains, among other documents, the able declaration made by the author before the Fourth Committee on the subject of the Drago Doctrine.

C. G. FENWICK

The Legal Status of Aliens in Pacific Countries. Edited by Norman MacKenzie. A Report in the International Research Series of the Institute of Pacific Relations. (New York, London, and Toronto: Oxford University Press, 1937. pp. xii, 374. Index. \$7.00.) This is a study, the editor tells us, which dates back to the beginnings of the Institute of Pacific Relations.

It is presented in 12 chapters, composed of studies by some 20 persons or organizations, each intimately acquainted with the country under discussion. The countries included are Australia, Canada, China, Indo-China, the Pacific Dependencies of Great Britain, Japan, Netherlands India, New Zealand, Philippine Islands, Russia and the United States of America. The chapter dealing with the United States was prepared by Professor J. P. Chamberlain. In an introductory chapter, Professor MacKenzie gives as his view that state control of migration is at the present time more desirable than individual freedom of movement. He finds also that the most direct and effective method of improving the existing situation in respect of the treatment of aliens lies in the field of national legislation, preferably uniform among nations. It is, of course, impossible to summarize the contents of the book. The contributions are of varying lengths and quality, all of them compact rather than exhaustive statements, and together constituting an invaluable source of materials for students in various fields who are interested in the immigrant or the alien. Much of it has doubtless been presented for the first time in this study. It includes constitutional and administrative problems, but excludes any sociological approach.

Force or Reason. By Hans Kohn. (Cambridge: Harvard University Press, 1937. pp. x, 167. Index. \$1.50.) In three short lectures, originally delivered at the Harvard Summer School, Dr. Kohn ponders the problem of the twentieth century, which is "the enlargement of democracy and all that it implies, liberty and equality, dignity and happiness," both as between nations and as between individuals. The nineteenth century was dominated by faith in reason; the American and French Revolutions, for the first time, attempted to order society on rational principles. But the bewilderment of the masses after the World War led to the Dethronement of Reason; the Cult of Force has replaced (or rather, perhaps, threatens to replace?) the civilization based upon Man and Reason. Since reason does not now control force, force becomes an end in itself—and just at the moment when humanity most needs its rational powers for rebuilding. Time and space no longer separate mankind; peoples everywhere are becoming equal. Thus comes the Crisis of Imperialism. The economic equilibrium of the 19th century is upset; new national states are appearing, as in the Orient, which attempt economic modernization through state control. "The eternal dumb suffering serfs are breaking through to a new life, to individuality and personality." The industrialization of backward countries calls for painful readjustment in imperialist countries. Solutions must now be found for a world community; yet we take refuge in provincial mindedness. Dr. Kohn writes in philosophical vein and in erudite style; what he says is characterized by common sense, and is supported by notes and references which fill a third of the book.

Le Droit des Gens et la Guerre. By J. Voncken. (Paris: Éditions Internationales; Bruxelles: Emile Bruylant, 1937. pp. 94.) This little brochure is the work of the *Directeur de l'Office International de Documentation de Médecine Militaire*, at Liège; and is evidently written from a deep interest. The title is a little misleading, for the author is concerned only with the rules for the protection of human life and the efforts of medical men and lawyers to work out these rules since the World War. Medical officers of that war held a conference at Brussels in 1921, and established a committee for carrying on the work. Various conferences of doctors and lawyers have been held since that time and a project of laws laid down at Monaco in 1934 is still under discussion. The thesis of the book is that life must be safeguarded.

CLYDE EAGLETON

Die Geistige Situation der Deutschen. By Heinz Lunau. (Brussels: Éditions de la Phalange, 1937. pp. xii, 152. Fr. 35.) Written by a courageous young German scholar who values his intellectual independence, this vigorously phrased book was rejected by publishers in Germany and had to be printed in Brussels. A pupil of A. V. Lundstedt, the author criticizes his compatriots for the creation of a condition of chaos in the political sciences. The sterility of German thought is shown to result from excessive preoccupation with the concept of the state to the neglect of the realities of communal life. The description of the epistemological morass into which the jurists have fallen is excellent. One section of the book is devoted to criticism of the formulation of international law in terms of the rights and duties of states. Here his analysis touches a larger group than the German legal fellowship. "Rights" in the national sphere are descriptions of the functioning of the machinery which exists to assure in the interests of the entire society that all difficulties between individuals will be resolved peacefully. In the international sphere, however, where machinery to safeguard the interests of the community is lacking, talk of "rights" serves only to rationalize the determination of states to have resort to force in order to make those rights effective. Hence, use of the term in international law is unscientific and socially vicious. Consistently with this analysis, the author criticizes the League of Nations on the double ground that it makes war "rightful" and sanctifies the system of subjective "rights" and "duties."

L'organisation Judiciaire, la Procédure et la Sentence Internationales. By J. C. Witenberg in collaboration with Jacques Desrioux. (Paris: A. Pedone, 1937. pp. vi, 436. Index.) The work under review supplements usefully the standard treatises on international arbitration of Merignhac and Ralston. The problems that arise at successive stages of an international cause are treated seriatim in a practical fashion. While textual discussion is suggestive rather than detailed, abundant citation makes easy further research. Throughout the volume the voluntary character of international arbitration is stressed, and the authors are able by keeping constant sight of the practical limitations resulting from that fact to avoid the unhappy divorce of theory from practice by which much discussion in this field suffers. Their practical grasp of the problems confronting the judge and the parties is particularly evident in the treatment of such questions as the effect of non-observance of the rules of procedure prescribed by the compromis or the tribunal. There is an interesting comment on the rôle of the agent. The authors find it necessary to remind the reader that the agent is the representative of his government and that his functions do not include the expression of personal opinion. It is somewhat unsatisfactory to find questions of competence discussed in three widely separated places. In this respect the authors might have followed Merignhac with advantage. They make the not uninteresting error of asserting that the Bryan-Chamorro Treaty of August 5, 1914, related to the Panama Canal!

• *Die völkerrechtliche Stellung der B- und C-Mandate.* By Wolfgang Abendroth. (Breslau: M. and H. Marcus, 1936. pp. x, 378. Index. Rm. 20.) The clamor for the return of Germany's colonies gives this careful study of the legal status of the B and C mandates added interest. It is fair to say that the author disclaims any tendentious aim. The book deals with the legal sources of the mandate system, the legal character of that system, the administrative duties of the mandatory, and the League's control of administration. Under the first head the author analyzes the Peace Treaty, the treaty of August 25, 1921, between the United States and Germany, the texts of the mandates, and what he calls the mandates-recognition treaties

(*Mandatsanerkennungsverträge*) of the United States. The discussion of these last is of particular interest. While Dr. Abendroth concedes that the claim of the United States to a voice in the allocation of the mandated territories and the determination of their boundaries rests on solid legal foundations—an admission in which he is almost alone among the numerous European and even American students of the subject—his analysis suffers from inadequate knowledge of the history of the mandates controversy between the United States and its Principal Associates in the late war. The material has been available ever since the publication by the Department of State in 1927 of the correspondence relating to the Mandate for Palestine. This deficiency also vitiates his conclusion that the United States had no rightful claim to a voice in the formulation of the terms of the mandates. Finally, his use of the term "recognition" treaties, mentioned above, leads him to overlook the significance of the use of the word "consents" in these treaties and its bearing on the rights of the United States *vis-à-vis* future modifications of the terms of the mandates. On the inevitable question of sovereignty over the mandated territories the author's position is that such sovereignty is held *pro indiviso* by the members of the League of Nations. There is a somewhat tedious parade of learning, especially in the unending tilting of lances with other scholars, which is probably an eternal characteristic of German legal writing.

Grundlagen und Methoden Internationaler Revision. By Werner Gramsch. (Stuttgart and Berlin: Kommissionsverlag Deutsche Verlags-Anstalt, 1937. pp. 181. Rm. 6.) The study under review is the prize-winning essay submitted in a contest sponsored by the German Studies Committee of the New Commonwealth Institute upon the question: "How would an equity tribunal have decided in the Rhineland question?" The answer to that question is not found in this book. While the author begins with some hopeful commonplaces concerning the necessity to make provision for peaceful change, his treatment soon degenerates into an epistemological philosophical analysis of the ideal conditions necessary for the establishment of effective machinery of peaceful change. As in most such discussions, the conditions are millennial, while the proportion of home-made technical terminology leaves one in doubt whether it was worth while to examine them.

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ELEANOR H. FINCH



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THE CONFLICT BETWEEN AUTOCRACY AND DEMOCRACY

BY E. T. WILLIAMS

Former United States Diplomatic Officer in China and Chief of the Division of Far Eastern Affairs, Department of State

✓ Autocracy and Democracy are mutually antagonistic. A dictatorship, whether that of the proletariat or one established by a totalitarian state, is a menace to popular government. We have all seen in the recent past how it has shown itself a foe to liberty; to freedom of the person, freedom of opinion and speech, freedom of the press, and hostile to religious toleration. Autocracy, relying upon force, is necessarily militaristic and readily assumes an aggressive attitude towards other forms of government.)

In 1917 we went to war "to make the world safe for Democracy." Today the world is more unsafe for Democracy than it has ever been. There are between fifteen and twenty autocratic governments, most of which were unknown in 1914. Even in our own country there are those who approve the dictatorship of Stalin, others who admire the policy of Mussolini, and some who have a good word even for Hitler. Yet the principles upon which these dictatorships are founded are the very negation of those upon which our democratic form of government relies.

The trend towards autocracy today in so many parts of the world is a remarkable phenomenon. But it is a retrograde movement. ✓ It appears to be a result of the disillusionment caused by the World War and even more by the dissatisfaction with the peace treaties that followed it.

The writer, on his way to the Peace Conference in December, 1918, was detained in London. On Sunday he went to Westminster Abbey for worship. There he listened to a sermon from the text: "We are more than conquerors."¹ It was an eloquent plea that peace be made in a Christian spirit with generosity to a fallen foe, that we ought to be something more and better than conquerors, that the treaty of peace should not be punitive, but rather seek to restore good feeling between the peoples so recently at war.

THE PARIS PEACE CONFERENCE

At Paris one entered an entirely different atmosphere. It was not surprising, of course, to find the French people filled with hatred of those who had invaded their land, who had reduced their magnificent cathedrals to heaps of powdered stone and mortar, who had destroyed cities and villages and covered the fertile fields of France with the wreckage of war. ✓ At Paris men talked of hanging the Kaiser. A commission was appointed to consider the question of responsibility for the war. The Commission recommended the creation of an international court to try those responsible for bringing on the war. The Commission made an exhaustive report, but the

¹ St. Paul to the Romans, viii, 37.

American members of it demurred to some of the recommendations.² They disputed the jurisdiction of any international court over the actions of sovereigns. The Kaiser was not brought to trial.

On the 30th of October, 1918, General Pershing had addressed a letter to the Supreme Council of the Allied and Associated Powers, in which he urged that no armistice should be granted to the Central European Powers until they should make an unconditional surrender.³ From the viewpoint of a military commander his argument was doubtless correct. Possibly some humanitarian might have shuddered at the possibility of uselessly continuing the strife. Fortunately the disposition of the Allied forces during the peace negotiations made a renewal of hostilities impossible.

The Treaty of Versailles, imposed upon Germany, gives clear evidence of the feeling that animated the men who framed it. In spite of the fact that Germany had consented to a peace based upon the Fourteen Points of President Wilson and upon conditions stated in his other addresses, the Treaty deliberately ignored some of these stipulations. Among the Fourteen Points we find the following:

V. A free, open-minded and absolutely impartial adjustment of colonial claims, based upon a strict observance of the principle that, in determining all such questions of sovereignty, the interests of the populations concerned must have equal weight with the equitable claims of the government whose title is to be determined.

THE PACIFIC ISLANDS

This principle was violated in the disposition made of the former German colonies in the islands of the Pacific and in the Chinese province of Shantung. The question of the disposition of the islands north of the equator formerly belonging to Germany was brought before the Council of Ten on January 27, 1918. Baron Makino arose and asked that they be given to Japan as spoils of war. He stated that they had been occupied by Japan *after the withdrawal of the Germans*.⁴ It was true that they had been occupied by Japan after the withdrawal of the Germans, but it was not the whole truth. The whole of the German New Guinea Protectorate with its dependent islands was surrendered to Great Britain on September 17, 1914. These islands north of the equator were included in that cession. When Japan seized them she took them not from Germany but from Great Britain. It was not until 1917 that Great Britain agreed in a secret exchange of notes to recognize Japan's right to hold them. This was done by Great Britain in order to get from Japan assistance against the submarine menace in the Mediterranean.⁵

While this question was under consideration, a missionary who had lived many years in the Marshall Islands called upon me and stated that the in-

² See The Times (London), Apr. 29, 1919.

³ *L'Illustration*, March 5, 1938, p. 244, "Si l'on Avait Écoute Pershing."

⁴ My diary, Jan. 27, 1918.

⁵ Archives of Department of State, History of the Treaty of Versailles.

habitants had been civilized and Christianized by missionaries from Hawaii, and that there could be no doubt that, if a plebiscite were taken, they would ask to be taken under the protection of the United States. This information was given to the American Commissioners, but President Wilson had determined that no transfers of territory to the United States were to be allowed. This attitude was taken despite the earnest recommendation by the United States naval authorities that the islands between Hawaii and the Philippines should be allotted to the United States.

SHANTUNG

The question of the disposition of German holdings in Shantung was considered on the same day as that relating to the Pacific islands, January 27, 1918. The subsequent transfer of these rights to Japan was an even more flagrant violation of the Fourteen Points, since the American Commissioners received cable messages from representative Chinese in Shantung protesting the grant of these possessions to Japan. The messages were received on April 9, 1919 and were from the Provincial Assembly of Shantung, the Provincial Chamber of Commerce, the Shantung Educational Association and from Duke K'ung, the lineal descendant of Confucius, whose home was at Kūfu in Shantung. These representative persons had a right to ask this assistance from the American Commission, since the American-Chinese Treaty of 1858 provided that the United States Government would use its good offices in behalf of China if any other government should deal unjustly with China.

The President's stipulation concerning territorial claims was extended and emphasized in his address at Mt. Vernon July 4, 1916:

II. The settlement of every question whether of territory or sovereignty, of economic arrangement or of political relationship upon the basis of the free acceptance of that settlement by the people immediately concerned, and not upon the basis of the material interest or advantage of any other nation or people which may desire a different settlement for the sake of its own exterior influence or mastery.

A similar statement was made in the address to the Congress February 11, 1918:

There shall be no annexations, no contributions, no punitive damages. People are not to be handed about from one sovereignty to another by an international conference or an understanding between rivals and antagonists. National aspirations must be respected. People may now be dominated and governed only by their own consent. "Self-determination" is not a mere phrase. It is an imperative principle of action, which statesmen will henceforth ignore at their peril.

OTHER GERMAN COLONIES

That the Conference failed to fulfill these stipulations that had been accepted by the Allies and by their enemies is evident from the dispositions that were made in Europe, Asia, Africa, and the islands of the sea. On Jan-

uary 27, 1919, President Wilson in the Council of Ten made an earnest plea against the annexations of territory that were being planned by various governments. He suggested that, as a substitute for annexation, the former German colonies should be turned over to the League of Nations to be administered by mandatories. This suggestion met with considerable opposition, but was eventually adopted with certain conditions that were embodied in the Covenant of the League of Nations. These colonies, according to Article XXII of the Covenant, are divided into three classes. Certain communities that formerly belonged to Turkey were to be recognized as independent but "subject to the rendering of administrative advice and assistance by the Mandatory until such time as they are able to stand alone." The second class comprised such territories as those of Central Africa where the mandatory was to be responsible for the administration, "subject to the maintenance of public order and morals" and the prohibition of the slave trade, arms and liquor traffic. The third class included former German colonies in southwest Africa and the South Pacific Islands which were to be "administered under the laws of the Mandatory as integral portions of its territory." This last classification was made to satisfy the protests of General Botha of South Africa and Premiers Hughes of Australia and Massey of New Zealand. This made the former German Southwest Africa practically a part of British South Africa, Samoa to be a dependency of New Zealand, and the German Protectorate of New Guinea, excepting the islands put under the Japanese mandate, to be a part of Australia. The only difference between this disposition and the proposed annexation of these territories is that the mandatory must report every year to the League of Nations the condition of the territories under its administration.

AUSTRIA

✓ Departure from the terms agreed upon for peace was shown in the treaty imposed upon Austria. In March, 1919, the Constituent Assembly of Austria voted for annexation to Germany, but the treaty which Austria was compelled to sign in September of that year, specifically forbade such union. The Austrian Tyrol with more than 200,000 German-speaking inhabitants was given to Italy, and one of the first measures adopted by the Italian Government was the prohibition of the use of the German language in the schools and in the sermons of the clergy.

Although the Allies had agreed to the stipulations made by President Wilson and accepted by Germany, reserving only assent to the clause relating to the freedom of the seas, they neglected to inform the President that they had already committed themselves on important questions by promises made to Italy and to Japan.

SECRET TREATY OF LONDON

It was in February and March, 1917, that Great Britain and France signed the agreements to support Japan's claim to the former German islands north

of the equator. The secret Treaty of London was signed on April 26, 1915, by which Italy was induced to forsake the Triple Alliance of Germany, Austria and Italy and cast in her lot with the Allied and Associated Powers. In return for Italy's assistance, the Allies promised Italy that she should have the Austrian Tyrol to the Brenner Pass, Goritzia, Gradisca and Istria and the city of Trieste, a portion of Dalmatia, Valona in Albania, the Dodecanese Islands and a zone on the Turkish mainland. Besides these important cessions of territory Italy was to receive compensation in case Great Britain and France should increase their territorial possessions in Africa.⁶

The secret Treaty of London had not promised Fiume to Italy. On the contrary it was excepted as being properly claimed by Yugoslavia.⁷ But the Italian poet, D'Annunzio, truly of the *genus irritabile vatum*, took a body of Italian troops and occupied Fiume in spite of the terms of the Armistice of November 4, 1918. President Wilson's appeal to the people of Italy over the heads of the Italian delegation on April 24, 1919, on this question of Fiume, stirred the whole Conference. The Italian delegates at once in indignant protest quit the Conference and returned to Rome. The people of Italy, very naturally, sided with their own representatives. In the end, however, Fiume was made a free city.

ITALY DISAPPOINTED

With the exception of Fiume, Italy obtained most of her claims on the eastern shore of the Adriatic, but with some modifications. Her claims in Asia Minor were based upon pre-war diplomacy. Turkey was in disorder in 1911. War with Italy broke out which resulted in the occupation by Italy of certain islands in the Aegean, the seizure of Libya in north Africa and a railway concession in Adalia. Thus at the opening of the World War, Italy was already in possession of certain territories and a region of interest in Turkey. The secret Treaty of London promised her Smyrna and rights in southern Asia Minor, but this promise could not be strictly fulfilled. Greece had superior claims. When Italy found Great Britain and France securing mandates over a good portion of the Turkish Empire, she refused to join in mapping the partition of that Empire. But in 1920 the three Powers, Great Britain, France and Italy, agreed in supporting each other's spheres of interest in Asia Minor. This gave Italy special interest in the region of Adalia, a share in the Bagdad Railway, and the right to exploit certain coal mines. Although Italy was already in possession of certain territories in Africa at the outbreak of the World War, they were not very extensive nor very important.

The former German colonies in Africa covered important regions in east Africa, in the southwestern part of the continent and in the west central por-

⁶ Isaiah Bowman, *The New World*, pp. 263, 264.

⁷ Bass, *The Peace Tangle*, p. 149.

tion. Italy found these vast regions (except a portion assigned to Belgium) being handed over to Great Britain and France under mandates, and the promise to herself was but reluctantly recognized. Great Britain ceded a piece to enlarge Italy's colony in Somaliland and another bit of territory on the west border of Egypt to enlarge Italy's Libya. France for a time refused to make any concession, but at last allowed a rectification of the boundary between Italian Libya and French Tunisia, which increased the Italian holding.⁸ These arrangements for the division of the spoils of war were, for the most part, made by secret agreements before the meeting of the Conference, and were among the things opposed by President Wilson in his "Fourteen Points." Another illustration of the same sort was the promise made by Lord Balfour to the Jews that they should have a home in Palestine, although he had not obtained the consent of the people chiefly interested in Palestine.

TWO DICTATORSHIPS

All these departures from the terms agreed upon for the negotiation of peace naturally irritated the defeated states and stirred jealousies among the Allies. Italy was of course displeased that the promises to her of greatly increased territory were not literally fulfilled. Moreover the year 1919 was marked by great social unrest in Italy. There were labor strikes in the cities and agrarian uprisings in the country. In that year Mussolini, who had been a corporal during the World War, but who was also a young political leader and a member of the Italian House of Deputies, organized in 1919 a new party, the Fascists. (By 1922 he had grown sceptical of the value of parliaments and disgruntled by the ineptitude of the Italian Government. He led his "Black Shirts" to Rome, was made Premier and became Dictator of Italy. He began at once to make his country a great military Power, and in due time was able to take territory in Africa and make the King of Italy an Emperor.

Germany and Austria were more disappointed than Italy with the Peace Treaties which violated the terms upon which they had agreed to negotiate. There another corporal, Adolph Hitler, an Austrian by birth and a resident of Germany, organized in 1920 the National Socialist Party, which by 1930 was able to poll 6,500,000 votes. He made himself Dictator of Germany. He saw his own country, the proud Austrian Empire, an aggregation of states and peoples, disintegrate under the influence of the theory of "self-determination." Austria was reduced to a small territory surrounding Vienna. He found Germany also dismembered; Alsace and Lorraine given to France, the Saar region temporarily under control of France, and one province granted to Denmark. Five of the provinces of Austria-Hungary went to form the state of Yugoslavia. Bohemia, Moravia, a part of Silesia and a portion of Hungary were taken by Czechoslovakia. Other portions of Austria-Hungary with parts of Russia and Germany formed the revived state of

⁸ Bowman, *op. cit.*, pp. 130-131.

Poland. These changes corrected in a measure the injustice done by the treaties of Vienna: one of 1815, the other of 1864. But one can understand that Germany did not view her territorial losses with philosophical detachment. We cannot, of course, be surprised that Hitler should view the Treaty of Versailles as a violation of the terms of the Armistice nor be astonished by his disregard, whenever possible, of the demands of that Treaty. So his action in building up an army and occupying the demilitarized zone along the French frontier was quite natural, as was also his annexation of Austria, already voted in 1919 by the Austrian Constituent Assembly. Neither is it remarkable that he should think of trying to gain control of German peoples bordering Germany, nor that he should talk of attempting to recover former German colonies.

His cruel persecution of the Jews, on the other hand, has deserved and received the condemnation of the civilized world. It illustrates well the intolerance and tyranny of autocracy.

The punishment of the German Government was richly deserved, but one may question whether it is just to hold the German people responsible. The bitterness shown toward them at the Conference by the Allies could only breed resentment. We may be said, therefore, to be reaping what we sowed. The American people, having taken a leading rôle in the negotiation of peace at the close of the World War, cannot now with consistency be indifferent to the result. True we did not ratify the Treaty of Versailles, but in our subsequent treaty with Germany and in that with Japan relating to Yap we condoned the wrongs done at Versailles.

The powerful autocracies that have sprung up since the World War, and their hostility toward all forms of democracy, together with their military preparations, warn us of coming danger to our country. Still more threatening is the danger that confronts us across the Pacific.

AN ORIENTAL AUTOCRACY

Tokyo lies about 130 degrees east of Berlin, *i.e.*, nearly half-way around the globe. But politically Tokyo is but a step from Berlin. When Ito with a Japanese Commission went abroad in 1871, he made a study of Western methods of government and became convinced that the Prussian constitution was the one best suited to conditions in Japan. Upon his return from a second visit in 1883 the drafting of a constitution began.⁹ The provisions of that constitution had been foreshadowed by the reactionary manifestations of the leaders of the new Japan. Before the Restoration Era the Mikado, an absolute monarch, surrounded by his courtiers, was the divine head of the state and regarded with religious veneration, while at the same time the administration of the government was in the hands of the Shogun. This was a system introduced from China, modeled upon the practice of the Chou Dynasty, whose king, "the Son of Heaven," lived in the Middle Kingdom

⁹ McLaren, *A Political History of Japan*, p. 365.

and performed the religious duties of the government while the practical administration of affairs was left to the President of the States. During the Restoration Period in Japan a bureaucracy had grown up which became an oligarchy that took charge of the administration while at the same time the leaders in this oligarchy proclaimed the monarch to be an autocrat. These two apparently irreconcilable features are preserved in the Constitution of 1889.¹⁰

The first chapter of the Constitution deals with the Emperor, who is divine and sacred. Sovereignty is embodied in him. He has both legislative and executive powers.¹¹ Ito in his *Commentary on the Constitution* declares that the Constitution, which he had prepared by command of the Emperor, made no change whatever in the powers of His Majesty. He remained the autocrat he had been before the Constitution was drafted. So Professor Hozumi of the Imperial University at Tokyo was able to declare: "The will of the Emperor is the will of the state. The monarchy and the state are identical."¹² At the same time it is stated that the Emperor exercises his powers in accordance with law. That would seem to make the law a restriction upon the absolutism of the Emperor. The adoption of a constitution would also appear to make the monarchy a limited one, but the lawyers explain the apparent contradiction by saying that the Constitution and the law are but expressions of the Imperial Will. By similar reasoning we may say that the existence of an oligarchy that determines the content of each decree and ordinance issued by divine majesty is also an expression of the Emperor's will.

In 1868 a civil war led to the overthrow of the Tokugawa Shogunate by an alliance of four southwestern clans: Satsuma, Choshu, Hizen and Tosa. The leaders were Satsuma and Choshu, and from that day to this, these two clans have headed the oligarchical bureaucracy that has shaped the modern history of Japan. The existence of a parliament or Diet, elected by popular suffrage, has given the people an organ for voicing their opinions but no independent power of legislation. Bills introduced by the government may be refused the approval of the Diet, but the Diet can pass no law without the approval of the oligarchy that advises the Emperor. The Japanese Government, therefore, is an autocracy, not modeled upon that of Italy nor entirely upon that of Germany, but one that has existed from medieval times — a government so similar to that in Prussia in the 1860's that Prussia was chosen as the one western state best fitted to furnish a model for the modernization of Japan.

The autocracies of the West have suspended or abolished parliamentary

¹⁰ McLaren, *A Political History of Japan*, p. 94.

¹¹ See Ito's *Commentary on the Constitution*, Chap. I. Also McLaren, *op. cit.*, p. 193, and MacNair, *Far Eastern International Relations*, p. 375.

¹² See also Kenneth Colegrove, "The Japanese Emperor," from which this quotation is made, *American Political Science Review*, Aug. and Oct., 1932.

representation and legislation. Japan does not need to give up her Diet, since it is powerless to make a single law not acceptable to the ruling oligarchy. Japan is just as hostile as Italy or Germany to democratic sentiment, and in her present invasion of China is aiming to crush the budding democracy of that country. Italy, Germany and Japan have entered into an alliance ostensibly directed against the Communism of Russia, but in reality they are opposed to all forms of democracy.

Thus it appears that men everywhere, throughout the world are arraying themselves in two opposing camps: autocratic and democratic. It is ostrich-like for us to close our eyes to this movement and say: "We are not endangered." If we appreciate the privileges that we enjoy, we cannot be indifferent to the spread of a spirit which denies that "it is a self-evident truth that governments derive their just powers from the consent of the governed." Our indifference, where it exists, is an indifference to the safety and welfare of our own people. The words of President Wilson in 1917 are just as pertinent today: "Neutrality is no longer feasible or desirable when the peace of the world is involved."

JAPAN'S AIMS IN CHINA

The spirit of autocracy is the spirit of militarism. It is the spirit that seeks to obtain and retain power by the use of force. We have seen it seize Ethiopia. It has added Austria to Germany. It is apparently about to triumph over popular government in Spain. But it is especially shown in the invasion of China by Japan. There was no just cause for that aggression. Many excuses are made for Japan's action, but most of them are based upon false assumptions.

A common excuse for Japan's attack upon China is that the Japanese are crowded in their own land and must find room abroad. But it was not necessary for the rulers of Japan to seize Chinese territory in order to enable the Japanese to migrate to China. Before the present conflict began, Japanese went to China in large numbers. They did not, however, like the regions recently conquered by Japan. They were found in considerable numbers in the large cities of China.

We have seen immigrants come to the United States from nearly all parts of Europe, but it was not thought necessary by European governments to attempt to seize portions of our territory to provide a place for these immigrants. If the density of population is so great in Japan, why do not the Japanese migrate to those provinces of China which Japan has already seized? Since 1905 Japan has had special rights in Manchuria along the South Manchuria Railway, and since 1915 her people have had the privilege of leasing land there for agriculture as well as for manufacturing purposes and have also had the right to open and work mines, yet Chamberlin in his recent volume, *Japan Over Asia*, declares that there is but a handful of Japanese in Manchuria aside from the military forces.

There is no doubt that the Japanese islands are densely peopled, but the density of population is not so great as has been claimed. In 1935, for the whole empire excluding all of Manchukuo, but including the railway zone and the Kuantung Peninsula, in Manchuria, the density was 375 to the square mile. In Japan proper it was 467 to the square mile. But in England it was 745 to the square mile in 1931 and in Belgium it is nearly 700. The most crowded portion of Japan is the island of Kyushu, where the density was recently reported as 585 to the square mile. But the Japanese islands are very mountainous and the amount of arable land is limited, being about one seventh of the total, which implies that manufacturing and trade are more profitable occupations than agriculture. Only 22 per cent of the people are engaged in agriculture. One cannot but wonder why, when population is so dense, the people migrate to regions where it is just as great or greater: to Shantung in China, where it is 700 to the square mile, or to the Chinese Province of Hopei, where it is nearly 600, or to China's Kiangsu, where it is 837. Why do the Japanese not migrate to parts of their own empire where it is not so crowded—to Formosa, where it is but 221 to the square mile, to the Hokkaido where it is 90, or to Karafuto where it is but 23?

With a people so successful in agriculture, one would expect a large emigration to the inviting lands of Manchuria. In Kirin Province of Manchuria there are fertile river valleys where the density of population is but 73 to the square mile. In the Amur Province there are woodlands and wide stretches of wheat land and the population is but 19 to the square mile. In both these provinces, even without the conquest of the country, the Japanese had a right to settle, but, as already stated, they did not care to go there. It appears that the Japanese emigrant prefers well-populated regions where there are opportunities for shopkeeping or truck gardening, and where the Japanese laborer can underbid the native, as in California, Peru and Brazil.

No, it is not density of population that forces the Government of Japan to attempt the conquest of China.

One reason given as justifying Japan's invasion is that Japan fears Communism and wants to build up a buffer state against Russian Sovietism. But if that were true, why did Japan not aid China when China was fighting with Communists? Why did Japan take advantage of China's preoccupation with the war upon Communism to attack China and invade Manchuria in 1931 and Jehol in 1933?

Another reason given by Japanese is that Japan wants the coöperation of China. There is a modicum of truth in this. About 1916 Japan organized the Black Dragon Society, which Chinese were invited to join, with the purpose of driving Europeans out of the Far East. Some Chinese did join. That the project is not yet abandoned was indicated a few days ago when Admiral Tsuetsugu declared that "the white man must be scrubbed out of Asia."

THE REAL REASON

Japan's real motive in invading China is that which in past ages animated the great military leaders of the world, that which induced Alexander to invade the Persian Empire, that which caused Caesar to march across Gaul and into Britain, that which tempted Napoleon to seek glory and power through military conquest. Hideyoshi felt this urge in the sixteenth century, but died without completing even the conquest of Korea. In 1853 Commodore Perry appeared in Yokohama Bay with a fleet of war vessels. In 1854 he returned to Japan and induced the Shogun to enter into a treaty with the United States. The size and power of Perry's "self-moving" ships evidently impressed the Japanese. One of their statesmen realized that to be a great Power it would be necessary for Japan to have a modern navy and a modern army like those of the Western World. He outlined a plan for the conquest of the outlying portions of the Chinese Empire. He proposed the seizure of Formosa, the Pescadores, the Loochoos, Korea, Manchuria and eastern Siberia. This was in 1854. The man was Shoin Yoshida. A number of young men were inspired by his vision. Among them was Ito, afterwards the Premier, Prince Ito. He visited a number of Western countries and when he returned to Japan in 1873 he found his followers already planning to provoke a war with China. He checked their impulsiveness and, informing them of the strength of the West, convinced them that they must wait until Japan had an army and navy fit to cope with others. In 1894 he was ready, and provoked a war with China over Korea, which was a dependency of China. The result of the war was the loss by China of Formosa, the Pescadores, the Loochoos and Korea. For a time Japan held also the southern part of Manchuria, but after protests by Russia, Germany and France, returned that region to China.

There was no justification for the war. The excuse made was that China had sent military forces into Korea without notifying Japan as China had promised to do. The statement was untrue; China had notified Japan that she was sending troops requested by Korea to put down a rebellion. Even Japanese historians now admit this.¹³

Thus the plan to seize China's territories was formed more than eighty years ago and for more than forty years Japan has been encroaching upon China's possessions by successive steps. In 1905 she obtained leases of Dairen and Port Arthur and of the South Manchuria Railway by winning a war with Russia. In 1914 she forced Germany out of Shantung and by the Treaty of Versailles put herself in Germany's place there. The notorious Twenty-One Demands of 1915 forced China to yield other concessions. In 1931 Japan without declaring war invaded Manchuria and took possession of the three provinces that constituted that dependency. In 1933 Japan invaded Inner Mongolia and added Jehol to the three Manchurian provinces, forming Manchukuo, which she proclaimed to be an independent state.

¹³ Akagi, *Japan's Foreign Relations*, p. 137.

Several events preceding the invasion of Manchuria had occasioned ill feeling on the part of Japan towards China, but they were not generally considered to be of such a serious character as to justify military operations. Chief of these was the expiration of Japan's Treaty of Commerce with China in 1926. When the proposal was made to renew it, China declined to renew the clause providing for Japan's extraterritorial jurisdiction over her subjects resident in China. This was not discrimination against Japan, since nine governments had given up their extraterritorial jurisdiction and six others had agreed to do the same on condition that all treaty Powers should do likewise. In May, 1931, the Chinese Foreign Office issued a proclamation abrogating all treaty clauses providing for extraterritorial jurisdiction by foreign governments, to become effective January 1, 1932. This proclamation was later rescinded, but in the meantime a Japanese military officer was murdered in northwestern Manchuria by brigands. These were reported to be a Chinese, a Russian and a Mongol. The officer, however, was traveling in disguise, with a false passport representing him to be a professor from the University of Tokyo making exploration in the interest of science. The incident was being dealt with in an amicable manner by the Foreign Ministers of China and Japan, but the Japanese military cried out against any peaceful settlement and demanded revenge for the murder of one of their number. On August 19, 1931, a number of military officers petitioned the Minister of War to take the matter out of the hands of the Foreign Office and avenge the insult to the Japanese Army. On the 27th of the same month the Minister of War explained to the Diet his proposal to increase the garrison in Korea by saying that in case of trouble in Manchuria it would be easy to send troops from Korea. This was done. Suddenly on the night of September 18, 1931, without any declaration of war, Mukden was seized with its arsenal, one of the largest in China. The Japanese War Office acts independently and is not bound by the wishes of the Ministry of Foreign Affairs. So, although the Foreign Office declared to the world that the affair was merely local and that the troops would return to the railway zone, wherein Japan had police authority, the army went steadily on its way, occupied city after city, set up local governments, seized banks and their deposits and within a few months was in complete possession of Manchuria.

A Commission of the League of Nations investigated and reported that Japan was the aggressor and in the wrong. The American and many other governments refused to recognize the conquest.

Since 1933 Japan has continued on her way, as pre-determined by her leaders in 1854 and 1894. An autonomous government was set up that year (1933) in the Chinese Province of Hopei. The Chinese National Government was warned not to interfere. The efforts of the Chinese Maritime Customs to prevent Japanese smuggling were resisted by Japan. The loss to the revenues of China in 1936 was declared to be twenty-five million Chinese dollars.¹⁴

¹⁴ Chamberlin, *Japan over Asia*.

The Powers parties to the Protocol of 1902 have the right to maintain legation guards at Peking and railway guards to keep the way open to the coast, but these forces are not authorized to move about at will in the interior of China. In July, 1937, a Japanese force was found on the bank of the Yungting River about ten miles west of Peking. These troops had no treaty or other right to be there. Their appearance was resented very properly by Chinese soldiers in the vicinity. The fight that followed seemed to have been deliberately provoked by the Japanese leaders. The results thus far (June, 1938) are the conquest by Japan of Hopei with its chief cities Peking and Tientsin, the Provinces of Chahar and Suiyuan in Inner Mongolia, the partial conquest of Shansi and Shantung, and an extensive region in the delta of the Yangtze, including Shanghai, Hangchow, Soochow, and Nanking. If Japan can hold her territorial gains, as just listed, she will have increased her territory more than twelve times since 1894 and her population from 43 millions to upwards of 200 millions. If she should succeed in taking control of all China, her empire will have a population of 550 millions and will be able to employ the agricultural and mineral resources of all China. The writer does not anticipate any such result in the near future, but if Japan can retain only the five provinces east and north of the elbow of the Yellow River, she will have increased her territory more than ten times and added some 82 millions to her population.

AMERICAN INTEREST

Someone may say: "Well, what of it? What difference does it make to us who rules China? Our trade with Japan is greater than that with China; if Japan rules China, will not our trade be enlarged by the conquest?" For answer, we have but to turn to Korea and Manchuria, where once we had large interests that have evaporated. Japan has repeatedly pledged support of the "Open Door" policy; it appears to be, as someone has said, "an open door for the exit of Americans." What better treatment can we expect in north China than in Manchuria?

American interest in China began immediately after the close of the War for Independence. On the 22d of February, 1784, the ship *Empress of China* sailed from New York for Canton. The supercargo was Major Samuel Shaw, whose report of the voyage created such interest that the Congress elected him first American Consul to China. He was not appointed by the President and confirmed by the Senate, as is the present practice. He was elected by the Congress.¹⁵

When the first war between Great Britain and China was ended by the Treaty of Nanking in 1842, Daniel Webster, then Secretary of State, urged Congress to authorize the appointment of a commission to negotiate a treaty with China. This treaty was signed in 1844. In the main it followed the provisions of the British treaty, but improved upon it in its provisions for

¹⁵ Josiah Quincy, *Shaw's Journals*, p. 114.

extraterritorial jurisdiction over our citizens in China. From that day to this the American Government has continuously sought to encourage trade between the Chinese and ourselves. A United States Court has been established in China to carry out the provisions for extraterritorial jurisdiction. In 1899 Secretary Hay proposed to the governments of the principal Powers the policy of the "Open Door," which guaranteed to Americans equality of treatment in China with merchants of other states. In 1915, after the presentation by Japan of the notorious "Twenty-One Demands," we notified Japan and China that we reserved our rights and could not "recognize any treaty or undertaking . . . impairing the treaty rights of the United States and its citizens in China, the political or territorial integrity of the Republic of China, or the international policy . . . known as the Open Door Policy."¹⁶

In 1922 the Congress passed the China Trade Act, in order to place American merchants in China upon a footing of equality with those of other lands who had been relieved by their governments of income taxes.¹⁷ After such continuous efforts by the American Government to promote trade with China, it can scarcely be denied that American investments in China have a claim to the protection of our Government.

It would be a mistake, however, to measure our interest in the conflict between China and Japan by the value of these investments. One frequently hears it said: "It costs more to give adequate protection to Americans in China than the total value of our investments there." One may doubt the accuracy of that statement, but there are interests whose value cannot be measured in dollars and cents. Confucius once said with truth: "The small man thinks only of gain." There are treasures which cannot be bought with money. A rejuvenated nation, governed by a group of young men educated in great part in the United States and imbued with American ideas and ideals, is attempting to set up a democratic form of government in China. A neighboring military autocracy has invaded China without just cause and, with ruthless barbarism, is trying to effect a conquest that will utterly destroy the beginnings of self-government among the Chinese. If we are really interested in "making the world safe for Democracy," we might do something to prevent the overthrow of Democracy in Asia.

It is said that not less than 200,000 men, women and little children have been killed in China by the operations of Japanese troops, without even the formality of declaring war. Other hundreds of thousands have been maimed and impoverished. Several millions are reported as subsisting on charity in the vicinity of Tientsin and Shanghai. It sickens one to read of the horrible outrages committed by Japanese soldiery at Nanking. China lies bleeding by the wayside. We declare that our foreign policy is that of the "good

¹⁶ MacMurray, *China Treaties and Agreements*, Vol. II, p. 1236.

¹⁷ See *China Yesterday and Today*, pp. 668-669.

neighbor," yet like the priest and the Levite in the parable of the good neighbor, we "pass by on the other side." In the parable it was a heretic Samaritan who performed the offices of the "good neighbor." Perhaps the economic heretics of Russia may prove to be better neighbors to China than we are.

The question at issue, however, is not that of showing charity; nor is it that of defending the policy of the "Open Door" and protecting our investments. These are matters of importance, but the matter is one of greater seriousness: that of preventing the triumph of militarism and autocracy and checking the growth of a Power that threatens the security of the United States. Many Americans ridicule the supposition that Japan might ever contemplate a war with the United States. "What!", they exclaim, "Japan cross the wide stretches of the Pacific to make war upon us! How amusing!" Yet Admiral Suetsugu in 1934 predicted such a war and more recently has said: "I do not fear to insist in the face of the entire world that the white yoke must be scrubbed from Asia."¹⁸ The Tanaka Memorial also, whoever may be the author, declared that such a war with the United States would become a necessity. Japan would not be required to cross the Pacific to make war upon us, although even that would not be an impossibility. We are responsible for the defense of the Philippines, at least until 1946. Guam is surrounded by islands governed by Japan; Hawaii, with its large Oriental population is not inaccessible; Alaska with its valuable fisheries and mineral resources is a desirable prize, and Alaska is but 800 miles from Japanese territory. If the white people are to be "scrubbed out of Asia," we shall be included, for we have important interests in Asia. No one can imagine for a moment that these interests and territorial possessions would be abandoned without a struggle. Lao Tze, the old Chinese philosopher, said: "There is no greater misfortune than making light of the enemy." Many Americans make light of Japan as a possible menace. Even now Japan is one of the great military Powers of the world. If she should be possessed of the vast resources in men and materials in China, her strength will be increased tenfold. The Chinese have several times been ruled by foreign dynasties. The Manchus governed the Empire for 268 years. Even today there are Chinese serving under Japan in Manchuria, in Peking and at Nanking. The Chinese inhabitants of Formosa are loyal to Japan. The Chinese are a practical people; if they cannot have at once what they prefer, they will wait, and in the meantime take what they can have. If Japan should conquer China, Japan will have no difficulty in enlisting a vast Chinese army, and with the possession of the stores of iron, coal, antimony, copper and the agricultural resources of China, can easily become the greatest military Power in the world.

But peace-loving Americans ask: "Why should Japan want to attack us? The American people have been good friends of Japan." Indeed, we greatly admire the Japanese people for their rapid assimilation of Western

¹⁸ International News Service, Paris, Jan. 4, 1938.

culture. We are too apt to forget that from the viewpoint of the Japanese they have good reason to hate us. Our Oriental Immigration Act, the various state laws forbidding alien ownership of land, our refusal to recognize the conquest of Manchuria, the wide-spread boycott of Japanese silk, the address of the President recommending the quarantine of aggressor nations, the rankling caused by our insistence upon a 5-5-3 naval ratio, and the Pacific coast fisheries question—all these fill Japanese hearts with bitterness and a desire for revenge.

We are undoubtedly within our rights in seeking to protect our workers from competition with cheaper Oriental labor. The Kellogg Pact, signed by Japan, justifies our refusal to recognize Manchukuo as well as our proposal to quarantine aggressor nations, but these acts, nonetheless, offend Japan's *amour propre*.

In the face of such a situation one would expect American citizens, however peaceably inclined, to approve the efforts of the Government to keep our defenses in order. Yet there are Americans who oppose every suggestion looking to the increase of our military strength. Only a few days since, the White House was picketed by pacifists protesting the Government's plans to strengthen our defenses. It is remarkable that we should be so pacific, seeing that we obtained our present wide domain by the hundred wars that we have fought—wars with the aborigines whom we dispossessed, wars with Great Britain, with Mexico, with Spain. But today peace is the word we hear most often spoken. Peace is desirable, of course, and war seems a foolish way in which to settle international disputes. Yet there are, nevertheless, some things more desirable than peace and other things worse than war. In 1776 our fathers thought independence more important than peace, so they fought the Revolutionary War. In 1860 we thought the preservation of the Union more important than peace and fought the Civil War. In 1917 we believed it more important to attempt to "make the world safe for Democracy" than to keep the peace, so we entered the World War.

Today, when men are clamoring for peace, it may be well to ask ourselves whether there may not be something needed that is more important than peace. Are we really willing to pay the price at which alone we can be assured of peace? Is not international justice more important than peace? There is a prevailing impression that international justice can be assured by appeal to arbitration. We are adherents of the International Court of Arbitration at The Hague and the American Government has repeatedly shown its desire to substitute arbitration for war. But, unfortunately, there are questions that cannot be arbitrated. When a military leader sets out on a career of conquest and seizes the territory of a neighboring state, the neighbor has the choice of submitting to the outrage or of going to war. There is nothing to arbitrate. This was the situation in Ethiopia; it is the situation in China. It may become the situation in America.

The autocracies of the world are strengthening themselves, creating great mechanized armies, building powerful fleets of warships, and swarms of bombing planes. The hostility of these autocracies to all forms of democratic government has been repeatedly declared. They spread their propaganda over the world. Even here in our own country Stalin, Mussolini, Hitler, Franco, and the alleged divine Emperor of Japan have their advocates. A committee of the Massachusetts Legislature has spent eight months investigating Communistic activities in that state, and reports plans of the Communist Party to get control of industry and transportation with a view to paralyzing our Government in the event of war.¹⁹ Complaint has appeared in several quarters against Italian propaganda, and a meeting of Nazi sympathizers in the United States was held in San Francisco during the last week of May, 1938.

The military autocracy in control of Japan is tightening its hold upon the economic factors there in order to carry out what the Japanese people have been taught to regard as the God-given mission of their country. In view of these facts, the democracies of the world seem called upon to take measures for their own safety.

What can we do? We can at least see that our defenses are in order, that we have an army, a navy and an air force sufficiently large and well equipped to meet the danger. The great Teacher whom we all revere, taught us, saying: "The strong man armed keepeth his goods." But our duty does not end there. We are sponsors of the Kellogg Pact which is being violated, and we have urged the quarantine of aggressor nations. Consistency requires us to cease giving aid to the aggressors in their aggression. We still permit shipment to them of supplies, even though we condemn the use made of the supplies. Are we not morally bound to stop such shipments? At once some one will cry: "But that would be unneutral." Be it so; the words of President Wilson are still pertinent and weighty with truth:

Neutrality is no longer feasible or desirable where the peace of the world is involved and the freedom of its peoples, and the menace to that peace and freedom lies in the existence of autocratic governments backed by organized force which is controlled wholly by their will, not by the will of their people.²⁰

¹⁹ International News Service, Boston, June 1, 1938.

²⁰ Address to the Congress, Apr. 2, 1917.

THE LEGAL STATUS OF POLITICAL REFUGEES, 1920-1938

BY LOUISE W. HOLBORN, PH.D.*

The term "refugee" is generally held to refer to those who have left or been forced to leave their country for political reasons, who have been deprived of its diplomatic protection and have not acquired the nationality or diplomatic protection of any other state.¹ This includes those from whom the state has taken away protection and assistance but without suppressing juridically their nationality, and those whom the state has deprived of their nationality, thus making them stateless.² While in strict law the position of these different categories of refugees is not uniform, in practice it is identical.³

* The material for this article was collected by the author while working under the Bureau of International Research, Harvard University-Radcliffe College, on a general study of "The Refugee Problem and The League of Nations."

¹ The Institute of International Law examined the legal status of political refugees in international law at the Brussels Conference in 1936 and accepted the following definition: "Dans les présentes résolutions, le terme réfugié désigne tout individu, qui, en raison d'événements politiques survenus sur le territoire de l'État dont il était ressortissant, a quitté volontairement ou non ce territoire ou en demeure éloigné, qui n'a acquis aucune nationalité nouvelle et ne jouit de la protection diplomatique d'aucun autre État." Cf. *Annuaire de l'Institut* . . . , 1936, Vol. II, p. 294; cf. also J. P. A. François, "Le Problème des Apatrides," *Recueil des Cours, Acad. de Dr. Int.*, 1935, Vol. 53.

² International assistance and protection may be withdrawn by implication or by decree. The Italian State, for example, did not denationalize Italian émigrés who were not Fascists, but by government order they refused them assistance and protection. Cf. G. Nitti, "Les émigrés italiens en France," *Revue générale de droit international public*, 1929, pp. 739-759, and A. Colanéri, *De la Condition des "Sans-Patrie"*, Paris, 1932, p. 31.

The second group, refugees deprived of their citizenship, has come as the result of specific legal measures taken by the country of origin. The Soviet Government promulgated a series of decrees which deprived Russian refugees of their citizenship. This loss was automatic and complete without resort to intervention or to special decision by tribunals or other authorities. Cf. T. A. Taracouzio, *The Soviet Union and International Law*, New York, 1935, pp. 80-122; also A. Colanéri, *op. cit.*, pp. 62-69; and V. Scheftel, "L'Apatridie des Réfugiés Russes," *Journal de Droit International*, 1934, Vol. 61, pp. 36-69. First Decree issued Dec. 15, 1921, and law, promulgated Apr. 22, 1931. Many of the Armenians became stateless by decree and, in specific cases, by administrative decisions. The Turkish law of Apr. 15, 1923, confiscated all goods of Armenians living abroad as "*biens abandonnés par des fugitifs*." The Turkish law of March 23, 1927, denaturalized Armenian refugees. *Droit International Privé*, 1929, p. 409. In general, cf. Lawrence Preuss, "La Dénationalisation imposée pour des Motifs politiques," *Revue Internationale Française du Droit des Gens*, 1937, Vol. IV, Nos. 1-2, 5.

³ "They are repudiated by their country of origin, which turns its back on them and grants them neither admittance nor protection. Their circumstances are conditioned and pervaded by the consequences of this repudiation." Cf. J. L. Rubinstein, "The Refugee Problem," *International Affairs*, 1936, Vol. XV, p. 721. The definition of refugees, therefore, adopted in the Arrangement of May 12, 1926, and later taken over in the Convention of 1933, is not

Despite the general acceptance of this definition of the term "refugee", the agreements and conventions which have been drafted during the post-war period for the purpose of clarifying the legal position of refugees and ameliorating their conditions have not given the term a general connotation. The benefit of these instruments has been extended only to certain groups of refugees. This is in part due to the fact that no clearly defined rules for the treatment of refugees had been evolved by the time the refugee problem became of great size and seriousness. The right of asylum, by which a state can accord hospitality and protection to political refugees and refuse to expatriate them even on demand of their state of origin, was widely practiced, and has been the basis for the immediate relief of vast numbers of refugees, even though they cannot claim it as a right.⁴

Widespread belief in fundamental human rights had, and has, some effect in relieving the condition of refugees. There was no move before the war, however, towards securing the general acceptance of a clearly defined legal status for all refugees which would make their position secure in hospitable countries and while traveling, and form a bridge to their absorption through repatriation, naturalization or colonization. The great increase of the refugee problem in the post-war era has been accompanied by political, economic and social difficulties which have made it difficult to achieve the legal status for refugees which must still be the aim of efforts on their behalf.

The political and economic repercussions of the World War, which intensified the refugee problem so enormously, universally affected the countries which had to meet the problem. The general situation was complicated by widespread unemployment, by political and economic nationalism, and by severe restrictions on immigration. Political alignments made it difficult to secure uniform practice in regard to even particular groups of refugees. The history of the efforts to secure a legal status for refugees shows a long series of attempts to meet urgent situations, few of which have fully succeeded.

The largest post-war group of political refugees was that of the Russians, who poured into adjacent states after the Revolution and Civil War. Their situation called not only for immediate relief measures, but raised the issue of their status in the receiving countries. Most of the refugees had no passports or the passports had lost their validity and, in order to transfer the refugees from places where they were living in destitution to places where

based on denationalization, but on the fact that the party has ceased to enjoy the protection of his state of origin.

⁴ A. Raestad, "*Statut juridique des apatrides et des réfugiés*," *Annuaire de l'Institut de Droit International*, 1936, Vol. I, p. 32; *op. cit.*, 1930. See also James Brown Scott in his preface to O. J. Janowsky and M. M. Fagen, *International Aspects of German Racial Policies*, New York, 1937, p. vi; A. N. Mandelstam, "*Les dernières phases du mouvement pour la protection internationale des droits de l'homme*" (*Extrait de la Revue de Droit International*, No. 4, 1933, and No. 1, 1934), Paris, 1934, p. 4; P. Fauchille, *Traité de Droit International Public* (8th ed.), 1922, Vol. I, 1, p. 757.

they could obtain employment, some kind of identification paper was needed.

At the beginning, the various countries handled the question of passports as well as of legal status of the refugees in different ways which were determined largely by their political attitude and their relation to the Soviet Government. Countries which had no relations with the Soviet Government and still recognized the consuls of the Czarist Government as the representatives of Russia,⁵ gave the refugees the status of other foreigners so that they enjoyed the full rights granted to aliens by internal law of the country.⁶ The border states like Finland, Poland, and others which had made peace with the Soviet Government and had recognized it not only *de facto* but also *de jure*, treated the refugees according to the stipulations included in the peace treaties or to the conventional rules of the right of asylum.⁷

For both legal and economic reasons, the states were unwilling to take the obvious and easiest way of settling the status of the refugees; that is, by naturalization. In strict law, the refugee might still be a national of his country of origin or there was the possibility that he might later aspire to reënter it and resume again a national status. Moreover, those who left permanently might wish to go to several other countries before definitely deciding upon a new country. From the economic side, there was the fear that the refugee, if nationalized, might more easily become a charge on public assistance. Far from wishing to extend their obligations by permanently accepting so many refugees, many countries even desired to refuse them entry or to rid themselves of refugees already within their boundaries. On the other hand, many of the Russian refugees refused naturalization on the ground of not wanting to be disloyal to their country of origin.

Although the status of the Russian refugees had been temporarily solved by the individual governments, the problems connected with their relief and settlement forced those governments especially affected to seek some more general scheme of protection. In May, 1921, the Czechoslovakian Government addressed the League of Nations, expressing its belief that a satisfactory settlement could be found only by joint action of the governments.⁸

⁵ Bulgaria, Serbia, and others.

⁶ Belgium, League of Nations Official Journal, July/August, 1921, Annex 3; Denmark, *ibid.*, Annex 10; Greece, *ibid.*, November, 1921, p. 1006.

⁷ The Treaty of Riga, signed March 18, 1921, arranging peace between the Soviet Union and Poland, provided that all Russians in Poland could retain Russian nationality, their interests being officially placed under the diplomatic and consular protection of the Moscow Government. The Russians in Poland, who included great numbers of refugees, had the choice, however, of accepting or refusing this protection. Those who did not wish to recognize the Soviet Government and refused its protection were accorded in Poland the right of asylum. Cf. League of Nations Official Journal, 1921, p. 486, Annex 9, and *ibid.*, November, 1921, p. 1006, Annex 7.

⁸ League of Nations Document, C.126.M.72.1921.VII, p. 6. They suggested concentrating activities under the League of Nations in view of the manifold problems involved.

It was felt that an institution like the League of Nations could combine the moral authority ⁹ to represent the rights of the refugees with a practical appreciation of the problems of the states which lodged these people. It seemed to be the right agency for negotiating the refugee question, the more so since it had just successfully contributed to the solution of a similar question of international scope, the repatriation of prisoners of war. The new responsibility was accepted, and Dr. Nansen, who had directed the repatriation of the prisoners of war, was appointed by the Council of the League on August 20, 1921, as "High Commissioner on behalf of the League in connection with the problem concerning Russian Refugees in Europe," with the threefold task of arranging the coördination of the relief work for the refugees, securing a definition of the legal status of refugees, and considering a solution through repatriation to Russia, employment in the countries where they were then residing, or emigration to other countries.

It was already apparent that the problem of the movement of refugees to overseas countries differed from that of their movement in Europe. In Europe it was vital to have the right of asylum recognized, and then to make arrangements whereby the refugee could get employment either in the original hospitable country or in another country. In order to travel, he needed an identity paper and the possibility of obtaining visas. With the increased number of boundaries in Europe since the Peace Treaties, and greater stringency in regard to passport regulations and visas, these were problems of considerable complexity. In the overseas countries, the problem was one of immigration. Refugees were on the same footing as other immigrants and subject to severe restrictions. No special concessions were given to them, and they might be discriminated against, and often were, because the receiving country stipulated the possibility of returning its immigrants to their country of origin if they proved unsatisfactory.

Owing to the complexity of the problem and the varying situations which had to be met, the efforts which were made were purely empirical. The first steps were taken with a view to alleviating the immediate situation, the more so since until 1924 repatriation to Russia was looked upon as a possible eventual solution for the greater part of the Russian refugees.

The most urgent need was for a form of identity certificate for the refugees, and generally accepted regulations governing its use. Since the war, passports have been of vital necessity not only for movement between countries, but, particularly in Europe, for normal existence within countries. Passports not only establish the holder's identity, but determine special rights and duties, both in domestic and international relations. They are not only documents of travel and identity, necessary to enter one country from another, but also to obtain work, to participate in the benefits of social insurance, and to obtain a permit of sojourn. With increasing frequency,

⁹ Cf. Switzerland, League of Nations Official Journal, July/August, 1921, p. 486; League of Nations Documents, C.277.M.203.1921.VII, and C.132.M.73.1921.

strict measures such as imprisonment or expulsion were taken against those who did not possess passports.¹⁰ Several governments, *e.g.*, Czechoslovakia and Germany, had already taken the initiative in giving provisional papers to refugees, but these certificates had not been recognized by other states and therefore could not serve in lieu of passports for visa and permit purposes.

After a preliminary conference¹¹ an International Governmental Conference was called in July, 1922,¹² which drafted an arrangement laying down a formula for papers of identity of which the validity would be recognized by all adhering countries. This certificate, which was approved by the League Council, was not identical with a national passport, although it is generally called a Nansen Passport. It was valid for one year only, and not for return to the issuing country unless it was specially authorized on the certificate. Within its limits, it was an identity paper of international validity for Russian refugees, intended as a substitute for a national passport.¹³ Twenty-four governments had accepted this Nansen Certificate by the end of 1922, and a further twenty-eight followed later.¹⁴ An Arrangement of May 31, 1924, extended the provisions of the Arrangement of July 5, 1922, to Armenian refugees¹⁵ which were scattered throughout different countries, particularly Syria and Greece. This was accepted by thirty-eight states.

The identity certificate became an important legal instrument for the refugees. It enabled them to travel to destinations where it was possible for them to obtain employment or to join friends willing to support them. On the other hand, it became of considerable value, too, to governments, "which could by these means, ascertain with greater accuracy the number of Russian refugees on their territories, and facilitate their departure elsewhere, and more especially to those Governments which, having recognized the Soviet Government, might have found it difficult to recognize the Russian refugees except through the intermediary of the League."¹⁶

Practical experience of the application of the arrangement, however, disclosed certain defects. For a satisfactory solution of the problem, it was essential that the system of identity certificates should be generally recognized and applied. Although the two Arrangements secured wide recognition, the extent of practical application, in many countries, fell far short of the standard necessary to give the refugees the benefits contemplated when the systems were recommended. Some countries had difficulties in harmo-

¹⁰ E. Reale, *Le Régime des Passeports et la Société des Nations*, Paris, 1931, pp. 167 and 197.

¹¹ League of Nations Official Journal, 1921, p. 899, and Conference on the Russian Refugee Question, Resolutions, Aug. 26, 1921, C.277.M.203.1921.VII.

¹² Held in Geneva, July 3 to 5, 1922, under the presidency of Dr. van Hamel, Director of the Legal Section of the Secretariat. Cf. Official Journal, August, 1922, p. 926.

¹³ Official Journal, August, 1922, p. 926. Arrangement with respect to the issue of certificates of identity to Russian refugees, July 5, 1922, Treaty Series, No. 355, Vol. XIII, p. 237.

¹⁴ Also non-member states adhered to it, *e.g.*, Germany, Mexico, in 1922.

¹⁵ Document: Ref./General/1-1931 (Arrangements), p. 4 (C.L.72(a).1924).

¹⁶ Document A.30.1923.XII, p. 4.

nizing their relations with the Soviet Government with the provisions of the Russian Refugee Identity Certificate Arrangement. Other governments had administrative difficulties in connection with the issue of the certificates. Countries were also unable to distinguish between the applications of bona fide refugees and those of persons who, although technically entitled to the certificates, were not really political refugees. The state of uncertainty led to the reaction that the immigration countries regarded the holders of the identity certificates with a certain amount of apprehension. The lack of a return permission of the certificate became a special obstacle to emigration. Certain immigration countries which in principle were willing to receive suitable refugees, had, according to their immigration laws, to be able to send back to the country of origin immigrants who might prove to be undesirable. Some countries had adjusted such defects by decrees and administrative practice. Uniformity, however, was essential for an efficient operation of the system.

The realization that repatriation was not a possible solution of the refugee problem, coupled with existing unsatisfactory conditions, led to further efforts to meet the needs of both refugees and hospitable countries, through an improvement and regularization of the handling of legal questions. On behalf of the League Council, Dr. Nansen convened an Inter-Governmental Conference at Geneva on May 10, 1926,¹⁷ to consider the improvement of the Arrangements concerning refugee identity certificates. He urged a universal application of the identity certificate system (which he wanted to call a passport system), and asked the states to accept the principle of permitting on the passport the return of refugees. He suggested that on each passport could be placed the *permis de séjour*, and the entrance, exit and transit visas, and that these should be given free of charge to indigent persons. He also proposed a definition of persons entitled to refugee passports.

The definition of the term "refugee" which was laid down in the Arrangement of 1926 was limited to the Russian and Armenian refugees, and read as follows:

Any person of Russian origin (respectively, Armenian origin, formerly a subject of the Ottoman Empire) who does not enjoy, or who no longer enjoys, the protection of the Government of the Union of Soviet Socialist Republics (respectively, of the Government of the Turkish Republic) and who has not acquired another nationality.¹⁸

The Arrangement foresaw permission to return to the hospitable country and general application of the system of identity certificates. As suggested, it provided for entrance, exit and transit visas, for transport facilities, for the issue of identity certificates gratis to indigent refugees, and for the mentioning of children on the identity papers of their parents. A revolving fund for

¹⁷ League of Nations, VIII. Transit. 1926.VIII.5.

¹⁸ Arrangement relating to the issue of identity certificates to Russian and Armenian refugees, May 12, 1926, Treaty Series, No. 2004, LXXXIX, p. 47.

settlement was to be created through an annual fee in the form of a "Nansen stamp" issued by the High Commissioner and cancelled by the national authorities in each country when the identity certificates were issued. The execution of the Arrangement was again entrusted primarily to the national authorities in each country. It contained, however, certain recommendations for coöperation between the national authorities and the High Commissioner and his delegations. This Arrangement was applied only by twenty-three governments, and thus the universal application which had been hoped for was not secured. More than half of the interested states continued to apply only the provisions of the first Arrangements.

According to various sources, it was estimated that there were about 19,300 Assyrian and Assyro-Chaldeans and 150 Turkish refugees,¹⁹ in addition to about 150,000 other refugees, situated primarily in Central Europe, who were without protection²⁰ and were in the same circumstances as the refugee groups already defined by the League. There were also Italian refugees who needed the assistance and aid of an international institution.

Although the High Commissioner expressed the opinion that the refugees mentioned above fell within the definition of the term "refugee" outlined in the Arrangement of 1926, only the Assyrians, Assyro-Chaldean and Turkish refugees were put under the protection of the League through an Arrangement of June 30, 1928.²¹ No responsibility was taken in regard to the other refugees. The attempt to make available the "Nansen passport" for stateless persons in general had also failed when the question of an identity and travel document for other refugees and stateless persons had been negotiated at the Passport Conference in May, 1926, and had been discussed at the Third General Conference on Communications and Transit, held from August 23 to September 2, 1927, in Geneva.²² The Italian delegation, supported by others, vigorously opposed the inclusion of those who are refused passports and cannot apply for them, either for political or material reasons. Provisions for them had to be left out of the final recommendations,²³ which suggested the use of a uniform document of identity and travel.²⁴ It is interesting to note that this document was later provisionally adopted for German refugees.²⁵

¹⁹ Document A.28.1930.XIII, p. 3.

²⁰ Document XIII.Refugees.1927.XIII.3.

²¹ The Arrangement of June 30, 1928, regarding the Extension to Other Categories of Refugees of Certain Measures taken for the Benefit of Russian and Armenian Refugees contains definitions of "Assyrian, Assyro-Chaldean and Turkish refugees," similar to those given for Russian and Armenian refugees. It provided for the extension to the former categories of the provisions of the Arrangements of 1922, 1924, and 1926, and twelve states adhered. Document A.28.1930.XIII, p. 2.

²² League of Nations Doc., Transit.1927.VIII.15.III.

²³ Document A.78.1927; and E. Reale, *op. cit.*, p. 164.

²⁴ Documents C.245.M.84.1929.VIII; C.216.M.81.1929.VIII, p. 15 (Resolutions). The resolutions were adopted by the Tenth Assembly on Sept. 21, 1929. Document A.66.1929.VIII.

²⁵ *Cf. infra*, p. 692.

An Inter-Governmental Conference took place in Geneva from June 28-30, 1928, and for the first time there was a comprehensive consideration of all aspects of the legal status of the refugees.²⁶ It resulted in an Arrangement relating to the Legal Status of Russian and Armenian Refugees,²⁷ which recommended that the High Commissioner, through his representatives in the different countries, should exercise a number of quasi-consular functions, such as certifying the identity and civil status and the character of the refugees. It further recommended that the personal status of the refugees should be determined by the law of domicile, or if they had no domicile, by the law of residence; that the refugees should enjoy certain rights usually granted to foreigners subject to reciprocity; that they should benefit from free legal assistance; that restrictive regulations concerning foreign labor should not be applied rigorously to the refugees; that there should be relaxation of expulsion measures; that there should be taxation equality with nationals; and that the obtaining and prolonging of passports and visas and acceptance of the return clause should be facilitated.))

In 1928, the Ninth Assembly approved these arrangements and especially urged that governments should not expel refugees from their territories until another country was willing to receive them. Twelve states adhered to this arrangement.²⁸

"Desiring to secure the most effective possible action on the Resolution contained in the Arrangement concerning the legal status of Russian and Armenian Refugees," France and Belgium signed an Agreement concerning the Functions of the Representatives of the League of Nations High Commissioner for Refugees, on June 30, 1928.²⁹ This Agreement, open to the accession of all states and regulating the functions of the local representatives in proving the refugee's identity and status, was not ratified. Therefore, its legal authority has been questioned and it has not been upheld in the courts of France and Germany. It remains a model, however, of an arrangement which would greatly facilitate the work for the refugees.

As has been seen, the function and status of the High Commissioner remained very uncertain, but his responsibility was to coördinate and direct the efforts of the governments and charitable organizations. Until 1924 his office was thought of merely as a passing emergency measure. During 1925 to 1929 the employment and settlement services of the High Commission formed a temporary section of the International Labor Office.³⁰ Dr. Nansen

²⁶ The discussion was based on a memorandum of May 21, 1928, prepared by a committee of Russian and Armenian legal experts in consultation with the High Commissioner. *Documents Préparatoires et Procès-Verbaux de la Conférence Intergouvernementale pour le Statut Juridique des Réfugiés*. Document XIII. Refugees. 1930. XIII.1, p. 14.

²⁷ League of Nations Treaty Series, No. 2005, Vol. LXXXIX, p. 53.

²⁸ Document: Ref./General/1-1931, p. 16.

²⁹ League of Nations Treaty Series, No. 2126, Vol. XCIII, p. 377.

³⁰ The administrative work was centralized in the hands of the Assistant High Commissioner who was also the Chief in charge of the Refugee Section of the International Labor

and M. Albert Thomas planned to organize settlements in the form of agricultural communities. The scheme was to be financed by the emigration and the immigration countries, together with the League of Nations. These far-sighted plans of mass settlement, however, failed through inability to secure necessary funds.

During its next stage, the refugee work chiefly required services for the consolidation and execution of the various measures which had been adopted by the successive inter-governmental conferences with a view to providing the refugees with a more normal existence.³¹ The work was thus re-transferred from the International Labor Office to the League. The Council attached to the High Commissioner an Inter-Governmental Advisory Commission of representatives of thirteen governments as an advisory body to the Council for the political and legal aspects of the refugee work. During the year 1930, the office of the High Commissioner was incorporated, temporarily and as an experiment, in the Secretariat of the League.

By 1930, the League had begun to consider steps to limit its activity in the hope that the problem might be solved in the near future. Before a final decision about the future of the work had been taken, Dr. Nansen died, in May, 1930. There was a strong tendency among League members and other groups to rid themselves of the responsibility for the refugee work, but the Tenth Assembly in its Sixth Committee considered it necessary to continue the international work for the refugees for a time. It was decided that the work should be wound up in ten years.

The Assembly in 1930, on the recommendation of the Inter-Governmental Advisory Commission³² and the Secretary-General of the League, decided to create an autonomous organization "under the direction of the League of Nations, on the basis of the principles of the Covenant."³³ This office, the "Nansen International Office for Refugees",³⁴ was to be charged with the humanitarian tasks relating to the maintenance of the refugees and their relief, employment and settlement, while the Secretariat remained responsible for the juridical aspects relating to the legal protection, civil rights and the status of refugees as defined by the various inter-governmental arrangements. As a matter of practical administrative convenience, however, the office and

Office. Dr. Nansen, however, as League High Commissioner, still retained the responsibility for the political and legal aspects of the refugee problem.

³¹ League of Nations Document, A.33.1928.VIII.

³² Document A.34.1930.XIII.

³³ Document A.29.1930.XIII.

³⁴ The office was called into being in April, 1931. Cf. Official Journal, Special Supplement, Minutes of the Sixth Committee, 1930, p. 84, for more details about the character and nature of the office. The organs of the office are: The Governing Body, with 12 members consisting of the President, nominated by the Assembly, 4 members by the Inter-Governmental Advisory Commission for Refugees, 2 members by international relief organizations, 3 members by the Advisory Committee of Private Organizations working for refugees, the Secretary-General of the League, and the Director of the International Labor Office; the Managing Committee; and the Finance Committee.

its representatives in the seventeen countries were requested to act as the agents of the League Secretariat for the legal questions.³⁵

In view of the plans for the liquidation of the Nansen Office not later than December 31, 1938,³⁶ the Inter-Governmental Advisory Commission for Refugees³⁷ in August, 1931, recommended assuring protection for refugees by establishing a convention which would replace the recommendations of the earlier arrangements with binding stipulations. This was the more necessary as the growing economic depression, coupled with the lack of uniformity in the treatment given to refugees, had brought on a grave crisis for the refugees. There was an increasing tendency on the part of certain governments to expel from their territories refugees whose certificates of identity and travel had expired, but who were not in possession of entry visas to neighboring states. This practice was aggravated by the growth of unemployment. Certain states enacted legislation which prohibited employers from taking on foreign laborers, and in consequence many refugees lost their work.³⁸ Government measures of relief for the unemployed amongst their own nationals were not generally extended to unemployed and stateless aliens, and the unemployed refugees³⁹ were forced to resort to illicit means of livelihood. In order to live and to maintain their families, many procured false papers or penetrated secretly into states where they hoped there might be better opportunities. The result was a succession of trials, imprisonment and expulsion. The latter move confronted the refugees with a conflict between two sovereign wills, the one expelling them, the other forbidding their entry.⁴⁰ There was no place left to go, and in many cases vagrancy or suicide were the only alternatives of the refugee. The governments, on their side, spent enormous sums without achieving any solution.⁴¹

This increasingly serious situation focused attention on the proposal for a more binding instrument than the earlier agreements, which only submitted

³⁵ Austria, Belgium, Bulgaria, China, Czechoslovakia, Danzig, Finland, France, Germany, Greece, Estonia, Latvia, Lithuania, Rumania, Syria, Turkey, Yugoslavia. Cf. Document A.24.1932, p. 2.

³⁶ It had been originally decided to terminate the office not later than Dec. 31, 1939.

³⁷ Document A.31.1931.

³⁸ E.g., Poland promulgated a law on Apr. 6, 1931, according to which no foreigners domiciled in Poland after January, 1921, could be employed without special authorization for each case. In France two laws of 1926 and 1932 were directed against foreign workers. The decree of Feb. 6, 1935, made renewal of working permits almost impossible. Cf. the Report on Russian, Armenian, German, and Saar Refugees in France by the Save the Children Fund, London, May, 1935.

³⁹ Cf. N. Bentwich, *The International Problem of Refugees*, Geneva, 1935, p. 9, and J. P. A. François, *loc. cit.*, pp. 329 and 370.

⁴⁰ Cf. J. P. A. François, *loc. cit.*, p. 324, for details; M. Hansson, *The Refugees and Their Fate*, Geneva, 1937, p. 17; B. Trachtenberg, "*L'expulsion des apatrides*," *Revue de Droit Internationale*, 1936, Vol. 17, p. 552.

⁴¹ France spent three million francs per annum for imprisonment of such cases.

recommendations to governments. (After careful preparation, the Nansen International Office, with the Inter-Governmental Advisory Committee,⁴² submitted a draft to the Inter-Governmental Conference of October 26-28, 1933, which sought to meet the most urgent needs of the existing situation of Russian and Armenian refugees. The Convention,⁴³ adopted by the fourteen participating states⁴⁴ and open to subsequent accessions, introduced a new stage in the efforts to achieve an international legal status for refugees, by putting forward a set of rules governing important aspects of the refugee problem. It was a culmination of the previous empirical efforts on behalf of Russian, Armenian, Assyrian, Assyro-Chaldean, Turkish and assimilated refugees, and although it did not in itself solve the question, it facilitated efforts for its solution.)

(The Convention improved the Nansen Certificate system in regard to the period of validity as well as to the right to return to the hospitable country; it restricted the practice of expulsion; and it adopted the general provisions laid down in the previous arrangement. It regulated points of international law; secured freedom of access to the law courts, and the most favorable treatment in respect to welfare, relief, and taxation; it exempted the refugees from the reciprocity principle;⁴⁵ it provided for the optional institution of refugee committees in every country, and it foresaw certain modifications of the measures restricting employment. 'Although the provisions in regard to expulsion,⁴⁶ employment, and education did not go far enough to solve the problem of the legal status of the refugees, the Convention provided a great improvement in this regard.' Unfortunately, the eight states which acceded to the Convention⁴⁷ did so with reservations which "in certain cases, appreciably restrict its value, particularly as regards the refugees' right to work."⁴⁸)

A new problem faced the Fourteenth Assembly in 1933, as a consequence

⁴² Document C.266.M.136.1933, p. 5.

⁴³ Documents C.650(1)M.311(1).1933, and C.650(a)M.311(a).1933.

⁴⁴ Austria, Belgium, Bulgaria, China, Czechoslovakia, Estonia, Finland, France, Greece, Latvia, Poland, Rumania, Switzerland, Yugoslavia.

⁴⁵ Most agreements concerning aliens are embodied in bilateral trade and immigration treaties and conventions. The refugee has no state to negotiate and conclude conventions on his behalf. This situation could be remedied only by a formal convention between states defining the international status of refugees.

⁴⁶ Article 3 provides "that Governments agree not to expel refugees except for reasons of national security and public order—a term which unfortunately lacks precision." Cf. Mr. Hansson in his Special Report: A.27.1936.XII, p. 10.

⁴⁷ The Convention came into operation in 1935 through ratification by Bulgaria, Czechoslovakia, and Norway. Belgium, Denmark, France, Great Britain and Italy adhered later. The United States, Estonia, Finland, Greece, Iraq, Latvia, Sweden, and Switzerland intimated that they would not accede to the Convention since "refugees already enjoy in their respective countries the majority of the rights provided for under the Convention or even more." Cf. A.21.1937.XII, p. 5.

⁴⁸ Mr. Hansson, Acting President of the Governing Body of the Nansen International Office in his Special Report to the Seventeenth Assembly: A.27.1936.XII, p. 9.

of persecution and dismissal by the National Socialist Government in Germany on grounds of race and political opinion.⁴⁹

- (The Nazi ideology is opposed to the liberal conception of the rights of man, especially to the freedom of thought and equality of citizenship without distinction of creed and race. A relatively short time after the coming into power of the Nazi Government, liberals, socialists, pacifists, Jews and Christians of Jewish ancestry were pushed out of public office, government employment, social services, the liberal professions, and business.⁵⁰ Other laws and decrees⁵¹ deprived of their German citizenship "non-Aryans" and those to whom the National Socialist State is opposed, because of their origin or political views. In addition, the denationalization of particular individuals (that is, the annulment of their German nationality) was carried out on a large scale and took two principal forms: the revocation of naturalization on racial grounds, and the withdrawal of nationality on political grounds.⁵² About 150,000 Germans left the country as a result of these measures.⁵³

The whole German refugee question was brought before the Assembly⁵⁴ in 1933 by the delegation of The Netherlands, and considered as a technical problem. Due to the objections set forth by the German delegate, the Assembly compromised, and the High Commission for the Refugees from

⁴⁹ It is estimated that during the spring and summer of 1933, the exodus comprised about 60,000 individuals. Ever since, other Germans have left their country. The figure 150,000 is given in the report of the Committee of Three to the Council at its 101st Session, May, 1938. A detailed account of the German refugee question is given in N. Bentwich, *The Refugees from Germany* (Apr. 1933 to Dec. 1935), London, 1936. He was the Director, under Mr. J. G. McDonald, of the High Commission for Refugees (Jewish and Others) coming from Germany. Cf. also O. J. Janowsky and M. Fagen, *International Aspects of German Racial Policies*, New York, 1937.

⁵⁰ Letter of Resignation of James McDonald, High Commissioner for Refugees (Jewish and Others) coming from Germany, London, Dec. 17, 1937, p. 31; also *International Conciliation*, 1936, p. 109.

⁵¹ *Gesetz über den Widerruf von Einbürgerungen und die Aberkennung der Staatsangehörigkeit vom 14. Juli 1933* (R. G. Bl. 1933.I, p. 480); *Durchführungsverordnung vom 26. Juli 1933*. Cf. Scelle, *Revue critique de droit international*, 1934, p. 63; and B. von Stauffenberg, "Die Entziehung der Staatsangehörigkeit und das Völkerrecht," *Zeitschrift für ausländisches Recht*, 1934, Vol. IV, p. 261. The law of Sept. 15, 1935 (R. G. Bl. 1935, p. 1146), withdraws citizenship from persons of non-German blood.

⁵² McDonald, Letter of Resignation, p. 31.

⁵³ The largest part went to France, Czechoslovakia, and Holland, which extended the right of asylum and did not require compliance with the passport regulations. Many went to Belgium, Denmark, England, Austria, Italy, Luxemburg, Switzerland, and to Spain, Yugoslavia and Poland. A large stream was directed overseas, primarily to the United States and to Palestine.

⁵⁴ The Council had already been engaged, in May, 1935, with the German question. The "Bernheim Petition" accused the National Socialist Government of having violated the spirit and letter of the German pledge of 1919 in regard to minorities, and the Upper Silesian Convention of 1922. *League of Nations Official Journal*, 1933, pp. 838 and 934. For details cf. also Janowsky, *op. cit.*, p. 110; *Official Journal*, Spl. Supp., Records of the Fourteenth Assembly, 1933, Plenary Meetings, p. 29, and Minutes of the Sixth Committee, p. 41.

Germany was set up as an autonomous organization, created by the League but responsible to its own Governing Body and not to the Council of the League. Mr. James G. McDonald,⁵⁵ an American, was appointed by the Council as "High Commissioner for Refugees (Jewish and Others) Coming from Germany" and fifteen states were invited to send representatives⁵⁶ to the Governing Body, which was formally set up in December. In contrast to the Nansen International Office, the funds for the settlement of the German refugees, as well as for the administration of the Office, were provided by private contributions.

Among the duties⁵⁷ of the High Commissioner for German Refugees, was that of negotiating with governments on technical questions such as passports, identification papers, permits of residence and of work, and on the admission of groups of refugees into countries where there was a possibility of their absorption.

The German refugees, whether deprived of their nationality, or, as was more common, still German nationals but deprived of the use of German passports, were not eligible for Nansen passports, nor could they obtain the document of identity and travel given to persons without nationality or of doubtful nationality. They did not come within any of the categories hitherto foreseen in the international arrangements. They were thus in a critical situation, many of them being without passports or equivalent papers, and unable to go into another country without risking the danger of being driven back to Germany or being imprisoned and later expelled. While Mr. McDonald foresaw as one of his tasks as High Commissioner⁵⁸ the issue of documents of identity and travel to refugees without passports, the Governing Body considered it inadvisable to institute a special traveling paper for German refugees. It suggested that the governments of the countries where the refugees resided, should give the document of identity and travel for *apatrides* which had been recommended by the Conference on Communications and Transit in 1927.^{58a} This measure would enable the German refugees to get the documents immediately, as it would not be necessary to wait for an international convention or agreement for their adoption.

The Administrative Body recommended that the documents of identity and travel given by governments to the refugees who resided in their countries, should be valid for one year and be endorsed with a return clause. They were to be recognized by other states either for entry or for transit. Further recommendations were later made to the interested governments in

⁵⁵ He was appointed by the Council on Oct. 26, 1933, and his resignation became effective on Dec. 31, 1935.

⁵⁶ The United States of America, Argentina, Belgium, Brazil, Czechoslovakia, Denmark, France, Italy, Netherlands, Poland, Spain, Sweden, Switzerland, United Kingdom, Uruguay. Spain, Argentina and Brazil did not accept. Yugoslavia was added.

⁵⁷ Report of the Second Meeting of the Governing Body, held in London, May 2-4, 1934.

⁵⁸ Cf. his opening speech at the First Meeting of the Governing Body, Dec. 5, 1933.

^{58a} Cf. *supra*, p. 686.

regard to the renewal of certificates before their expiration and in regard to visas. It was also recommended that the charge for these should be as low as possible and that in the case of destitute persons there should be no charge.

After negotiations with the German Government, German consuls were instructed by their Foreign Office to give notice in writing when they refused to extend or to grant a passport. The refugees were thus able to prove the impossibility of getting papers from their country of origin, a stipulation made by a number of the hospitable countries and previously difficult to satisfy.

A uniform regulation in practice, however, was not achieved. As with the application of the Arrangement of 1928 in regard to the certificates of Russian and Armenian refugees, the application of the recommendations in regard to the documents of identity and travel for the German refugees varied a great deal.⁵⁹ Some states such as Great Britain, Czechoslovakia, Sweden, and Poland, were willing to give certificates valid for a year if other states would do the same, but France and Switzerland limited the duration to six months, and other states made the duration dependent upon special circumstances. The right to return during the validity of the document was accorded by some states, while others asked a special visa for return. Almost all the governments recognized the validity of the documents, but most of them asked special visas for admission to their territory. The United States Government declared itself ready to extend the same treatment to holders of papers of identity and travel, Nansen passports or even of simple affidavits, as to holders of national passports.

As the High Commissioner had not the authority of the League behind him, he was able to achieve even less than the Nansen Office. Work and residence permits became increasingly difficult to procure. The German refugees, like the Russians and Armenians under the Nansen Office, suffered through the exclusion of aliens from employment during the economic depression.⁶⁰ For them also began the vicious circle⁶¹ of unemployment, notice of expulsion, and evasion or entry into another country without permission, both of which led to imprisonment.

Another refugee group, the Saar refugees, who had to flee from the Saar basin after it was reunited with Germany in 1935, complicated the administration and solution of the German refugee problem.⁶² It was estimated that the group comprised about 3300 inhabitants of the Saar territory and some

⁵⁹ Fourth Meeting, July 17, 1935, p. 18. Cf. also, E. Reale, *Le Problème des Passeports* (*Extrait du Recueil des Cours, Acad. de Dr. Int.*), Paris, 1935, p. 78.

⁶⁰ Cf. Report of the Fourth Meeting, p. 18.

⁶¹ Belgium and Holland at first surreptitiously expelled great numbers of German Jews into each other's countries. Later they agreed not to expel into each other's territory German refugees found in their countries, whether coming from Germany or from a third state. Cf. François, *loc. cit.*, p. 322.

⁶² Document C.233.1935.XII.

1500 from Germany who had taken refuge in the Saar after 1933.⁶³ The French Government urged that assistance to the emigrants from the Saar should be regarded as a League responsibility in view of the fact that they had been subjects of the League and had presumably voted for the continuance of League administration. The Nansen International Office was entrusted with the protection of refugees from the Saar, but the Nansen passport system was extended only to

all persons who, having previously had the status of inhabitants of the Saar, have left the territory on the occasion of the plebiscite and are not in possession of national passports.⁶⁴

Those who had come from Germany to the Saar had to look for help to the High Commissioner for Refugees (Jewish and Others) Coming from Germany.

Though faced with many difficulties as to status, and in the general situation, Mr. McDonald laid a sound foundation for the work of the Office. With his letter of resignation of December, 1935, exposing the condition of non-Aryans and of "politically unreliable" persons in Germany, and the probability of further large emigrations, he aroused public interest and concern which stimulated the efforts of governments and of the League on behalf of German refugees.

The duties of the High Commissioner for Refugees from Germany were taken over by Sir Neill Malcolm, an Englishman. He was appointed by the Council of the League on February 14, 1936. The position of the new High Commissioner differed from that of Mr. McDonald in that he was a League official and obtained the sums for administrative expenses directly from the League. He was responsible to the League and had the assistance of the Secretariat, but had no Governing Body of government representatives. The High Commissioner was entrusted with the responsibility of improving the legal status of the refugees and of studying the conditions of placement and finding employment.⁶⁵ Humanitarian work was left to the private organizations, and the form of liaison with them was left to the discretion of the High Commissioner. Thus the High Commission was established on a plan somewhat analogous to that of the High Commissariat for Russian and Armenian Refugees, of Dr. Nansen.

A travel document for the German refugees had been secured relatively easily, but great efforts by the High Commissioner were needed to reach an agreement on a general legal status for the refugees, in order to secure to them a certain legal and political protection similar to the provisions for the Russian and Armenian refugees laid down in the Arrangement of 1928.

⁶³ Cf. Document A.27.1936.XII, p. 5, No. 13, and N. Bentwich, *The Refugees from Germany*, p. 65. Later figures give 7,000 to 8,000 refugees from the Saar.

⁶⁴ Document C.L.120.1935.XII. Seventeen states acceded to the Arrangement of May 24, 1935.

⁶⁵ Documents A.VI/1936 and A.19.1936.XII, p. 2.

In July, 1936, an Inter-Governmental Conference⁶⁶ drew up a Provisional Arrangement which defined the term "refugee coming from Germany" and provided for the issue by governments of a certificate of identity similar to the Nansen passport.⁶⁷ In addition to general rules concerning expulsion and re-conduction, the Arrangement dealt with the personal status of refugees.

There were still serious difficulties,⁶⁸ however, among them the conditions under which permission to work might be obtained, and various measures of social assistance and welfare, which charitable organizations could not be expected to handle indefinitely. Moreover, the definition of the term "refugee," which reads as follows: "refugees coming from Germany shall be deemed to apply to any person who was settled in that country, who does not possess any nationality other than German nationality, and in respect of whom it is established that in law or in fact, he or she does not enjoy the protection of the Government of the Reich," did not include the *apatrides* among the German refugees who had been deprived of their nationality.

This provisional arrangement was followed by the adoption of a convention⁶⁹ which was the outcome of an Inter-Governmental Conference⁷⁰ held from February 7-10, 1938. The definition of "refugee" in this Convention included *apatrides*. It was as follows:

- ✓(a) Persons possessing or having possessed German nationality and not possessing any other nationality who are proved not to enjoy, in law or in fact, the protection of the German Government.
- ✓(b) Stateless persons not covered by previous Conventions or Agreements who have left German territory after being established therein and who are proved not to enjoy, in law or in fact, the protection of the German Government.

It did not include, however, "persons who leave Germany for reasons of purely personal convenience."⁷¹

⁶⁶ Belgium, Czechoslovakia, Denmark, Ecuador, France, Ireland, Latvia, Netherlands, Norway, Poland, Rumania, Sweden, Switzerland, United Kingdom, and Uruguay were represented. The United States of America and Finland were represented by observers.

⁶⁷ Document A.19.1936.XII, Appendix 1, p. 8. The Arrangement was signed by six states: Belgium, Denmark, France, Netherlands, Norway and Switzerland. It went into effect on Aug. 4, 1936. Cf. *ibid.*, p. 4. Later Spain and several other states which have not signed the Arrangement, put it into practice, *e.g.*, the United Kingdom.

⁶⁸ *Ibid.*, p. 4. The High Commissioner's Report to the Seventeenth Ordinary Session of the Assembly.

⁶⁹ Document C.75.M.30.1938.XII. Convention concerning the Status of Refugees Coming from Germany, of Feb. 10, 1938, and C.75(a).M.30(a).1938.XII, Final Act.

⁷⁰ Delegates were sent by Belgium, Czechoslovakia, Cuba, Denmark, Spain, France, Luxemburg, Norway, Netherlands, Poland, Portugal, Sweden, Switzerland, United Kingdom, while the United States of America, Yugoslavia and Finland sent observers. See the draft Convention drawn up by the High Commissioner in Document A.17.1937.XII, Appendix, p. 6.

⁷¹ This term needs to be more specifically defined. The stipulation of the Swiss delegate, that any economic, fiscal or military reason should be considered as purely personal, seems to be very broad.

Article 5 of the Convention states that measures of expulsion and repatriation should be taken only through considerations of public order or national security.⁷² Articles 9 to 17 give the refugees an economic and social status similar to that provided by the Convention of 1933. Most of the states, however, which signed the Convention made a reservation as to the exemption of the reciprocity clause and as to the application of Article 9 concerning the right to work. These reservations considerably weaken the value of the Convention. Nonetheless, the advantage of a general convention was extended to German refugees,⁷³ providing them with some legal, economic and social standing.

The general situation of the refugees for whom responsibility had been accepted, was far from satisfactory, however, and the League of Nations was forced by the actual developments to reconsider its responsibility in regard to the refugee problem. The Norwegian delegate proposed to the Sixteenth Assembly in 1935 that it should consider the extension of the existing work to all groups of refugees, and the coördination or centralization of activities.⁷⁴ The British delegate, Lord Cranborne, declared that in view of the economic situation and the new categories of refugees which had come into existence, the problem could no longer be considered ephemeral. The League had to determine the best scheme for dealing with it, and he believed that of the three main aspects of the problem, status, relief and settlement, the question of status was "eminently one which might be solved on an international basis. . . ."

✓ Practical steps which needed to be taken in regard to the legal aspect of the refugee question were summarized in January, 1936, by Judge Hansson,⁷⁵ one of the members of the Committee of Five on International Assistance to Refugees:

- ✓ (1) Governments should be urged to furnish a refugee with proof of his identity and status, and the refugee's country of origin should be urged to grant the necessary facilities.

⁷² The British delegate declared that his government would take these measures only in case of condemnation for a serious crime or delinquency, or for offences against morality.

⁷³ The general provisions (Chapter XIII), although based on those of the 1933 Convention, differ from them in regard to the period for denunciation (Art. 23), etc. The principle of a convention applicable by stages has been adopted. The Convention was signed by Belgium, the United Kingdom, Denmark, Spain, France, Norway and The Netherlands.

⁷⁴ League of Nations Official Journal, Minutes of the Sixth Committee, 1935.

⁷⁵ The Council appointed Mr. Hansson as acting President of the Governing Body of the Nansen International Office as from Feb. 1, 1936, and the Assembly appointed him as President at its next session. Mr. Hansson is Norwegian and a former President of the Mixed Court of Appeal in Egypt. For the first time, the Nansen Office was given a president who could devote his full time to the service of the Office. He successfully initiated a new period of activity of the League of Nations for the refugees. The first president, Dr. Max Huber, resigned at the end of 1932; his successor, Dr. Max Werner, died at the beginning of 1935. (Both were members of the International Red Cross Committee.) The presidency was then vacant for a year.

- (2) An appeal should be made to Governments to ratify the 1933 Convention and to accede to the Franco-Belgian Agreement of 1928.
- (3) The advisability of convening a meeting of representatives of States bound by the 1933 Convention, States signatories of that Convention, and States whose accession is deemed to be desirable should be considered, and such representatives should study the means of inducing other states to accept the Convention.
- (4) The benefits of the 1933 Convention should be extended to refugees coming from Germany by means of a special protocol or declaration on the part of the Governments.
- ✓ (5) An arrangement should be negotiated with the German Government to enable refugees to liquidate their assets in Germany and transfer them abroad, and to grant them the necessary facilities for the communication of all legal documents relating to them.⁷⁶

These proposals were brought before the governments for consideration by the Assembly of 1936. At the same session, the Assembly indicated that its previous decision concerning the closure of the refugee offices did not imply that the League could dissociate itself from the obligations in regard to the refugees. The resolution recommended that in 1938 at the latest, the whole refugee problem should be examined, and that general principles should be accepted to guide the League in its future action.

The efforts, however, of the Sixth Committee of the Eighteenth Assembly in 1937, to obtain unanimity in favor of a resolution, which pointed out the obligation on the League for the legal and political protection of refugees, and asked for the continuation without interruption of the work carried on up to that time under the auspices of the League, met the resistance of the delegate of the Soviet Union.⁷⁷ It was possible to secure only a resolution which requested the Council to draw up before the next Assembly a plan of international assistance to refugees.

It was clear from the situation of refugees, both under the Nansen International Office and the High Commission for Refugees from Germany, as well as outside the League,⁷⁸ that what had been done was not sufficient. The plans for the transfer of Armenians to Erivan, and of Assyrians⁷⁹ overseas could not be carried out. Unemployment threatened the Russian refugees and the emigration of refugees from Germany was still continuing. No real improvement had been brought about in regard to ratification of the Convention of 1933.

⁷⁶ Document C.2.M.2.1936.XII, Annex 4, p. 15. This expert Committee was appointed by the Council in order to examine the question of international assistance to refugees as a whole.

⁷⁷ Official Journal, 1937, Spl. Supp., No. 175, pp. 70-80.

⁷⁸ There are about 10,000 Italian political refugees whose legal status has not yet been solved, many of them being *de facto* stateless.

⁷⁹ About 30,000 Christian Assyrians were transferred to Iraq after the war. When Iraq ceased to be a mandate, they desired to migrate. Those Assyrians did not enjoy the protection of the Nansen Office, although the latter was entrusted with responsibility for the "Assyrian, Assyro-Chaldean and Assimilated Refugees" in 1927.

General agreement was being reached that a central organization of the League of Nations should be created which would have the necessary authority not only to be able to secure the minimum of legal and of economic protection indispensable for the refugees and to coördinate the efforts of private assistance, but also to carry through a permanent solution comprising naturalization in the country of residence of the refugees and plans of emigration well determined in favor of all refugee groups for which this was not possible.

Not only do the former refugee groups—those for whom responsibility has been accepted and those for whom it has not—offer a problem, but new categories are being thrown on the world by political upheavals. The growing numbers of Spanish refugees, now largely in France and England, constitute a new problem which has been hitherto left to voluntary effort and the action of a few governments. Another serious problem has been created by the incorporation of Austria into Germany.⁸⁰ The introduction of the German racial and political exclusion laws and administrative measures have had drastic effects in Austria because of the high proportion of the population affected. According to the official census of 1934, there are 192,000 Jews in Austria, of whom 176,000 are in Vienna. The number of “non-Aryans” is not known but is estimated to be 800,000. There are also many political refugees, including Hapsburg legitimists, Fatherland Front partisans (Schuschnigg), Liberals, Social Democrats, as well as Catholics.

Restrictions on the migration of Austrian refugees were imposed from inside as well as from outside. The German Government tried to prevent emigration even though destitution and persecution were faced; countries like Czechoslovakia and others closed their frontiers to those who escaped.⁸¹ Switzerland allowed only the transit of refugees. France, Holland and Belgium tightened their laws against the admission of immigrants. England complicated their entry by administrative difficulties and refusing the permit to work. Nonetheless, many fled from the country and large numbers await only the opportunity to do so under more favorable conditions.

The League Council on May 14, 1938, accepted a proposal of the British Government, seconded by the French, to extend until the next Assembly, the powers of the High Commissioner for Refugees Coming from Germany to cover refugees coming “from the territory which formerly constituted Austria.” The High Commissioner is to consult with the interested governments concerning the extension to Austrian refugees of the Convention of February 10, 1938, and eventually of the Provisional Arrangement of July 4, 1936, and is to give a report to the next Assembly on the numbers and situation of the Austrian refugees.

At the same meeting in which this decision was taken, the Council accepted a report proposing that a single organization should be set up for a limited

⁸⁰ The law of March 13, 1938. Cf. League of Nations Official Journal, March–April, 1938, p. 237. Document C.102.M.54.1938.VII.

⁸¹ Manchester Guardian Weekly, May 27, 1938, p. 403.

period to take the place of the Nansen International Office and that of the High Commissioner for Refugees Coming from Germany. The proposed institution would be directed by a High Commissioner for Refugees under the protection of the League of Nations, who would be assisted by a small staff comprising neither refugees nor former refugees. The Secretary-General, in consultation with the President of the Nansen International Office and the High Commissioner for Refugees Coming from Germany, was instructed to prepare a detailed plan on the basis of the report to be submitted to the Assembly.

(Under these proposals, the League's activity on behalf of the refugees would be confined mainly to legal assistance. It would exercise a type of consular service for many who have been deprived of the protection of their state and are in fact, if not always in law, in the situation of stateless persons; it would supervise the giving of passports to the refugees by the governments of states members of the League; and would watch over the application of the international conventions and agreements which provide a minimum of rights for the refugees. Direct humanitarian help, emigration, permanent settlement and absorption in the economic life would be left to other organizations, international and national, undenominational and religious.)

Although private organizations have succeeded in settling great numbers of Russian and Armenian refugees, and although more than 120,000 German refugees have been settled through the direction and financing of emigration and settlement by Jewish organizations, many belonging to these refugee groups, as well as those for whom no responsibility has been accepted, are in acute need. ✓ The recent increase of persecution in Germany and Austria which threatens the existence of approximately a million Jews, "non-Aryans" and political opponents of the Nazi régime, threatens to augment the refugee problem far beyond the numbers with which private organizations might be able to deal.

Due to the initiative of President Roosevelt,⁸² the refugee problem is being approached at the present time, through inter-governmental action outside the League, as a problem of facilitating immigration by agreement between the "refugee exporting" countries and those which might absorb refugees. President Roosevelt appealed to those governments of the world which are receiving refugees, for a coöperative effort to facilitate emigration of political refugees from Germany and former Austria, and an Inter-Governmental Conference met at Evian, France, from July 6 to 15, 1938, under the presidency of Myron C. Taylor, former Chairman of the United States Steel Corporation. The United States Government foresaw the two tasks of the Conference as being, first, to consider the measures to be taken in order to bring help quickly to political refugees from Germany and Austria, and secondly, to create a permanent international organization, with its seat in one of the European cities, which should work out a long-range program for

⁸² New York Times, March 25 and 26, 1938.

aid to all actual or potential refugees. The American plan brought forward two new ideas: an international organization consisting only of states receiving refugees and made up of representatives delegated by their governments, and a permanent body, outside the League "to concern itself with all refugees wherever governmental intolerance shall have created a refugee problem." In both cases, the inter-governmental organization was to be "complementary" to, and was to cooperate with, the League's existing refugee organizations.

In favor of this plan are the facts that the League is tending to restrict its refugee work to juridical protection, that it is easier for an independent body to deal with Germany, and that it is possible to achieve more through a body with membership restricted to countries receiving refugees than through the League in which such potential refugee producers as Poland and Rumania have a veto.

As the English and French representatives at the Evian Conference were anxious that the new committee should be an advisory body to work in liaison with the High Commissioner for the League, and also that it should restrict itself to helping German and Austrian refugees, it was necessary to seek a compromise. The first recommendation of the resolution, as unanimously accepted on July 15, limits the scope of the Inter-Governmental Committee for the present to refugees from Germany and Austria. The recommendations end, however, by pointing out that the Inter-Governmental Committee "should continue and develop" the work of the Evian Conference. The door is thus left open for the Committee to extend its scope in the future.

The Inter-Governmental Committee which has its seat in London, is set up as a permanent body to deal with the refugee problem. It is composed of representatives of all governments which sent delegates to Evian.⁸³ Closest liaison will be maintained with the existing refugee machinery of the League of Nations and the International Labor Office. The first meeting was held on August 3 in London. Mr. George Rublee, a lawyer, the nominee of President Roosevelt, was appointed director of the new organization, while Earl Winterton, the British delegate at Evian, and a British Cabinet Minister, became Chairman of the Executive Bureau. The representatives of the United States, France, Brazil and The Netherlands became vice-chairmen. The administrative expenses will be paid by the participating governments.

Through Mr. Roosevelt's initiative, the attempt is being made to tackle the problem at its source. In his letter of resignation, Mr. McDonald has hinted that pressure should be exerted on the German Government to end the persecution which was causing the refugee exodus. All suggestions of this nature have been resented by the German Government as an interfer-

⁸³ Thirty-two governments representing all countries of possible temporary or permanent asylum for refugees took part in the Conference. Italy refused the invitation. Germany, Poland, Russia, Hungary, Rumania, Yugoslavia, Greece, Turkey and Spain were not invited.

ence in its internal affairs. The approach at the present time accepts the policy of the Nazi Government, but seeks an agreement whereby in return for facilitating the emigration of "non-Aryans" and others from Germany, the Nazi Government will allow the potential refugees to take money and goods with them. Mr. Rublee's first task will be to negotiate with the German Government along these lines with the end, in the words of Mr. Taylor, "that orderly emigration should replace disorderly exodus."

It has been estimated by Mr. Taylor that the Inter-Governmental Committee for Refugees "must budget for an exodus from Germany of at least 600,000 refugees during the next five years. They would include Jews, half-Jews, and Roman Catholics." ⁸⁴ The Evian Conference as well as the meeting in London showed that there is a general willingness to increase reception of refugees as far as is possible within the frame of immigration laws. The quota system in effect in certain countries would permit the reception of an appreciable number of refugees, while others having no numerical limitation are prepared to adopt "a liberal attitude" in admitting refugees under their method of control.⁸⁵ A practical step has already been taken by the United States in merging the quotas of Germany and Austria, and President Roosevelt has expressed the opinion that "a considerable number of refugees can be admitted from Germany and Austria if there is financial assistance to prevent their becoming public charges."⁸⁶

A decisive question in this approach to the refugee problem will be how far political refugees will be able to conform to the type and experience needed by the immigration countries. Private organizations have already been

⁸⁴ The London Times, Aug. 5, 1938.

⁸⁵ The Evian Conference set up two sub-committees, one of which received the reports of 22 private refugee organizations, and the other of which, under the chairmanship of Mr. Hansson, dealt with the legislation of various countries concerning immigration, the documentation of refugees deprived of passports, and other technical questions, and with confidential statements made by governments concerning their capacity to receive refugees.

The second sub-committee was able to build on the work of a conference held in February under the sponsorship of the International Labor Office, at which representatives of South American and European immigration countries had given information as to their capacity to receive immigrants. The report of the sub-committee of the Evian Conference stated that governments in general held out prospects for an increased reception of refugees who would qualify under their immigration laws. Experienced agriculturists were needed by certain countries and others needed selected classes of workers. Still others were prepared to admit immigrants without occupational restrictions.

⁸⁶ Germany's quota of 25,000 set by the Immigration Act of 1924 has been less than half-filled in recent years. Since 1933 the excess of German immigration over emigration has been only 7,108. These figures were prepared from government records by the President of the Advisory Committee on Political Refugees, of which Mr. McDonald is Chairman. Cf. New York Times, June 26, 1938. The quota for the fiscal year ending June 30, 1938, for Germany and Austria together is 27,370. Since a quota is determined not by nationality but by the country of birth, it is noteworthy that about 70 or 80 per cent. of the Jews in what was formerly Austria, were born in territories now belonging to Czechoslovakia, Poland, Hungary and Rumania.

spending much money and time in re-training younger members of the refugee groups for agricultural work. The continuance of such efforts was stressed at the Evian Conference, and the British delegate and others proposed that the country of origin or of temporary refuge in Europe should carry through the re-training.

The Evian Conference and the work planned as an outgrowth of it, mark an important step in the development of the work for refugees. While Nansen had far-sighted plans for the settlement of refugee groups, it was not easy to put them into execution through lack of funds and difficulty in securing the right place. Moreover, infiltration offers better chances of satisfaction both for refugees and for the receiving country than does mass settlement. The emphasis which the Evian Conference has given to this side of the refugee work does not mean that there is no longer need to work for an improved legal status for refugees. The Conference itself recognized this fact by specifically noting the need for continued activity in improving the legal status. If arrangements are concluded with the German Government for an orderly emigration of potential refugees, it will be necessary to decide upon their legal status in the re-training countries as well as for entering the country of eventual destination. It will also be necessary to have officials to supervise all technical arrangements. There are already offices in different countries under the High Commissioner of the League of Nations, and recent plans for the League's work for refugees include their continuation. This system could be extended and the offices entrusted with responsibilities ordinarily undertaken by consular officials. These offices should work in close touch with, if not directly under, the new international refugee organization.

While attention is at present concentrated on the German refugees, the fact that the way has been left open for the new refugee organization to concern itself with other actual or potential refugee groups, gives the opportunity to work for a generally accepted legal status for all political refugees. Under this would come not only those, like the Russian and Armenian refugees, for whom a certain legal status has been achieved in some countries, but those, like the Italian and Spanish refugees, for whom no provision has been made. Moreover, such a general legal status for refugees would do much to ease possible future problems. While it may be hoped that the refugee problem is one of a generation and that it will gradually cease to be of serious international concern, the position of the five million Jews in eastern Europe, the present uneasy political situation, and the bitterness of ideological divisions, indicate, however, that there may be still other refugee groups in the future.

The customary arguments against accepting a general legal status for political refugees are that it might encourage countries to get rid of their unwanted people and that many might emigrate who would otherwise remain in their countries even under serious disabilities. It has been demonstrated,

however, that refusal to grant a legal status to those who have been forced out of their countries has had no deterring effect upon governments, and it is now clear that pressure upon governments to persuade them to keep their own people is a political matter. Disorganized groups of refugees are more difficult for hospitable countries to deal with than are organized groups, even if the latter are larger in number. A clearly defined status for refugees would aid efforts to make refugee status transitory in character and would facilitate settlement. If coupled with adequate technical organization, refugees would be under more direct control than at present, and the possibility of subversive political activity against governments responsible for their exile would be greatly lessened. The political complications often connected with aiding refugees would be practically eliminated also, particularly if the local offices concerned with refugees were qualified to decide which people fell within the accepted definition of "refugee."

At a time when renewed and comprehensive efforts are being made to meet the needs of the refugee problem, the question of a general legal status should be seriously considered. The arrangements and conventions which have been concluded under the League of Nations for special refugee groups, as well as the discussions of the International Law Association at Brussels, 1936, and of the Hague Conference on Nationality, 1930, have provided the framework for a definition of political refugees and for a comprehensive legal status, which would guarantee them protection during the period of refugee status, enable them to travel, and help them in finding a place of permanent settlement. The acceptance of such a legal status, and the extension of the technical organization along the lines already being developed, would aid in the transition to new national status, and an orderly basis upon which to deal with the refugee problem would be achieved.

THE NATIONAL SOCIALIST THEORY OF INTERNATIONAL LAW

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Despite a rather wide range of disagreement among National Socialist writers, a general, characteristic National Socialist theory of international law is definitely discernible. Hans Helmut Dietze is perhaps the most representative and certainly among the most thoroughly National Socialist writers on this subject. Helmut Nicolai, Ernst Wolgast, Norbert Gürke, Herbert Kraus, and G. A. Walz may be considered as ranking next in importance from the point of view of expounding the most typical National Socialist doctrines in the field of international law. The words and deeds of the Führer have formed, of course, the basis upon which these doctrines stand. Although the utterances as well as the actions of Hitler have not always been consistent (this is obvious in any comparison of *Mein Kampf* with his speeches as *Reichskanzler*), this fact does not seem greatly to have hindered the formulation of an international legal theory, but then this theory itself may appear to many, when viewed objectively, as likewise inconsistent. However, just as it is possible to dismiss certain statements of Hitler as embodying words coined more for tactical purposes and not sincerely in line with National Socialist ideology, so it is possible to see through many of the inconsistencies in the National Socialist theories on international law and obtain the real *volklich-nationale* point of view.¹

(A characteristic of National Socialist writings on law is to be found in the emphasis laid upon the fact that law is conditioned by the form of society it governs.) Actual social conditions or relationships, not abstract norms, are claimed to be the basis for recognition of all law. Reality, *die konkrete Wirklichkeit*, should determine the nature of law,² for it is here in the social forces that law has its source.³ The fundamental reality, it is claimed, is the permanent division of mankind into different races and nationalities (*Völker*), the central fact from which all thought must proceed.⁴ This is at the very core of the National Socialist *Weltanschauung*; we find this theme rising again and again out of the variations of their thought.

(Developing upon this hypothesis, the most representative National

¹ Norbert Gürke distinguishes the National Socialist point of view, aptly termed the *volklich-nationale*, from the Catholic church (*katholisch-kirchliche*), the democratic pacifist, the marxist and the positivist points of view. In "Der Stand der Völkerrechtswissenschaft", *Deutsche Rechtswissenschaft*, Hamburg, 1937, p. 82.

² H. H. Dietze, "Europa als Einheit," *Zeitschrift für Völkerrecht*, Breslau, 1936, p. 295, "nicht eine abstrakte Norm, sondern die konkrete Wirklichkeit (ist) der Geltungs und Erkenntnisgrund allen Rechts."

³ H. Nicolai, *Rassengesetzliche Rechtslehre*, München, 1934, p. 27.

⁴ Norbert Gürke, *Grundzüge des Völkerrechts*, Berlin, 1936, p. 16.

Socialist theories of international law hold that there are only two possible forms of social life, the *Gemeinschaft* (community), and the *Gesellschaft* (association).⁵ The *Gemeinschaft* reaches its most perfect expression in a racially homogeneous nation; the *Gesellschaft*, on the other hand, is best reflected in the order existing between states. To understand fully National Socialist conceptions of the *Gesellschaft* and of its law, international law, it is above all necessary to comprehend the nature of and the importance given to the *Gemeinschaft*. It is only against the background of National Socialist concepts of the *Gemeinschaft* and its law that a true evaluation of their theories of international law can be attempted.

The *Gemeinschaft* clearly expresses the will of nature. It arises from those forces out of which all natural forms of life arise; from the impulse of the blood, from the sap of the soil and from the power of similar dispositions.⁶ The most intense, the highest *Gemeinschaft*, is the racially pure *Volks-gemeinschaft*.⁷ Racial purity thus becomes essential to the attainment of a real, natural community. Racial purity is furthermore of key importance, as the law of the community is only discernible by means of the racial instinct. The law of a community is a biological phenomenon. The law is preëxistent in the blood of the race.⁸ The purer the race the greater the legal perception (*Rechtsempfinden*) of the *Volk*.⁹

This law which is embedded in the perception of the *Volk* is a natural law.¹⁰ Thus the National Socialists herald the return of a natural law in their legal thought. But the natural law they envisage is in no way reminiscent of the natural law of the eighteenth century. It is no ideal, universal system of law to be aspired toward by means of man's reason. It is a natural law embedded in the blood and soil of a *Volk*. It is a natural law peculiar to each nation.¹¹ It is likewise not absolute, though it is connected with the

⁵ H. H. Dietze, *loc. cit.*, p. 295, "*Gemeinschaft und Gesellschaft bilden die beiden grundsätzlich möglichen Formen sozialen Lebens*"; E. Wolgast, "*Nationalsozialismus und internationales Recht*", *Deutsches Recht*, Berlin, 1934, p. 196; G. A. Walz, *Wesen des Völkerrechts und Kritik der Völkerrechtsleugner*, Stuttgart, 1930, p. 241 ff. Walz would admit the existence of three fundamental forms of human relationship, and hence three fundamental types of law. In addition to the *Inordinationsrecht* and the *Koordinationsrecht* which correspond respectively to the *Gemeinschaft* and the *Gesellschaft*, Walz includes a *Subordinationsrecht*, based upon a power rather than an organic relationship, as exemplified in most states.

⁶ H. H. Dietze, *loc. cit.*, p. 296; *Naturrecht in der Gegenwart*, Bonn, 1936, p. 39. The *Gemeinschaft* is, according to the author, "*eine Schöpfung der Natur, wachsend wie diese aus den Kräften, daraus alles Leben entstammt: aus dem Drängen des Blutes, den Säften des Bodens und der Innigkeit gleicher Gesinnung.*"

⁷ H. H. Dietze, *loc. cit.*, p. 304.

⁸ R. Eberhard, *Modernes Naturrecht ein rechtsphilosophischer Versuch*, Rostock, 1934, p. 22, "*das deutsche Blut trägt in seiner Naturanlage die Idee des deutschen Rechts.*"

⁹ H. Nicolai, *op. cit.*, p. 29, "*der reinrassige Mensch entscheidet ungekünstelt, sicher, instinktmässig richtig.*" ¹⁰ H. H. Dietze, *loc. cit.*, p. 329.

¹¹ *Ibid.*, p. 325, "*Echtes Naturrecht muss arteigen, aber nicht allen eigen, d.h. allgemein sein wollen.*"

absolute ethical concept of truth.¹² The natural law of a *Volk* is relative,¹³ for it represents the continually changing needs of a *Volk* as determined by its right of existence (*Lebensrecht*).¹⁴ *Naturrecht* is *Lebensrecht*.

Natural law is unwritten, it lies in the very blood of man; ¹⁵ it is a biological natural law. Yet this biological (*Rassengesetzliche*) natural law is at the same time divine law, for the voice of the *Volk* is the voice of God.¹⁶ It is only another step to the position that the German nation is the chosen *Volk*. This from the very beginning has been the claim of Hitler.¹⁷ In a world of unequal races, Germany stands for the best and strongest race destined to subjugate the weaker races. National Socialist legal philosophy closely reflects this position. The law of a *Volk* should be so adapted as to enable the *Volk* to enter the competitive struggle between races.¹⁸ Law is always on the side of the stronger.¹⁹ Norbert Gürke clearly expresses this belief in the just use of force to secure the dominance of a superior nation. "Not all nations are entrusted in world history with the same cultural and civil tasks. Only those nations and cultures can survive in world history who have the will and the strength to protect their freedom. International law takes from no nation its right to fight for self-assertion."²⁰

The positive law of a community is the natural law of that community,²¹ for the state is not the source of law but merely formulates the law which already exists. There seems to be no question but that the leaders of the people will rightly, instinctively discern the natural law of the *Blutsgemeinschaft*. Everything which is for the good of that community is *Recht*, everything which is harmful to the *Volk* is not *Recht*. Hence all legislation must be interpreted freely and is liable to change. Positive law is dynamic, ever changing, in keeping with the natural law of the community. The National Socialists refuse to be bound by a static, positive law, to be bound by letters and paragraphs.

(The National Socialist belief in the dependence of law, both natural and positive, upon the racial composition of the *Volk* it governs, and the claim that the purer the race, the clearer the legal perception of the *Volk*, has aroused in the minds of many the question as to what exactly the Germans

¹² H. Nicolai, *Rasse und Recht*, Berlin, 1933, p. 13.

¹³ R. Eberhard, *op. cit.*, p. 40.

¹⁴ H. H. Dietze, *loc. cit.*, p. 329.

¹⁵ *Ibid.*, p. 326.

¹⁶ *Ibid.*, p. 329.

¹⁷ A. Hitler, *Mein Kampf*, München, 1933, p. 421.

¹⁸ R. Eberhard, *op. cit.*, p. 14. Dr. Frank, Justizcommissar, is here quoted as saying that every law is only "das Mittel zu dem Zweck der Nation die heldische Kraft zum Weltstreit auf dieser Erde anzuvertrauen."

¹⁹ H. Nicolai, *Rassengesetzliche Rechtslehre*, München, 1934, p. 21.

²⁰ N. Gürke, *op. cit.*, p. 16, "Nicht allen Völkern ist in der Weltgeschichte gleiche kulturelle und staatliche Leistung aufgegeben. Nur jene Nationen und Kulturen können in der Weltgeschichte bestehen, die den Willen und die Kraft haben, ihre Freiheit zu schützen. Das Völkerrecht nimmt keiner Nation ihren Selbstbehauptungskampf ab."

²¹ R. Eberhard, *op. cit.*, p. 23; A. Török, "Nationalstaatsidee und Völkerrechtsordnung", *Zeitschrift für Völkerrecht*, 1934, p. 256.

mean by racial purity.) The National Socialist connotation of the word "race" is certainly not that scientifically ascribed to it. Race has been defined by Günther as a "group of people which distinguishes itself from every other group of people by its peculiar union of physical characteristics and spiritual attributes, and which continuously only produces of its own kind."²² Günther admits that at present, even according to this general definition, there are in the main, seven races which go to make up the German *Volk*. But he maintains that the racial kernel of the German *Volk* is nordic and because this racial strain predominates, it has molded the German culture and exists more or less in all Germans. The conclusion is drawn that the German *Volk* is nordically destined (*nordrassisch bestimmt*). Whether when all of Germany has become nordic, with the same physical and spiritual characteristics, every member of the *Volk* will instinctively discern the same law, remains to be seen. Meanwhile, even though Germany has not reached its nordic destination and the *Volk* cannot be considered as racially pure, the Führer speaks in the name of the whole *Volk*, and those not endowed with the instinct of the nordic race may discern a different law but one which they cannot disclose. (To any outsider examining National Socialist theories, the attempt to develop a group of people with essentially the same physical and spiritual characteristics does not seem as impossible, though it might seem undesirable, as the attempt to put over the thesis that with racial purity comes a unified, instinctive conception of the means and end of law and government.)

The law of a community is, therefore, according to National Socialists, not the result of a power relationship which they claim is the case of most state law today. Power can merely serve the law.²³ The law is there, and might has the function of seeing that this law has a free chance for expression.²⁴

Proceeding from this National Socialist interpretation of the *Gemeinschaft* and its law, is it possible to envisage any kind of a legal order existing between such communities? National Socialists definitely put forth such a claim. H. Nicolai maintains that since everything living is under the jurisdiction of a legal order, therefore individual states also stand under a legal order.²⁵ (The basis of international law lies, according to Dr. Bumiller, in the consciousness that the social relations between states also stand under a legal order.²⁶ Herbert Kraus finds conclusive proof for the existence of an international legal order in Hitler's own words. Hitler in his 17th of May speech demanded the revival of an international legal consciousness²⁷ (*Rechtsempfinden*), and, as Kraus points out, the existence of an interna-

²² H. Günther, *Rassenkunde des deutschen Volkes*, München, 1935, p. 14.

²³ H. Nicolai, *op. cit.*, p. 20.

²⁴ *Ibid.*

²⁵ *Ibid.*, p. 48.

²⁶ Dr. Bumiller, "Die Nationalsozialistische Rechtsidee und das Problem des Völkerrechts", *Deutsches Recht*, 1934, p. 205.

²⁷ *Die Reden Hitlers als Kanzler*, München, 1934, p. 53.

tional legal consciousness establishes the existence of an international law.²⁸

This international law is, like all law, conditioned by the form of social life it governs.²⁹ International law governs the *Gesellschaft*, a society founded upon the individualism and the egoism of its members.³⁰ Self-interest is the only basis for accord in this Hobbesian society. The *Gesellschaft* is not a natural but an artificial society, because it is the result of purposeful thought and not the natural, spontaneous expression of will.³¹ The *Gesellschaft* is a synthesis *a posteriori* as compared to the *Gemeinschaft* which represents a synthesis *a priori*.³²

National Socialists draw a distinction, as they do with regard to the law of a *Gemeinschaft*, between a natural and a positive law of the *Gesellschaft*. The *Gesellschaft*, as the *Gemeinschaft*, has its natural law, because every form of social life has a natural legal order.³³ This acceptance of a natural law of the *Gesellschaft* might seem to the impartial observer inconsistent with the artificial character of the international society, as well as somewhat inconsistent with the theory of the racial basis of all real natural law. But if we consider this natural law of the *Gesellschaft* as a natural law conceived by the German *Volk* rather than by all the members of the *Gesellschaft*, we will eradicate some of these inconsistencies and reflect more clearly the National Socialist position. This natural law is likewise, according to National Socialists, conditioned by the form of social life it reflects.³⁴ The natural law of the *Gesellschaft* is therefore quite different from the natural law of the *Gemeinschaft*.³⁵ The natural law of the *Gesellschaft* has its origin in, and is stamped by, the purpose for which it exists. It serves as a means for the fulfillment of this purpose.³⁶

The purpose or primary duty of the international legal order is to serve and satisfy the interests of the various states.³⁷ H. Kraus aptly calls this a national (*etatische*), in contradistinction to a universal, conception of

²⁸ H. Kraus, "Das Zwischenstaatliche Weltbild des Nationalsozialismus", *Juristische Wochenschrift*, Leipzig, Nov. 4, 1933, p. 2420.

²⁹ H. H. Dietze, *loc. cit.*, p. 295; G. A. Walz, *op. cit.*, p. 241.

³⁰ H. H. Dietze, *loc. cit.*, p. 296. ³¹ H. H. Dietze, *op. cit.*, p. 42. ³² *Ibid.*, p. 45.

³³ H. Richter, "Völkerrecht", *Deutsches Recht*, 1934, p. 206. Richter differs from the general position taken, in that he believes it a mistake to talk of natural law concepts in the international sphere. National Socialist thought, according to him, can be applied only to their own *Volk*. H. H. Dietze, *op. cit.*, p. 303, ascribes this position of Richter's to the fact that he does not distinguish between two types of natural law, one in relation to the *Gemeinschaft* and the other in relation to the *Gesellschaft*.

³⁴ H. H. Dietze, *op. cit.*, p. 20.

³⁵ *Ibid.*, p. 302. It is noteworthy that Dietze admits that few forms of social life may be classified as exclusively *Gemeinschaft* or *Gesellschaft*. Most forms have characteristics of both the *Gemeinschaft* and the *Gesellschaft*, but almost always they have a preponderance of the one or the other. International society, according to Dietze, is preponderantly a *Gesellschaft*, and is only in few respects a *Gemeinschaft*.

³⁶ *Ibid.*, p. 54.

³⁷ H. Kraus, *loc. cit.*, p. 2421.

international law.³⁸ H. H. Dietze brings out this basic characteristic of international law, service in the interest of state needs, when he defines law (*Recht*) as only that which benefits the *Volk*, internationally as well as nationally (*zwischenstaatlich genau so wie innerstaatlich*).³⁹

Such an interpretation of the primary duty and validity of international law results in limiting its sphere of action to a few external and superficial rules. Thus the primary duty of international law as envisaged by National Socialists does not ascribe to that law a function which has potentialities of growth and development, but it limits and almost destroys any law which might exist between states. The nationalistic interests of states are today so absolutely opposed to each other, so irreconcilable, that little real law can be envisaged which could serve and satisfy the nationalistic interests of all states.

This devotion to state needs is a duty of positive as well as natural law. Positive law, to have any validity, must conform to the precepts of its natural law. The positive law between nations is just as much subjected to certain moral commandments and certain moral prohibitions⁴⁰ as is the positive law of a community. H. Kraus clearly sums up the National Socialist position in this respect, "the totalitarian National Socialist state . . . knows . . . no difference between law (*Recht*) and ethics (*Moral*)."⁴¹ Law and ethics lose their distinction and become synonymous in the international sphere, as they do for National Socialists within their own community. Carl Schmitt may be quoted in this respect: "For us there is only right and wrong, wrong and (*unsittliche*) unethical law is for us no law at all."⁴² We are forced to admit, however, that this conception of "right" is not one common to mankind, but limited to National Socialists. And the law, both national and international, based upon this concept, if we are to be realistic, is to serve not in uniting nations but in clearing the way for the dominance of the German *Volk*.

Let us turn now to a consideration of some of the fundamental principles of the natural law of the *Gesellschaft*, to which positive international law must conform to be valid. The fundamental principles largely resolve themselves into three inherent and inalienable rights held by states, which it is the duty of the international legal order to safeguard. These three fundamental natural rights, according to Dietze, are the right of self-preservation (the right of self-defense flowing from this right), the right of equality (*Gleichberechtigung*),⁴³ and the right to sovereignty.⁴⁴ No associa-

³⁸ H. Kraus, *loc. cit.*, p. 2421.

³⁹ H. H. Dietze, *loc. cit.*, p. 320.

⁴⁰ H. Kraus, *loc. cit.*, p. 2418.

⁴¹ *Ibid.*, p. 2421.

⁴² Carl Schmitt, *Nationalsozialismus und Völkerrecht*, Berlin, 1934, p. 17, "Für uns gibt es nur Recht und Unrecht, und das unrichtige und unsittliche Recht ist für uns kein Recht."

⁴³ According to Carl Bilfinger equality means for states the same degree of independence. "Gleichheit und Gleichberechtigung der Staaten", in *Nationalsozialistischen Handbuch für Recht und Gesetzgebung*, editor Dr. Hans Frank, München, 1935, p. 117.

⁴⁴ H. H. Dietze, *op. cit.*, p. 307. The classification here found may be considered as a

tion of states can dispense with these basic rights surrendered to the law of nature.⁴⁵ National honor is, of course, inseparably associated with each of these natural rights.⁴⁶ (Infringement upon these natural rights is an infringement upon the honor and freedom of a state, and is a violation of the law of nature. Therefore any positive law incorporating such infringements, cannot be recognized as legally valid by Germany.) Hitler announced this to the world on May 21, 1935. "Thus pacts which are not honorable, which disrespect the honor of one of the parties, and are hence against the natural basis of international law, Germany does not recognize."⁴⁷ It is upon this moral and ethical basis that Hitler has launched his attack upon the Treaty of Versailles. What is striking, however, in the continual emphasis laid by National Socialists upon these basic rights of a nation is their flagrant disregard of just these rights when claimed by another nation. It is inconceivable how any agreement which may be reached with regard to Czechoslovakia can be considered as respecting the honor of that nation. The basic rights of nations as comprehended by National Socialists can be taken only as a demand embodied in the formal verbiage of traditional international legal language, camouflaging the National Socialist limited application to what they conceive to be their own basic rights as opposed to, and if necessary in violation of, those of other nations.

The demand for equality⁴⁸ has been most insistently advanced by National Socialists, as a demand of morality and justice. Hitler in his speech of May 17, 1933, strongly urged equality of armaments because his "demand for equality of rights expressed in actual facts . . . (was) . . . a demand of morality, right and reason."⁴⁹ National Socialists claim that disarmament below the requirements for self-defense, as Germany was forced to accept by the Treaty of Versailles, is irreconcilable with the equal right for security and self-defense, the basis of all international law.⁵⁰ G. A. Walz characteristically maintains that the political function of international law lies in the equal guarantee to the national communities, members of the international society, of the necessities of life (*Lebensbedingungen*), that is, the function lies in the bringing about and preservation of equality.⁵¹

representative one. These basic rights (*Grundrechte*) are the very prerequisite for the existence of any law between nations, according to Carl Schmitt, *op. cit.*, p. 7.

⁴⁵ H. H. Dietze, *op. cit.*, p. 307.

⁴⁶ H. Rogge, *Hitlers Friedenspolitik und das Völkerrecht*, Berlin, 1935, p. 61. Rogge considers national honor as a basic right of international law, in fact, the fundamental right. Other authors tend to consider it more as an implied right.

⁴⁷ A. Hitler, speech of May 21, 1935.

⁴⁸ Equality is to be understood as equality of opportunity. H. H. Dietze, *loc. cit.*, p. 314, defines the principle of equality as "*natürlich nicht irgend eine mechanische Gleichheit, sondern die Möglichkeit der gleichen Chance.*"

⁴⁹ A. Hitler, speech of May 17, 1933.

⁵⁰ H. Rogge, *op. cit.*, pp. 35, 36.

⁵¹ G. A. Walz, "*Das Verhältnis von Völkerrecht und staatlichem Recht nach Nationalsozialistischer Rechtsauffassung*", *Zeitschrift für Völkerrecht*, Breslau, 1934, p. 149.

This demand for equality lodges one of the most blatant inconsistencies of National Socialist thought, for inequality is the very foundation of their *Weltanschauung*. (The National Socialist world is a world of unequals, between individuals within a nation, as well as between races.) The *Führerprinzip* and the unshakeable belief in the superiority of the German *Volk* cannot be reconciled with any demand for equality. One cannot expect nations to relinquish the fruits of their victory in answer to a demand for equality, when this status once granted is merely to serve as the stepping-stone for the German *Volk* to fulfill its destiny. The Germans believe that "it is God's will that the victory of the better, the stronger be assured and that the subjugation of the worse, the weaker, be accomplished,"⁵² and they maintain that the *völkische Weltanschauung* corresponds to the inner will of nature, in that it reestablishes "that free play of forces, which must lead to a higher breeding (*Höherzüchtigung*) until finally free way is given to the best part of mankind, as the result of the conquest of this earth."⁵³ With such views they cannot ask that much weight be given to their plea for equality. A grant of equality would not be consistent with "that free play of forces" which seems so desirable. If we remember that the *Gesellschaft* is a society existing solely for the selfish interests of its members, National Socialists in their demand for equality may be accused of disregarding their much emphasized theory that law is conditioned by the form of society it represents. They must be accused of not facing that reality, *die konkrete Wirklichkeit*, which according to them should determine the nature of law.

A general demand for a readjustment of positive international law in line with the natural law of the international association of states, is persistently made. This demand, that positive law should closely reflect the precepts of natural law, is claimed to be a dynamic, as opposed to a static interpretation of law. "If then natural law stands as a permanent basis of positive international law, and if the positive is continuously measured and evaluated by the natural international law, then necessarily all norms of positive international law lose their rigid character; they become dynamic law and fulfill thereby the demand for justice."⁵⁴ It is in this spirit that Hitler announced to the world that though they might cling to the letter of the law, he clings to the eternally moral (*die ewige Moral*).⁵⁵ National Socialists thus believe that "natural law is eternal, and all paragraphs transitory."⁵⁶

Hitler has maintained that Germany has the right, yes, the moral duty to bring about a readjustment between positive and natural law, to reestablish the artificially displaced nature of things in the international world.⁵⁷ Ful-

⁵² A. Hitler, *op. cit.*, p. 421.

⁵³ *Ibid.*, p. 422.

⁵⁴ H. H. Dietze, *op. cit.*, p. 309.

⁵⁵ *Ibid.*, p. 321. Reference is here made to a speech of Hitler's at Berlin.

⁵⁶ *Ibid.*

⁵⁷ A. Hitler, in a speech made March 16, 1935, parts of which are to be found in H. H. Dietze, *op. cit.*, p. 307.

filling this duty, Hitler on March 6, 1936, marched his troops into the Rhineland in disregard of the Pact of Locarno. He justified this move on the basis that it was the demand of the primitive right of a *Volk* for security of its borders and preservation of its means of defense, which caused the German Government to reestablish its unlimited sovereignty in the demilitarized zone of the Rhineland.⁵⁸ Possession of the Saar and hence a change of the international order was similarly demanded by Dr. Frank, on the grounds of its being in line with the natural order of things.⁵⁹

National Socialists claim, however, that they do not repudiate the sanctity of treaties, *pacta sunt servanda*. "That famous phrase *pacta sunt servanda*, the hypothesis and very basis for the existence of an international law, is recognized as valid by National Socialists in the international sphere."⁶⁰ *Pacta sunt servanda* remains a fundamental precept of international law, but it is no longer an absolute, it has become a relative precept. Treaties are to be observed if they embody *richtiges Recht*, that is "right law". If they are not in keeping with the primitive, natural law of nations, then it is no longer a duty, and is in fact dishonorable, to observe them. Hitler considers it a fundamental principle of international law that the "sanctity of treaties presumes the existence of honorable treaties" (*Vertragstreue ehrenhafte Verträge voraussetzt*).⁶¹ Thus Wolgast likewise, though he accepts *pacta sunt servanda* as the juristic basis (*Geltungsgrund*) of international law, demands that this law be "rightly orientated to justice"⁶² (*richtigerweise orientiert an der Gerechtigkeit*), if it is to be considered as true law. Richter quite frankly sums up the National Socialist position with respect at least to treaties made in the past. ("Generally recognized international legal principles and international custom are recognized by Germany only then when they coincide with the legal concepts of the German *Volk*, and not because of their international character, but because basic, ethical ideas of German law are at stake.")⁶³ This is perhaps putting it a little more bluntly than most National Socialists would be willing to do, but it does seem to be a realistic presentation of the National Socialist attitude with regard to deciding upon the legality of certain international agreements. But even Richter refuses to abandon the principle of *pacta sunt servanda*. With regard to the future, Richter maintains that the principle simply means that Germany will only enter upon agreements which it can keep. With regard to the past, however, *pacta sunt servanda* stands for revision. "When Truth,

⁵⁸ A. Hitler, speech before the Reichstag, March 7, 1936, "*Des Führers Kampf um den Weltfrieden*", München, 1936, p. 29.

⁵⁹ H. H. Dietze, *op. cit.*, p. 113. The author quotes Dr. Frank from his introduction to the first number of the *Zeitschrift der Akademie für deutsches Recht*, 1934, p. 1. "*Das Recht Deutschlands auf die Saar ist das unabdingbare, von keinem Vertrag, von keiner Machtanwendung zu erschütternde ewige Naturrecht wie das Recht der Mutter auf ihr Kind.*"

⁶⁰ H. Kraus, *loc. cit.*, p. 2419.

⁶¹ A. Hitler, speech of May 21, 1935.

⁶² E. Wolgast, "*Nationalsozialismus und internationales Recht*", *loc. cit.*, p. 199.

⁶³ H. Richter, *loc. cit.*, p. 208.

Honor, and Faithfulness of themselves demand that a once given word should be held, so do they also demand withdrawal from dishonest and dishonorable commitments." ⁶⁴ Thus the National Socialist interpretation which has been more recently emerging would seem to make of *pacta sunt servanda* a relative, instead of an absolute principle.)

We must conclude with O. Koellreuter that *pacta sunt servanda*, in the form of the absolute maintenance of certain legal norms of international law, is no longer for National Socialists the highest value, but that the preservation of states, "even in the case of conflict," is the highest value (*Wert*). ⁶⁵ Koellreuter concludes from this that the *clausula rebus sic stantibus* is the positive basis of all international law actually in force. *Rebus sic stantibus* is for National Socialists a vital and fundamental part of any international law. International law exists, according to them, as we have seen, in the interests of states, and when these interests change, the states can no longer be bound by mere technical laws. ⁶⁶ The violation of the Concordat with Rome was justified by the Germans on the ground that "observance of any treaty becomes immoral if the evolution of the nation is endangered thereby." ⁶⁷ The *Völkischer Beobachter* defended the violation of the treaty with the Holy See by stating that a "treaty must observe living evolution if it is not to become powerless." ⁶⁸ *Rebus sic stantibus* has taken the place of *pacta sunt servanda* in the international legal order as envisaged by the National Socialists. *Pacta sunt servanda* in the relative form in which it is still accepted by the National Socialists owes its change of character precisely to this emphasis upon and expansion of the principle of *rebus sic stantibus*.

There are other principles of international law, as emphasized by the National Socialists, which must be presented to obtain a full picture of their conceptions on this subject. Among these are the demands for a positive system of law as comprehensive as possible, ⁶⁹ and for contract law (*Vertragsrecht*) within this system. ⁷⁰ Both these demands are claimed to emanate from the very nature of the *Gesellschaft*. Just as the *Gesellschaft* arises out of a contract, so also does its positive law come into existence as the result of contract, of agreement between sovereign states. ⁷¹ But National Socialists are careful to point out that the will of nations as such is not sufficient to create valid agreements, the will must be accompanied with a communal interest between the parties to any treaty, and must not violate their honor. ⁷²

⁶⁴ H. Richter, *loc. cit.*, p. 208.

⁶⁵ O. Koellreuter, *Grundriss der Allgemeinen Staatslehre*, Tübingen, 1933, p. 229.

⁶⁶ Norbert Gürke, *Volk und Völkerrecht*, Tübingen, 1935, pp. 48-53.

⁶⁷ New York Times, June 1, 1937, p. 8.

⁶⁸ *Ibid.*

⁶⁹ H. H. Dietze, *op. cit.*, p. 55. The author speaks of "das naturrechtliche Verlangen nach möglichst umfassender positiver Normierung."

⁷⁰ *Ibid.*, p. 309, "Ein weiteres Merkmal dieses Völkerrechts ist die Auffassung des positiven als eines vertraglichen Rechts." See also G. A. Walz, *op. cit.*, p. 255.

⁷¹ H. H. Dietze, *op. cit.*, p. 309.

⁷² Norbert Gürke, *Grundzüge des Völkerrechts*, p. 14.

International law is formulated by the will of states, which at present are the only subjects of this law. National Socialist lawyers, however, look toward the development of an international law where nationalities as well as states will be subjects. Dietze thinks that the fact that minorities are recognized as having subjective rights under international law is indicative of a period of transition.⁷³ Török, a Hungarian, considerably influenced by National Socialist thought, but by no means going to the full extent of their position, points out that international law at present is out of keeping with the sociological facts. The new sociological fact in the modern legal consciousness is that the personality of the nation is the source of law. The fact of the personality of the *Volk* (*Volkspersönlichkeit*) has legal consequences.⁷⁴ International law must be made to conform to this new fact. Ernst Wolgast supports this view. "Europe, it would seem, must return to a personalistic, as well as a territorial, order of life."⁷⁵ Similarly G. A. Walz believes that "the rights of co-nationals and of the nationality must and will find their place in a future international legal order, they are an essential element for a permanent and satisfactory European legal order".⁷⁶

Contracts between two parties, that is bilateral treaties, are for National Socialists much to be preferred to multilateral treaties. Bilateral treaties can express and serve state interests, whereas multilateral treaties by their very nature reflect unimportant formulae, for any real concord of interests is not possible among many states.⁷⁷ (Since Germany stands for concrete agreements as opposed to mere abstract settlements, bilateral treaties are demanded in the sphere of international law. Furthermore, because of this lack of common interests among states, international law can only produce a few external legal maxims (*Rechtsätze*).⁷⁸ International law represents a thin, technical, essentially positive structure of law, as compared to the comprehensive, almost completely natural law of the community.)

Another fundamental principle of the international order may be said to emanate from the National Socialist principle of national self-sufficiency (*ationale Saturiertheit*), or of racial contentedness (*rassischen Selbstgenügsamkeit*).⁷⁹ This principle holds that every community should only comprise those of a similar race, and it is interpreted as laying the basis for the elimination of imperialism from international politics. This principle is represented as creating an atmosphere of peace amongst the various nations.⁸⁰ In order to ascertain the real National Socialist conception of the legal order as existing between states, it is necessary to question and evaluate

⁷³ H. H. Dietze, *loc. cit.*, p. 319.

⁷⁴ A. Török, *loc. cit.*, p. 257.

⁷⁵ Ernst Wolgast, "Völkerrecht, eine Kritik", in *Völkerbund und Völkerrecht*, 3. Jahrgang, 1936/37, p. 610.

⁷⁶ G. A. Walz, "Deutschlands Recht auf die Saar", in *Nationalsozialistisches Handbuch für Recht und Gesetzgebung*, editor Dr. H. Frank, München, 1935, p. 116.

⁷⁷ H. H. Dietze, *op. cit.*, p. 306.

⁷⁸ H. Nicolai, *op. cit.*, p. 48.

⁷⁹ H. H. Dietze, *op. cit.*, p. 304.

⁸⁰ E. Wolgast, *loc. cit.*, p. 198.

Germany's claim that this principle of *nationale Satisfiertheit* creates the basis for the peaceful relations of states, and dispenses with all imperialism.

Imperialism may be generally defined as the extension of the political power of a state over territory which is not occupied by its nationals. May Germany herself be accused of having any imperialist designs, or is her aggressive foreign policy limited merely to the acquisition of contiguous territory on which her nationals reside? True, Germany claims to respect the existence of other nations as well as to oppose the assimilation of peoples of different racial composition.⁸¹ Viewed with this assurance in mind, one would be inclined to admit that imperialism must fall by the board in the foreign policy of a *völkisch* state. Yet there are innumerable statements, made in particular by Adolf Hitler, which cannot be ignored while attempting to answer this question. It is to the opinions expressed by Hitler in *Mein Kampf* that we must turn for a straightforward and sincere expression of his aims. The statements of Hitler before the Reichstag are of little value, as they are invariably opportunistic and phrased for the benefit of other nations. Such, for instance, is the following assurance given by Hitler to the world in his Reichstag speech of May 17, 1933: "The German Government wishes to come to a friendly understanding with regard to all difficult questions with other nations. It knows that every military action in Europe, even presuming its complete success, as compared to the sacrifices would bring negligible profits."⁸² In *Mein Kampf* on the other hand Hitler vigorously maintains that "suppressed countries are not won back to the bosom of the common Reich by protests, but by the stroke of a mighty sword."⁸³ Hitler definitely looks beyond a *Grossdeutschland* when he says that "only when the boundaries of the Reich include even the last German . . . [a goal toward which Hitler is at present making rapid strides] does there arise from the need of its own people the moral right to acquire foreign soil. The plough then gives place to the sword."⁸⁴ Feder likewise states that "the duty of the German foreign policy is to obtain for the growing German *Volk* territory for settlement and for subsistence" (*Ernährungs- und Siedlungsraum*).⁸⁵ Again to quote Hitler, "we reverse the eternal Germanic migration to the South and to the West of Europe and look Eastwards."⁸⁶ The German *Volk* is therefore not to remain stationary, but it is to grow and to expand. "The German Reich as a state must embrace all Germans; its duty is not only to rally and to preserve the most valuable original racial elements, but to lead them onwards, slowly but surely, to a position of dominance."⁸⁷

⁸¹ Dr. Bumiller, *loc. cit.*, p. 205. Hitler's radio speech of May 27, 1933, is here quoted, "So sehr wir als Nationalsozialisten es ablehnen, aus fremden Völkern Deutsche machen zu wollen, so fanatisch wehren wir uns gegen den Versuch den deutschen Menschen seinem Volke zu entreissen."

⁸² *Die Reden Hitlers als Reichskanzler*, München, 1934, p. 61.

⁸³ A. Hitler, *op. cit.*, p. 708.

⁸⁴ *Ibid.*, p. 1.

⁸⁵ G. Feder, *Das Staats- und Wirtschaftsprogramm der Nationalsozialistischen D.A.P.*, München, 1932, p. 13.

⁸⁶ A. Hitler, *op. cit.*, p. 152.

⁸⁷ *Ibid.*, p. 439.

But what is to become of the non-German races over whose territory the growing German *Volk* would expand? Would the Germans still refuse to assimilate foreign elements? Would this be feasible? What about the minorities or possibly even the foreign majorities in the Sudetenland? Could the inhabitants of southern Russia for instance, certainly not nordically conditioned, be driven out of their land? We are no longer living in an age where emigration on a large scale is possible. The Germans, it would seem, do not face this problem, or at least they do not push their position to its logical conclusion. The principle of self-determination is receiving in the hands of the Germans that same one-sided interpretation which disregards the rights of other nations.^{87a} Force alone in such a case becomes the arbiter, might makes right. As Nicolai plainly puts it, "the strong have the right over the weak and they have the right to demand that the weak give way to them, that they relinquish land where the strong can settle and provide for their descendants."⁸⁸

National Socialist conceptions indicate a strong reaction to the juristic idealism and normativism of the post-war schools.⁸⁹ The monistic construction with the primacy of international law is vehemently opposed. That national law should find its ultimate source in a norm at the peak of international law, is to disregard the very basis of all purposeful law. Kelsen with his "bloodless" norm is antipathetic to the National Socialists. As much disclaimed is the interpretation of international law as being merely external state law, *Aussenstaatsrecht*.⁹⁰ International law is accepted more and more as part of a pluralistic legal order. To the extent that no real fundamental, general legal principles exist for all nations, but only specific rules for specific concrete international situations, to that extent one cannot speak of a law of nations. The *Rechtsuniversum* is made of numerous independent legal systems.⁹¹ This pluralistic interpretation of international law is also noticeably held by Ernst Wolgast and G. A. Walz.⁹²

^{87a} Hans Kohn, in his brilliant preface to the third edition of his *Force or Reason*, Cambridge, Mass., 1938, points out the fundamentally inapplicable use of the term "self-determination" in a world as conceived by fascists. "Some bear witness to the dangerous confusion of thought produced by fascist propaganda, by speaking of 'self-determination.' As if self-determination would be an abstraction in itself, and not the concrete part of a whole system of liberty and individualism, indissolubly linked up with the liberalism of the French Revolution which the fascists so vehemently combat. A régime denying liberty and equality, cannot demand the application of liberalism whenever it fits into its plans of ruthless destruction of liberalism."

⁸⁸ H. Nicolai, *op. cit.*, p. 20.

⁸⁹ O. Koellreuter, *op. cit.*, p. 230.

⁹⁰ E. Wolgast, "*Nationalsozialismus und internationales Recht*," *loc. cit.*, p. 198.

⁹¹ Otto v. Sethe, "*Deutsche Völkerrechtswissenschaft seit 1933*," *Deutsches Recht*, Berlin, 1935, p. 126.

⁹² Ernst Wolgast, "*Völkerrecht, eine Kritik*," *loc. cit.*, pp. 607-8. G. A. Walz, *loc. cit.* Lawrence Preuss, in an extremely interesting and thorough study on "National Socialist Conceptions of International Law," *American Political Science Review*, August, 1935, claims that this pluralistic interpretation is at bottom a monistic system based upon the primacy of state law (p. 603).

The distinction between *Gemeinschaft* and *Gesellschaft*, it must be noted, is not universally made among National Socialists.⁹³ In general it may be said that the distinction has been stressed by the ardent racial doctrinists. It has been stressed by them, however, to the point where the distinction may be considered as fundamental, and characteristic of National Socialist thought. It is this denial of an international community, and the possibility of such, which constitutes one of the severest blows international law has as yet received. The racial doctrinists have, however, had to modify their limited conception of a community. Hitler has frequently referred to Europe as a community of nations (*Völkergemeinschaft*).⁹⁴ As a result of Hitler's use of the word "community" and his conception of Europe as a family of nations, writers have at least conceded the possibility of a more comprehensive law as between European nations to the west of Russia. Russia is, of course, not included within this community. Dietze justifies the application of the term "community" to the European society of nations west of Russia on the grounds that "Europe within this area is to a certain extent composed of racially similar peoples with similar cultural experience."⁹⁵ The acceptance of Europe as a *Gemeinschaft* must stand as another inconsistent National Socialist position. It follows as an anti-climax to the much-labored distinction between the artificial *Gesellschaft* and the racially homogeneous, natural *Gemeinschaft*. The very fact that Europe is considered as being composed of racially similar peoples, and is hence accepted as a *Gemeinschaft*, destroys much of the validity of any impressions one may have received as to the division of mankind into irreconcilable and hostile races.

It remains for us to draw a few obvious conclusions as to the National Socialist theory of international law. (It is basically distinguishable from the theories held by the historical or sociological schools of jurisprudence by the premises upon which it is erected. The theories are founded upon the assumption of the *absolute* value of the *Volk* around which is built the whole comprehensive National Socialist *Weltanschauung*. The democratic method has proceeded upon relative grounds; the fascist method is absolute in its approach,⁹⁶ it accepts the *Volk* as a natural and eternal fact. Hence the fundamentally unbridgeable gulf between National Socialist and Western democratic theories of international law. Another fundamental difference lies in the shift of emphasis as to the subject of international law, from the

⁹³ O. Koellreuter, *op. cit.*, p. 228, accepts as the basis for an international legal order a community of nations. Of course this community is weak and has its limits, but it exists. Carl Schmitt, in *Nationalsozialismus und Völkerrecht*, Berlin, 1934, talks throughout of a *Völkerrechtsgemeinschaft*. Similarly Norbert Gürke, "Der Stand der Völkerrechtswissenschaft," *Deutsche Rechtswissenschaft*, Hamburg, 1937, p. 57.

⁹⁴ A. Hitler in his *Reichstagsrede* of March 7, 1936.

⁹⁵ H. H. Dietze, *loc. cit.*, p. 297.

⁹⁶ N. Gürke, *Volk und Völkerrecht*, p. 15. National Socialism is based upon "der natürlichen Lebenseinheit des Volkes als absolutem Wert."

rather static sovereign state to the dynamic *Volk-nation*. The state is no longer sovereign, but the *Volk*. The state is only the outward form serving the needs of the collective entity of the nationality, the *Volk*.⁹⁷ And because the *Volk*, as far as Germany is concerned at least, is not yet comprised within the orbit of the German state, German theories of international law are necessarily of a politico-ethical nature, rather than strictly legal; they emphasize not enforcement,⁹⁸ but the content of any system of law. Time and again we find the statements that international law is essentially political law, "*Völkerrecht ist politisches Recht*,"⁹⁹ and that law must be "*richtiges Recht*" before it can be considered as real law.

Despite the fact that the *volklich-nationale* point of view claims to cast off all democratic ideas, nevertheless it may be said that the acceptance of certain fundamental rights pertaining to nations, especially that of equality, is not thoroughly consistent with this *volklich-nationale* philosophy. It would seem as though in the international sphere certain democratic ideas, or rather the mere shell of certain democratic ideas, were still being clasped, perhaps because they are the strongest weapons that can be used by a nation, whatever its purpose. Inconsistencies are, however, in the very nature of National Socialist thought. The very word *Weltanschauung* denotes an emotional, intuitive, rather than rational approach to the realm of thought and action.¹⁰⁰ Certain hypotheses are accepted as a matter of faith and are not to be questioned. To the extent then that National Socialist theories sooner or later dissolve into the non-rational realm of faith, they must remain to the minds of many never completely understandable.

⁹⁷ *Ibid.*, p. 28, "*Volk und Gebiet sind nicht 'Elemente' des Staates, sondern der Staat ist die Lebensform eines sesshaften kulturschaffenden Volkes.*"

⁹⁸ N. Gürke, *Volk und Völkerrecht*, p. 5.

⁹⁹ O. Koellreuter, *op. cit.*, p. 227. N. Gürke, *op. cit.*, p. 30.

¹⁰⁰ H. Mankiewicz, *Le National-socialisme Allemand*, Paris, 1937, p. 15.

TREATY REGULATION OF INTERNATIONAL RADIO AND SHORT WAVE BROADCASTING

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The significance of international short wave broadcasting has been enhanced recently by a sequence of apparently unrelated international developments, both political and technical in character.¹ These developments, with their widespread ramifications, place additional strains on the international radio regulatory régime built up during the last three decades. This regulatory pattern has evolved out of some of the most voluminous, intricate, and technical multilateral treaties to be put in force between sovereign states.

Since the smooth functioning of this regulatory system bears an increasingly intimate relationship to world welfare, and since the failure of many international agreements to achieve their objectives tends to subject all international administrative arrangements to critical scrutiny, it may be well to trace briefly the development of this form of international regulation with particular respect to the participation therein of the Government of the United States.

GENERAL REGULATION OF INTERNATIONAL RADIO COMMUNICATION

Radio communication differs from other communication arts in certain important respects. First, radio is limited by a physical factor called interference. Second, electro-magnetic waves are in no way limited by political boundaries. Third, radio lends itself exclusively to certain public service functions. These distinctive physical characteristics of the art have been controlling in the formulation of the international regulatory régime. The efficient performance of radio's unique services necessitates freedom from interference. This can be assured only by closely coördinated regulation by political authority. To be effective, regulation must be synchronized in both the national and international realms.²

¹Some of the developments contributing to the current pattern of international short wave broadcasting include: (a) the rise of fascism; (b) the adoption by governments of international short wave broadcasting for political purposes; (c) the trend toward transmitting with super-power and directive beams; (d) report of John H. Payne, Chief of the Electrical Division of the Bureau of Foreign and Domestic Commerce, Oct. 19, 1937, entitled "Latin America Shows Increased Interest in Short Wave Broadcast Reception"; (e) Pan American Broadcast Convention of Havana, 1937; (f) Telecommunication Conference, Cairo, Feb. 1, 1938; (g) Interdepartmental Committee appointed by the United States Feb. 26, 1938, to study international broadcasting; (h) establishment of Divisions on Cultural Relations and International Communications by the Department of State.

²"The Utility of Comparative Law in Drafting Legislation and Treaties Relative to Communications and Broadcasting," by Howard S. LeRoy, *Tulane Law Rev.*, June, 1936,

In the international field the general regulation of radio may be approached from either the historical or the analytical viewpoint.

Historically, the following phases may be differentiated: (1) Point-to-point or maritime safety phase; (2) National or long wave broadcasting phase; (3) International or short wave broadcasting phase.

Analytically or functionally, regulation has been imposed to achieve the following purposes: (1) International technical control of the new physical art; (2) As an incidental or contributory factor in the accomplishment of some major international objective; (3) As an international propaganda agency for the dissemination of certain national political doctrines.

HISTORY OF DEVELOPMENT OF INTERNATIONAL RADIO REGULATION

International regulation of radio communication began as an incident of the Prince Henry episode.³ In 1902 Prince Henry of Prussia made an official visit to the United States.⁴ He returned on the German steamship *Deutschland*, equipped with Sloby Arco (*Telefunken*) wireless apparatus. Desiring to send a radiogram of appreciation to President Theodore Roosevelt, a request was made upon an English shore station to relay the message by cable. The English shore station equipped with Marconi apparatus declined to transmit the message from the ship equipped with the apparatus of its commercial rival. Upon his return to Berlin Prince Henry reported the incident to his brother Emperor William.⁵ The following year the first international radio conference was held at Berlin from August 4-14, 1903.

At the first conference discussion centered about the question whether the station of any company should be allowed to decline to receive messages as the Marconi Company had done. The result of this conference was the Berlin Protocol signed by seven nations August 13, 1903, embodying the proposals of the interested governments with a view to the formulation of an international convention. The draft convention never became effective. This is stated to have been due principally to the opposition of the Marconi Company.⁶ It is significant that at this first attempt at international regulation a conflict of interests arose which has continued down to the present time in various forms; namely, the struggle between public service and private exploitation.

It is also noteworthy that this first abortive regulatory attempt gave rise to the first radio decision in the municipal law of the United States. This was an opinion⁷ by Acting Attorney General Beck on a question submitted by the Secretary of State as to the constitutional power of the Government

Vol. X, p. 604; "Observations on Comparative Air Law," by Howard S. LeRoy, *Air Law Rev.*, Oct., 1937, Vol. VIII, p. 259.

³ "International Radio Regulation," by William Roy Vallance, *Radio Law Bulletin*, Catholic University, Aug., 1931, p. 88.

⁴ U. S. For. Rel., 1902, Vol. 61, p. 422.

⁵ *North American Review*, Nov., 1903, p. 663.

⁶ *Supra*, note 3.

⁷ *Wireless Telegraphy*, XXIV Op. Atty.-Gen., p. 100, Aug. 18, 1902.

of the United States to participate in an international conference for the regulation of wireless. The opinion asserted the power and rested it squarely on the commerce clause of the Constitution.

The conflict of public and private interests, which caused the calling and adjournment of the first conference without the adoption of a regulatory convention, resulted in the convocation of the Second Berlin Conference on Wireless Telegraphy. This conference was attended by some 26 Powers, including the United States. It continued its sessions from October 22 to November 3, 1906.⁸ This brief ten day conference when compared with the many weeks of the recent Cairo Conference is significant as showing the growth in the art and the increase in the range of the problems involved. The International Radiotelegraphic Convention signed at Berlin on November 3, 1906,⁹ provided for the reciprocal exchange of telegrams irrespective of the type of wireless equipment used. It contained regulations directed to point-to-point communication, to maritime safety uses, and to interference.

Following the Second Berlin Conference, radio received recognition in the Hague Conventions of 1907. The Convention Respecting the Rights and Duties of Neutral Powers and Persons in case of War on Land differentiated the rights of belligerents and neutrals as concerns the erection and employment of radio stations (Articles 3, 5, 8, 9). The Convention for the Adaptation of the Geneva Convention to Maritime Warfare permitted radio installation on board a hospital ship (Article 8) if not employed to injure the enemy. The Convention concerning the Rights and Duties of Neutral Powers in Naval War prohibited the erection of radio stations by belligerents in neutral ports and waters (Article 5).¹⁰

Although the Berlin Convention had been submitted promptly to the United States Senate for its advice and consent, ratification was withheld until April 3, 1912. About this time public appreciation of radio as a maritime safety agency was quickened by the sinking of the *Titanic* with the loss of about 2,000 lives.

At the Third International Wireless Telegraph Conference which met in London in 1912 controversy arose over the question of multiple voting. The larger Powers found that their interests would be served by permitting the separate adherence of dominions, colonies, and dependencies, with a separate vote for each such political entity. The real purpose of this device became more apparent when the same issue arose in the post-war International Radiotelegraph Conference held at Washington in 1927, where Germany insisted upon and was accorded her quota of votes in spite of the

⁸ U. S. For. Rel., 1906, Pt. 2, Vol. 68, p. 1513 *et seq.*

⁹ 37 U. S. Stat. at L. 1565; U. S. Treaty Series, No. 568; Malloy, *Treaties, Conventions, etc.*, of the U. S., Vol. III, p. 2889; this JOURNAL, Supplement, Vol. 3 (1909), p. 330.

¹⁰ 36 U. S. Stat. at L., Pt. 2, pp. 2310, 2371, 2415; Hague Conventions and Declarations of 1899 and 1907, J. B. Scott, ed., pp. 133, 163, 209; this JOURNAL, Supp., Vol. 2 (1908), pp. 117, 153, 202.

fact that the war had deprived her of the colonies on which the additional votes had been based. The London Convention, similar in many respects to the Berlin Convention of 1906, was signed on July 5, 1912.¹¹ This convention settled finally the original controversial issue relative to obligatory interchange of traffic irrespective of the type of radio equipment used. None of the signatory Powers voted reservations on this point.

Two years later, radio, still evolving in its maritime safety period, played a secondary or contributory rôle in the London Convention of January 20, 1914, for Safety of Life at Sea.¹²

The war intervened to prevent the holding of the next international radio conference at the usual five or six year interval. However, war conditions created special intergovernmental uses,¹³ and so stimulated an intensive technical development of the new art as to broaden and enlarge the scope of the international regulatory problem. One of the new developments was the advent of broadcasting.¹⁴ The post-war period ushered in certain instances of incidental international radio regulation. These included the Washington Conference on Electrical Communications of 1920¹⁵ with its anti-monopoly declaration as applied to radio communication, and a resolution passed by the Washington Limitation of Armament Conference of 1921-1922 dealing with radio stations in China.¹⁶ Conformably to another resolution adopted by this conference, an international commission of jurists met at The Hague and prepared a set of rules for the control of radio in time of war.¹⁷ In some respects the proposed rules were supplementary to the principles enunciated in the Hague Conventions of 1907.

Radio played an incidental or contributory rôle in the Fifth International Conference of American States at Santiago, Chile, in 1923, and as a consequence an Inter-American Committee on Electrical Communications¹⁸ met at Mexico City and signed a convention on July 21, 1924, proposing an Inter-

¹¹ U. S. For. Rel., 1913, p. 1375 *et seq.*; 38 U. S. St. at L. 1707; U. S. Treaty Series, No. 581; Malloy, *Treaties, etc.*, Vol. III, p. 3048; this JOURNAL, Supp., Vol. 7 (1913), p. 229.

¹² Text: Hertslet's *Commercial Treaties*, Vol. XXVII, p. 416; see "International Conference on Safety of Life at Sea," by Everett P. Wheeler, this JOURNAL, Vol. 8 (1914), p. 761.

¹³ Protocol of March 27, 1918, Relative to Radio Service, United States and Italy, U. S. Treaty Series, No. 631-A; Malloy, *Treaties, Conventions, etc. of U. S.*, Vol. III, p. 2707.

¹⁴ Although there were unsuccessful sporadic experiments with radio telephony, broadcasting did not come into use until the Harding election returns were broadcast in 1920 by Station KDKA of Pittsburgh. See Zollmann, *Cases on Air Law*, 2d ed., p. 296, note; Herring and Gross, *Telecommunications*, p. 98.

¹⁵ Radio Law Bulletin, Catholic University, 1931, p. 90.

¹⁶ Treaties and Resolutions approved and adopted by the Conference on the Limitation of Armament, Sen. Doc. 125, 67 Cong., 2d Sess., reprinted in this JOURNAL, Supp., Vol. 16 (1922), p. 79.

¹⁷ Gt. Br. Parliamentary Papers, Cmd. 2201, Misc. No. 14 (1924); this JOURNAL, Supp., Vol. 32 (1938), p. 2.

¹⁸ "The Inter-American Committee on Electrical Communications," by Irvin Stewart, *Air Law Rev.*, Oct., 1936, Vol. VII, pp. 351-386.

American Union of Electrical Communications.¹⁹ In this conference controversy arose over Article 9 establishing a broadcasting service of an official nature extending to neighboring seas and countries. The United States delegation opposed the article on the ground of the heavy expense involved and its departure from the policy and legislation of the United States permitting private exploitation of broadcasting.²⁰ Due in some measure to this controversy, the convention was ratified by only four states, and it has, therefore, remained a dead letter. Historically, however, the convention is significant as showing the relationship between the United States and Pan American problems in the radio and broadcasting field prior to the adjustments evolved in the Washington and Madrid Conferences.

A period of six years elapsed between the advent of broadcasting and the year 1927. This period of rapid and unregulated growth has been called the era of "chaos" in the realm of national regulation of broadcasting. The outstanding development of the period was the phenomenal expansion of this new physical art in both the national and the international realms. During this period it was impossible to determine the nature and scope of the regulatory problems. In the international field there were certain regulatory attempts of minor importance.²¹ It is noteworthy that they related to the basic problems of interference and sovereign rights in the ether.

Regulation on broad lines integrating the national and international problems was imposed in 1927. A national regulatory régime for the United States was established by the Radio Act of February 23, 1927.²² On October 4, 1927, the International Radiotelegraph Conference convened at Washington. The primary purpose of this conference was the technical regulation of the new physical art, which had now reached the long wave broadcasting phase. Fifteen years had passed since the London Conference. During this period, World War developments and widespread popular acceptance of broadcasting had increased the range and complexity of international radio regulatory problems. The extended deliberations of the Washington Conference were terminated with the signature of an International Radiotelegraph Convention and General Regulations on November 25, 1927.²³ The

¹⁹ Text: Hudson, *International Legislation*, Vol. II, p. 1292.

²⁰ Report of Delegation of the United States, Inter-American Committee on Electrical Communication, May 27 to July 22, 1924. Govt. Printing Office. *Comisión Inter-Americana de Comunicaciones Eléctricas, Convención, Resoluciones y Actas*.

²¹ Exchange of notes between United States, Great Britain, Canada, and Newfoundland for the prevention of interference with radio broadcasting by ships, Sept. 8/Oct. 1, 1925 (U. S. Treaty Series, No. 724-A; 69 League of Nations Treaty Series, p. 179); First International Juridical Congress of International Committee on Wireless Telegraphy, Paris, 1925, dealing with the principle of ether freedom; Second International Juridical Congress, Geneva, 1927, expressed the "hope" that ether would be free without prejudice to the right of each state to regulate it (2 *Journal of Radio Law*, p. 46).

²² 44 U. S. Stat. at L., Pt. 2, p. 1162.

²³ *Ibid.*, p. 2760; U. S. Treaty Series, No. 767; 84 League of Nations Treaty Series, p. 97; Hudson, *International Legislation*, Vol. III, p. 2197.

Supplementary Regulations were not signed by the United States because they were thought to contravene our traditional policy of private exploitation of communications facilities.²⁴

This great international legislative assembly made new and significant contributions to the field. It has been said that the outstanding achievement of this conference was the allocation of frequencies for various international services and uses (Article 5). In the establishment of the allocation table it was recognized that short waves (frequencies from 6000 to 23,000 kilocycles approximately—wave lengths from 50 to 13 meters approximately) were well adapted for long distance communication between fixed points. The reservation of this wave band was made with little thought of the impending technical and political changes which would force this part of the broadcasting spectrum into international controversy before the end of the following decade.

At the Washington Conference the lines were sharply drawn between two groups of Powers. The largest group included those Powers which absorbed radio and broadcasting into the established governmental monopoly of communication facilities. The much smaller group of Powers, including the United States, insisted on the right to continue a traditional policy of private exploitation of communication facilities. The result of this basic conflict of policy was a compromise involving the segregation of regulations into two sets designated as General and Supplementary. In the Supplementary Regulations were placed the provisions which were objectionable to the United States and certain other Powers, and by Article 23 of the Convention the Supplementary Regulations were binding only on the Powers signing them. Under this provision the United States signed only the General Regulations. This drafting device permitted the negotiation of a convention which was satisfactory in whole or in part to all of the participating Powers.

The sweeping advance made by international radio communication during the fifteen-year interval between the London and Washington Conferences is well shown by the increase in the range and scope of regulatory subject-matter. Illustrative of these advances are the articles of the General Regulations relating to aircraft stations, and such special services as meteorological services, time signals, radio-compass stations and radio-beacon service. The convention (Article 14) recognized the right to make special arrangements on matters of service which do not bind the governments generally.

One of the achievements of the Washington Conference was the establishment of the International Technical Consulting Committee on Radio Communication (Article 17). This committee, generally referred to as the C.C.I.R., meets at intervals between international conferences. Its recom-

²⁴ "International Radiotelegraphic Conference of Washington," by Irvin Stewart, *this JOURNAL*, Vol. 22 (1928), p. 29; "The International Radiotelegraph Conference," by Howard S. LeRoy, 14 *Am. Bar Assn. Jour.* (Feb., 1928), p. 86.

mentations are technical and advisory in character. It has contributed largely to the international regulation of radio.

The Washington Convention by Article 14 authorized international regional radio agreements subject to certain limitations. Pursuant to this authorization, regional agreements were effected between the United States and Canada. These agreements extended to the regulation of private experimental radio stations²⁵ and the assignment of high frequencies to radio stations on the North American continent.²⁶

In the interval between the Washington and Madrid Conferences, radio played a contributory rôle in advancing the broad international objective of safety of life at sea. Chapter IV of the London Safety of Life at Sea Convention of May 31, 1929,²⁷ incorporated radiotelegraphy provisions applicable to maritime safety and conforming to the advances in the radio art in the period since the London Safety of Life at Sea Conference of 1914. Although the United States signed the convention, it did not ratify it until August 7, 1936.

The Washington Conference of 1927 was the last International Radiotelegraph Conference. That conference, as well as the International Telegraph Conference of Paris of 1925, passed resolutions providing for the eventual amalgamation of the two conferences. As a result of the merger of these two parallel international legislative bodies, the Madrid Telecommunication Convention established the International Telecommunication Union (Article 1). One of the effects of the union was to increase the complexity of an already extended and intricate international agreement. The precedent of the Washington Conference of classification of regulations was followed and elaborated in resolving a still wider range of conflicting national interests. The Madrid Convention, signed December 2, 1932,²⁸ carried four sets of appended regulations. These regulations included a set each for international telegraph and telephone services as well as two sets for radio. To the General Radio Regulations²⁹ were added fourteen appendices. The convention provided (Article 2) that only signatories or adherents to the convention should be permitted to sign the regulations or adhere thereto. It was also obligatory upon parties to the convention to sign or adhere to the regulations, or to sign at least one set of regulations. Conformably to these provisions, the delegation of the United States signed the Convention and the General Radio Regulations. The article of the General Regulations which evoked greatest interest and discussion was Article 7 dealing with

²⁵ U. S. Treaty Series, No. 767-A; 102 League of Nations Treaty Series, p. 143.

²⁶ U. S. Treaty Series, No. 777-A; 97 League of Nations Treaty Series, p. 301; 2 Air Law Rev., 440; Radio Bulletin, p. 94.

²⁷ Text: 50 U. S. Stat. at L., Pt. 2, p. 1121; U. S. Treaty Series, No. 910; Hudson, International Legislation, Vol. IV, p. 2724.

²⁸ International Telecommunication Convention. 49 U. S. Stat. at L., Pt. 2, p. 2393; U. S. Treaty Series, No. 867; Hudson, International Legislation, Vol. VI, p. 109.

²⁹ 49 U. S. Stat. at L., Pt. 2, p. 2445; Hudson, *op. cit.*, p. 133.

the allocation and use of frequencies. At the beginning of the Madrid Conference it was the consensus of opinion of the delegations of the major Powers, including the United States, that a minimum number of changes should be permitted in the Washington allocation table. Accordingly, no changes were made in the international short wave broadcasting bands. The Madrid Convention recognized the policy of entering into regional international communication agreements, provided such agreements did not contravene the terms of the convention and the appended regulations with respect to interference to the services of other countries.

The United States was the dominant Power in the development of radio and broadcasting on the North American continent. As a leader in this field, it had the largest stake in maintaining an interference-free radio service as related to other continental Powers. It early entered into regional agreements with Canada and certain other Powers. These agreements were not inclusive of Mexico and other countries to the south. With a view of solving problems of continental distribution of broadcasting channels, the North and Central American Radio Conference was convened at Mexico City from July 10 to August 9, 1933. The countries included in this conference were Canada, Costa Rica, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, and the United States. The conflicting interests so represented were unable to reach an agreement on the continental allocation of broadcasting frequencies.

Very few cases have arisen so far involving an application and interpretation of the provisions of international agreements regulating broadcasting. However, on January 25, 1935, the Federal Communications Commission of the United States issued its decision and order on the application of The Crosley Radio Corporation.³⁰ This was an application for extension of special temporary experimental authorization to operate Station WLW of Cincinnati with a power of 500 kilowatts on the 700 kilocycle frequency unlimited time. Following operation with the increased power, the Canadian Legation at Washington filed a protest with the Department of State alleging that Station CFRB of Toronto, Canada, broadcasting on the adjacent exclusive Canadian frequency of 690 kilocycles, was suffering objectionable interference which reduced the service area of Station CFRB to little more than the city of Toronto itself. This protest was referred to the Communications Commission and, after careful consideration, it decided that it was without legal authority to grant the application for an extension of the night time use of 500 kilowatts of power. The Commission rested its decision squarely on Chapter IV, Article 35, of the Telecommunication Convention of Madrid, Article 7, Sec. 5, paragraph 3(b), of the General Radio Regulations annexed thereto, and on the regional agreement between the United States and Canada embodied in the exchange of notes signed May 2, 1932.³¹ Interference conflicts between stations licensed by different nations are likely

³⁰ *In re* Application of The Crosley Radio Corporation (WLW). File No. B2-SA-78, 1 F.C.C. Reports 203.

³¹ Executive Agreement Series, No. 34.

to become more frequent as the present trends develop toward growing congestion in the broadcast band and increased use of power by both long and short wave broadcasting stations.

The increasing urgency of an equitable solution of these problems brought about the two Pan American Radio Conferences in Havana in 1937. A preliminary conference was held in the spring, followed by the Inter-American Radio Conference in November and December. As a result, a convention was signed providing for an elaborate distribution of broadcasting channels among the participating North American Powers. This North American Agreement, if ratified, will necessitate extensive readjustments in the national broadcasting allocation pattern of the United States.³² The effective date of the agreement, except for certain specified provisions, is one year from the date of ratification by the fourth of those governments whose ratification is requisite for the validity of the agreement. The term of the agreement is five years from its effective date.

Undoubtedly, one of the impelling factors in effecting the North American Agreement was the impending International Telecommunication Conferences which convened at Cairo on February 1, 1938. It was felt that the North American countries would occupy a stronger position in the Cairo Conference if they could point to an agreement with respect to their regional radio broadcasting problems. At the Cairo Conference one of the controversial issues was the consideration of international short wave broadcasting. Technical and international political developments since the Madrid Conference have so increased the importance of international short wave broadcasting as to call for some discussion of this new development as well as the relation of the United States to it.

ORIGIN AND REGULATORY DEVELOPMENT OF PAN AMERICAN FREQUENCIES

The treaty relationships of the Pan American frequencies may be traced to the Washington Radiotelegraph Convention of 1927. The outstanding achievement of the Washington Conference was the tabulation of allocations and use of frequencies incorporated in the appended General Regulations as Article 5. This tabulation allocated six bands of short wave frequencies for international broadcasting service. Under this article, national administrations were authorized to assign these frequencies to radio stations within their jurisdictions subject to the sole condition that interference should not result to the service of any other country. The article also directed that assignments of frequencies should be notified to the International Bureau at Berne. Under these provisions many of these frequencies were assigned and notified to the Berne Bureau by interested national administrations. In some instances the notifications of assignments were followed by actual use of the frequencies. In other instances the notification was not followed by

³² "Inter-American Radio Conferences, Habana, 1937," by Harvey B. Otterman, this JOURNAL, Vol. 32 (1938), p. 569.

use, but the frequency continued registered in the name of the national administration.

In 1929 the United States Navy Department, being alert to the possible future value of these frequencies, registered five of them with the Berne Bureau in the name of the United States. By Executive orders allocating radio frequencies to specific government services, these frequencies were assigned to the Navy Department for use by the Pan American Union.³³

In March, 1931, an agreement was made between the Reichs-Rund Funk-Gesellschaft and the Polskie Radio.³⁴ Special significance attaches to this bilateral agreement from both the historical and the functional viewpoint. This agreement may fairly be said to have ushered in the era of international regulation of short wave broadcasting. It also marked one of the earliest efforts to limit the use of radio broadcasting as an international propaganda agency. It bound the parties to take all reasonable steps to prevent broadcasts over their respective stations prejudicial to the spirit of coöperation and understanding in the fields of politics, religion, and economics.

The growing international appreciation of the propaganda potentialities of short wave broadcasting was further evidenced by the acts of the Seventh International Conference of American States convened at Montevideo, Uruguay, in December, 1933. The large volume of international legislation enacted by this conference included a resolution dealing specifically with international short wave broadcasting frequencies.³⁵ The resolution urged the Pan American Governments to avail themselves of the five short wave broadcasting frequencies assigned to the Pan American Union for the purpose of broadcasting inter-American radio programs. The Pan American Union was also requested to take the necessary steps to bring about the utilization of these frequencies, to formulate a plan for the assignment of time, and to recommend to the respective governments the types of programs best adapted to fulfill the purpose for which they were allotted.

This resolution marks a broadening of the field of international short wave broadcasting and involves certain novel features. The resolution was multilateral in character involving collective action by the Pan American Governments, including the United States. This collective action was directed to the broad international objective of Pan American welfare. The means selected involved an exploitation of the positive propaganda poten-

³³ In the matter of World Wide Broadcasting Corporation (W1XAL), Docket No. 4843, decided Feb. 1, 1938, by Federal Communications Commission; Executive Order No. 5067, dated Mar. 2, 1929, allocating frequencies 6120 and 9550 kilocycles; Executive Order No. 5638, dated June 8, 1931, allocating frequencies 11730 and 15130 kilocycles; Executive Order No. 5855, dated June 6, 1932, allocating frequency 21500 kilocycles.

³⁴ Inter-American Conference for the Maintenance of Peace, Special Handbook for the Use of Delegates, p. 104.

³⁵ Report of the results of the Seventh International Conference of American States submitted to the Governing Board of the Pan American Union by the Director General, Feb. 21, 1934, p. 23 (Resolution LXXXVI).

tialities of international short wave broadcasting. The term "positive" is here used to characterize the emphasis upon the use of the broadcasting facilities. In the German-Polish agreement the emphasis was negative or restrictive in pledging the elimination of international broadcasts of a controversial character. In the Pan American resolution the emphasis was placed on the selection of programs in the interest of the general Pan American welfare by the Pan American Union as an international administrative agency. Furthermore, the resolution designated the five Pan American frequencies for this special service. Was the resolution by the Pan American Governments an acceptance of our offer for collective use of the frequencies by the United States? Was the United States within its treaty rights in making such an offer? If so, what international servitudes or rights were imposed upon the use of these frequencies in favor of the Pan American Powers? With the rapidly growing congestion on the international ether lanes, these are some of the queries that may arise.

Following the Montevideo Conference, delays were experienced in utilizing the Pan American frequencies, and a growing appreciation developed of the dangers of radio broadcasts as an offensive propaganda agency. To meet this situation a South American Regional Agreement on Radio Communications was signed at Buenos Aires on April 10, 1935. This agreement provides (Article VII) directly against the use of broadcasting as a propaganda agency. The provision takes the form of a pledge by the signatory Powers to control broadcasts relative to co-signatories as regards sources and accuracy of information, to avoid defamatory broadcasts, and to abstain from participation in political or social tendencies operating in other adhering states.

This early attempt in South America to restrict the use of broadcasting as an international irritant was quickly followed by European and Pan American conferences seeking to control the use of broadcasting in achieving the broad international objectives of peace and good will. The Geneva Conference of September 17-23, 1936, resulted in a convention including both continental and Pan American states.³⁶

Radio broadcasting by short wave became a secondary or contributory factor in the Inter-American Conference for the Maintenance of Peace at Buenos Aires, December 1-23, 1936. This conference passed three resolutions with a view to the use of radio in accomplishing its objectives.³⁷ The first radio resolution (Resolution XIV) related to Radio Broadcasting and Moral Disarmament, and on its approval the United States delegation ab-

³⁶ International Convention concerning Broadcasting in Cause of Peace, Geneva, Sept. 23, 1936. Great Britain, Parliamentary Papers, Cmd. 5505, Misc. No. 6 (1937); this JOURNAL, Supp., Vol. 32 (1938), p. 113.

³⁷ Report on the Proceedings of the Inter-American Conference for the Maintenance of Peace, Buenos Aires, by the Director General of the Pan American Union. U. S. Dept. of State, Congress and Conference Series, No. 22, Feb., 1937, pp. 17, 54, 55, 58.

stained from voting. The second radio resolution (Resolution XV) related to Radio Broadcasting in the Service of Peace, and the United States delegation voted for the resolution subject to the limitations of its internal legislation. The third and most important of the radio resolutions recommended the establishment of the Pan American Radio Hour, with its administration delegated to the Pan American Union. It provides that the broadcasts shall emanate from each of the Pan American Governments; that the diplomatic and consular officers in each capital city shall provide the program material, which shall emphasize important continental developments; that particular attention shall be given to important governmental measures and events and anniversaries of historical importance. It is significant that the United States delegation recorded no reservation to this resolution. This resolution was based on the collective use of the five short wave frequencies first registered at the Berne Bureau by the Government of the United States and now known as the Pan American frequencies.

In a relatively short time the concept of international short wave broadcasting evolved a regional technique embracing a large portion of the Western Hemisphere. Each successive international conference in legislating with respect to the new art made some distinctive contribution. It may be noted that most of these conferences have been held in South America, which is the area toward which international short wave broadcasts have been most heavily concentrated.

The broadening program of international regulation of political and cultural broadcasts was reflected with even greater particularity in the Rio de Janeiro revision of the South American Regional Agreement on Radio Communications. It will be well to note some of the provisions of this revised agreement. Their importance is enhanced by two facts. First, these provisions constitute the most recent declaration of international policy by the South American countries. Second, the United States is being increasingly drawn into the orbit of South American policy through the Pan American relationship and the growing pressure of world events.

The revised agreement was signed at Rio de Janeiro on June 6, 1937.³⁸ Article 2 regulates international emissions. The regulation takes the form of an obligation imposed upon the administrations of the contracting Powers to adopt measures necessary to accomplish the following objectives: (1) that international political news broadcasts concerning contracting states be made with full disclosure of duly authorized and unimpeachable sources; (2) that all broadcasts be avoided which might in any way strain good international relations, offend the national sentiments of other peoples, or disturb international peace activities.

Under Article 3, international coöperation is further advanced by the assumption of an obligation by the administrations of the contracting parties to adopt legislation calculated to achieve the following purposes: (1) that the

³⁸ C.I.R. Doc. 13, Pan American Union Library, Washington, D. C.

re-transmission of international cultural, artistic or literary programs of South American countries be facilitated for both official and private broadcast stations; (2) that the broadcasting of programs relating to national events of South American countries and the homage due to illustrious South American leaders be increased as much as possible; and (3) that mutual assistance be accorded whenever necessary in discovering and suppressing clandestine broadcasting stations. It is clear that, following the designation of the Pan American frequencies by the United States but before their allocation and use by the United States, the South American countries had taken affirmative and advanced positions with respect to international political and cultural broadcasts. These positions rested in recent South American and Pan American regional agreements.

One of the five Pan American frequencies, the 6120 kc channel, was allocated for use in international broadcast service to the Columbia Broadcasting System Station W2XE at Wayne, New Jersey. This allocation was made on a temporary basis and subject to revocation without notice or hearing. The four remaining frequencies, although assigned to Pan American use by Executive orders and subject to the international servitudes imposed by recent Inter-American Conferences, continued unused to February 1, 1938. The Interdepartmental Radio Advisory Committee, due to the impendency of the Cairo Telecommunication Conference, recommended the allocation of the remaining Pan American frequencies in advance of the Cairo Conference. Applications for the allocation of some or all four of the Pan American frequencies were filed in sequence with the Federal Communications Commission by the World Wide Broadcasting Corporation operating under the World Wide Broadcasting Foundation—a non-profit educational organization, the National Broadcasting Company, and the General Electric Company, beginning in August, 1937.

The intimate international relationships created by short wave radio broadcasting have created powerful propaganda forces linking Pan America with the authoritarian European states.³⁹ The most powerful international short wave broadcasting station is located at Zeesen, twenty miles south of Berlin. Broadcasts from this station, with its eight powerful transmitters, cover the world. Five directional short wave beams transmitted on super-power may aim the beams to hit North America, Central America, South America, Africa, and Australia. With excellent engineering and astute publicity technique this giant station has become the most potent agency for the dissemination of political doctrine that the world has known.⁴⁰

³⁹ "Democracy versus the Totalitarian State in Latin America," by Samuel Guy Inman, American Academy of Political and Social Science, 1938, Pamphlet Series, No. 7.

⁴⁰ "Radio as a Political Instrument," by Cesar Saerchinger, Foreign Affairs, Jan., 1938, Vol. 16, p. 244; "The American System of Broadcasting and Its Function in the Preservation of Democracy," address by David Sarnoff at Town Hall Luncheon, Hotel Astor, New York City, April 28, 1938.

Great Britain quickly saw the advantage of this new method of long distance communication as a connecting link to the far flung parts of the Empire. The British Empire station at Daventry, with its six transmitters, reaches every British Dominion and possession with a carefully prepared cycle of broadcasts. As a consequence of the increasing international tension in the use of this new propaganda facility, on January 3, 1938, Near Eastern Potentates met in the British Broadcasting Corporation House, London, to sanction British broadcasts to Arabic-speaking countries to counteract the effect of the Italian broadcasts to the Near East from the Bari station.

On January 5, 1938, two days after the change in British broadcasting policy to use of foreign languages, Senators Chavez and McAdoo introduced a bill in the United States Senate⁴¹ to authorize the construction and operation of a short wave radio broadcasting station designed to promote friendly relations among the nations of the Western Hemisphere. The bill was referred to the Senate Committee on Interstate Commerce. Hearings on the bill have been held before a subcommittee under the chairmanship of Senator Homer T. Bone of Washington. The bill directs the Secretary of the Navy to construct, maintain, and operate an adequately equipped broadcasting station, with power sufficient to transmit programs upon high frequencies to all nations of the Western Hemisphere. It provides that the station, to be known as the "United States Pan American Radio Station," shall be located in the vicinity of San Diego, California, on a site to be selected by the Secretary of State. Under Section 3, an Advisory Council is set up to be known as the "Pan American Radio Station Advisory Council" and to be composed of the Secretary of State, the Chairman of the Federal Communications Commission, the Secretary of Commerce, and two other officers of the United States to be selected by the President.

The Cairo Conference was convened by King Farouk on February 1, 1938, with international short wave broadcasting allocations as one of the important items on the agenda.⁴² On the same day the Federal Communications Commission announced its decision on the allocation of the pending applications for the use of the Pan American frequencies.⁴³ Of the four Pan American frequencies involved in the hearing before the Commission, two were allocated to the World Wide Broadcasting Corporation—the non-profit, educational station—and the two remaining frequencies were assigned to the General Electric Company.⁴⁴ These allocations were expressly held to be temporary and subject to recaption without notice or hearing. The alloca-

⁴¹ S. 3342, 75th Congress, 3rd Session.

⁴² "The Cairo Telecommunication Conferences," by Francis Colt de Wolf, this JOURNAL, Vol. 32 (1938), p. 562.

⁴³ See p. 728, note 33, and p. 731 *supra*.

⁴⁴ W1XAL, World Wide Station at Boston, was awarded frequencies 11,370 and 15,130 kilocycles; W2XAD and W2XAF, General Electric Stations at Schenectady, were assigned 9550 and 21,500 kilocycles. This decision had no bearing on the "loan" of the fifth Pan American frequency 6120 kilocycles to the Columbia Broadcasting System operating W2XE at Wayne, N. J.

tions, under the practice of the Commission prevailing with respect to short wave grants, are experimental.⁴⁵ This prevents any commercial use of these frequencies by the private stations as a source of profit.

In the opening broadcast on February 22, 1938, inaugurating the new wave length assigned to the World Wide Broadcasting Corporation, Secretary of State Hull, speaking from the Pan American Union at Washington, D. C., sent a message to the peoples of Spanish America. Because of his specific reference to the resolutions passed at the Montevideo and Buenos Aires Conferences, special significance may attach to the following excerpt from this address:

Two inter-American Conferences, the one in Montevideo in 1933 and the other in Buenos Aires in 1936, recognized the importance of radio in the promotion of friendly relations among the American Republics. Five short-wave frequencies have been assigned through the intermediary of the Pan American Union for the broadcasting of Inter-American radio programs. The Buenos Aires conference recommended that the American nations broadcast periodical continental radio programs with a view to bringing about a better understanding of important social, cultural, political, economic and scientific developments. It is in accordance with these recommendations and with the approval of the Governing Board of the Pan American Union that four of these five Pan American frequencies have been assigned temporarily for use by two private stations over one of which this message is being read tonight.

The foregoing pronouncement may carry implications of new international policies of broad significance. Particularly may this be true when considered in the light of (1) the international scramble for short wave facilities, (2) the pending legislation in Congress, such as the Chavez-McAdoo and the Celler bills, and (3) the fact that Mr. Hull at the time of this address was not only *ex officio* Chairman of the Governing Board of the Pan American Union, but also Secretary of State of the United States.

The growing appreciation by the United States of the importance of international short wave broadcasting was evidenced by the appointment of an Interdepartmental Committee to study International Broadcasting four days after the Washington's Birthday Address of the Secretary of State on February 22, 1938, and while the Cairo Conference was still in session. On this committee, appointed by the President, the following Federal Departments and agencies are represented: State Department, Department of Justice, Post Office Department, Interior Department, Department of Agriculture, Bureau of Foreign and Domestic Commerce of the Commerce Department, the President of the Export-Import Bank, and the Federal Communications Commission. The announcement also stated that the committee expected to consider methods of coöperation between the Pan American nations in using the Pan American frequencies temporarily allo-

⁴⁵ International Broadcast Stations, F.C.C. Rules 1010-1015.

cated by the Federal Communications Commission to the World Wide Broadcasting Corporation and the General Electric Company on February 1, 1938, as well as in using other frequencies which may be available. The report of this committee may be very persuasive in shaping Congressional action on the pending bills.⁴⁶

On April 8, 1938, the Cairo Telecommunication Conference adjourned after a session of more than nine weeks with some seven hundred delegates or representatives in attendance. The purpose of the conference was the revision of regulations governing telegraph and radio enacted at Madrid in 1932. The radio regulations divide the spectrum into blocks of wave bands allotted for use by the following main services: (a) fixed or point-to-point service; (b) maritime service or shore-to-ship and ship-to-ship; (c) air service—airports to aircraft; and (d) broadcasting, now including television. The first two services have existed from the beginning of radio. The last two are newcomers and first received attention at the Washington Conference of 1927. At the Madrid Conference of 1932 broadcasting received recognition in an increased allotment in the long wave broadcasting band. The narrow short wave bands, however, remained as allocated at Washington. The controversies at Cairo centered around the demands for additional wave bands by the air and broadcasting services. The resistance of the older services resulted in a compromise in which there was a limited recognition of broadcasting demands for increases in the short wave bands. These increases, though less than hoped for, taken together, with certain added facilities for tropical broadcasting in the intermediate wave band, should lead to some elimination of existing congestion. The Cairo Convention provides that its regulations go into effect January 1, 1939, but it is expressly provided that the article changing the allocation of wave bands will not be applied until September 1, 1939.

Television, or visual broadcasting, is one of the imponderables in the future development of broadcasting. This new art, in so far as the United States is concerned, remains in the research laboratory. For that reason, it is hazardous now to predict what regulatory problems may be raised in the field of national and international short wave broadcasting. The advent of visual broadcasting is envisaged by the inclusion of definitions of a visual broadcasting station⁴⁷ and a visual broadcasting service⁴⁸ in the General Radio Regulations annexed to the Madrid International Telecommunication Convention of 1932. The transmission of visual images requires a wide band of frequencies. This characteristic may tend to increase the congestion already existing in the radio spectrum.

⁴⁶ S. 3342 and H. 4281.

⁴⁷ General Radio Regulations, Madrid, 1932, Art. 1 (13): "A station carrying on a visual broadcasting service."

⁴⁸ *Ibid.*, Art. 1 (28): "A service carrying on the broadcasting of visual images, either fixed or moving, primarily intended to be received by the general public."

The General Radio Regulations as revised at Cairo in 1938 contain definitions for television service and facsimile service.⁴⁹

The time lag between the advent of television in Great Britain and other continental countries and the United States has already brought out certain differences in national policies which could not be easily reconciled.

At the recent Cairo Conference the delegation of the United States sought to obtain world wide agreement with respect to the allocation of television frequencies. It was suggested that, for purposes of research and experimentation, the entire world use the bands recommended by the Inter-American Radio Conference of Havana. This proposal was unsatisfactory to Great Britain and other major nations which are now operating television stations on a permanent basis on slightly different frequencies.

The British delegation indicated that several thousand receiving sets were now in use in England by the general public; that these sets were designed to operate on a locked frequency which could not be changed without redesigning all of these sets. Other continental countries felt that the allocation should be handled on a regional basis so that each region might use the frequencies best suited for television and other services. It appeared that the only solution would be to obtain a separate agreement for Europe. Nations outside the Americas expressed the opinion that the frequencies desired by the United States for fixed mobile and broadcasting services did not coincide with the use being made of these bands elsewhere. The resulting allocation is a compromise of the various viewpoints. The report of the American delegation states that, from a practical operating standpoint, it is not important that these very high frequencies be used by the same services in all regions of the world.⁵⁰

To meet changing conditions the Secretary of State has established two new administrative divisions. Under date of July 27, 1938, a Departmental order⁵¹ established the Division of Cultural Relations. The scope of this new division includes the "supervision of participation by this government in international radio broadcasts." On August 19, 1938, a Division of International Communications was established.⁵² The announcement states that: "The international aspects of problems connected with telecommunications (radio, etc.), have developed in importance at an extraordinary rate during recent years and it has been increasingly apparent for some time that the system heretofore followed of handling these problems in the political and other policy-making divisions of the Department was no longer adequate."

The Federal Communications Commission on August 23, 1938, announced

⁴⁹ General Radio Regulations, Cairo, 1938, Art. 1.

⁵⁰ Report to the Secretary of State by the Chairman of the American Delegation to the International Telecommunication Conference at Cairo, 1938, June 16, 1938, p. 28.

⁵¹ Dept. of State Press Release, No. 367, July 27, 1938.

⁵² *Ibid.*, No. 391, Aug. 19, 1938.

the selection of ten additional frequencies for international broadcasting.⁵³ This selection was made following an engineering study of the present and proposed allocations in the new international broadcasting bands. The frequencies so selected have been notified to the Berne Bureau of the International Telecommunication Union. The additional frequencies from which the selection was made were included in Article 7 of the Cairo General Radio Regulations, which will become effective September 1, 1939, among the nations ratifying them. Pending ratification of the Cairo Radio Regulations, applications will be considered by the Communications Commission conformably to Paragraph 1 of Article 7 of the Madrid Radio Regulations. Due to the existing congestion in the international high frequency broadcasting bands, applications will not be considered for frequencies other than those so selected or other than those now allocated to stations in the United States.

CONCLUSION

Radio has been the subject of international regulation for some thirty-five years. During that period its rapid development has passed through at least three phases following closely the technical progress of the art. The first period extended from 1903 to 1920, during which time radio was an agency for point-to-point communication and an aid to maritime safety. The second period marked the advent of long wave broadcasting and might be said to begin about 1920. The third period, initiated in 1930, saw the origin and growth of international short wave broadcasting with super-power and directional antennae. With each successive technical advance in the art, the international regulatory problems have increased in number, complexity, and gravity.

The international regulatory legislation may be broadly classified under two categories. The first category includes those international multilateral acts of a technical character directed primarily to the physical functioning of the art free from interference. The second category includes those international acts directed to the regulation of the subject-matter transmitted by this new agency of international mass communication. This new art, operating with the speed of light, has quickened social, economic, and political activities in the international area. It is more than a coincidence that the dynamic drift to state totalitarianism has concurred with an intensive exploitation of multilingual short wave broadcasting with super-power and directional beam equipment. With respect to the increasing momentum of this tendency, the following facts are significant: In 1930 there were no international short wave broadcasting stations. In 1932 there were 37 using a maximum power of 200 kilowatts, while in 1937 there were 116 with the maximum power raised to 500 kilowatts. At the present time, Italy is broadcasting in eleven languages, Russia in seven, Germany and Japan in six

⁵³ F.C.C. Press Release of Aug. 23, 1938, No. 29048; Broadcasting, Sept. 1, 1938, p. 59.

each. At the suggestion of the Chancellor of the Exchequer, the British Broadcasting Corporation has changed to multilingual broadcasts within the past few months.

The relatively unfavorable position of the United States in this radio race is deducible in part from the facts of the Payne report ⁵⁴ and the maximum power limitation of 50 kilowatts on all except experimental grants by the Federal Communications Commission. It is to be noted that both totalitarian and so-called democratic states are now participating in this peaceful penetration or undeclared conquest by air.

The impact of this electro-magnetic barrage on the peoples of this hemisphere is raising serious issues of policy for the Government of the United States. There may be necessity for some re-appraisal and reformulation of such time honored policies as the Monroe Doctrine, Pan Americanism, and the distinctive United States doctrine of private exploitation of broadcasting facilities. In view of the far reaching ramifications of these and related issues, it is readily understandable that the recently appointed Interdepartmental Committee to Study International Broadcasting has found it desirable to postpone its report for the further exploration of this matter, and that the Department of State has set up two new administrative divisions each charged with handling certain aspects of the problem.

⁵⁴ See note 1, *supra*.

THE NATURE OF THE ADVISORY OPINIONS OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE

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Though general interest in the advisory opinions of the Permanent Court of International Justice has waned of late because of the decline in the Court's advisory activity and the dormancy of the question of American adherence, there are questions relating to the advisory work of the Court which still command the interest of the serious student. On January 26, 1937, the Council of the League referred to the special committee set up to study the application of the principles of the Covenant the question of the conditions of voting requests for advisory opinions.¹ As appears from the observations of governments as well as from the discussions in the Council and Assembly, the question of the vote necessary to a request for an advisory opinion raises the larger question of the nature of advisory opinions.

Among authorities we find substantial disagreement. Manley O. Hudson, in his authoritative treatise on the Permanent Court, concludes that an advisory opinion "is what it purports to be. It is advisory. It is not in any sense a judgment under Article 60 of the Statute, nor is it a decision under Article 59. Hence it is not in any way binding upon any State, even upon a State which is especially interested in the dispute or question to which the opinion relates."² Charles de Visscher, however, while recognizing that in principle the opinion is not binding upon the Council (or Assembly) or the interested states, believes that the judicial character of the Court and of its advisory procedure modifies the general principle, with the result that within the limits of the question put to the Court on the judicial aspects of the dispute, the Council and, under certain circumstances, the interested states are bound by the opinion.³ Before the First Committee of the Ninth Assembly M. Politis expressed the view that the Court's opinion is, in point of fact, equivalent to a judgment and is binding.⁴ This seems to have been the view

¹ League of Nations Official Journal, February, 1937, pp. 77-79. This question was first raised by the Assembly in a resolution adopted Sept. 24, 1928, inviting the Council to make a study of the question whether an opinion might be requested by a simple majority vote. The study was not made, and at its 16th session, on Sept. 28, 1935, the Assembly adopted a resolution reaffirming its invitation. The Council invited the members of the League and the International Labor Organization to express their views, and on the basis of the diversity of opinion expressed, it was decided to refer the matter to the special committee. Publications of the Permanent Court of International Justice, Series E, No. 12, pp. 117-127; No. 13, pp. 79-82; League of Nations Official Journal, *supra*, pp. 77-79, 170-186.

² The Permanent Court of International Justice: A Treatise (New York, 1934), p. 455.

³ *Recueil des Cours, Académie de Droit International*, 1929, I, p. 23 *et seq.*

⁴ League of Nations Official Journal, Special Supplement, No. 65, p. 47.

of the committee of the Court appointed in 1927 to report on the proposal that Article 31 of the Statute be applied under certain conditions in advisory procedure. The committee expressed the following opinion: "In reality, where there are in fact contending parties, the difference between contentious cases and advisory cases is only nominal. The main difference is the way in which the cases come before the Court. . . . So the view that advisory opinions are not binding is more theoretical than real."⁵

I

The third sentence of Article 14 of the Covenant, which provides the legal basis for the advisory jurisdiction of the Court, reads as follows: "The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly." The history of this text would seem to indicate that those responsible for its drafting intended that the opinions of the Court should have a purely advisory character and that they were not seeking somewhat surreptitiously to introduce the principle of compulsory arbitration.⁶

It soon became apparent that in actual practice the opinions of the Court would have a more conclusive effect than the text of Article 14 would suggest. While it remained true that in principle the Council and Assembly were free to disregard them and that *per se* they created no legal obligations for the interested parties, it also soon became clear that the opinions of the Court would in practice usually be accepted. It was the fear of many of those who were concerned with the establishment of the Court and its original orientation that it would lose its moral authority as an international court of justice if it gave opinions that were not binding.⁷ The provisions of the draft relating to advisory opinions finally adopted by the 1920 Advisory Committee of Jurists seem to have been clearly intended to secure for opinions of the Court on questions constituting the subject-matter of existing dis-

⁵ P.C.I.J., Series E, No. 4, p. 76. This conclusion is accepted by M. Negulesco, who distinguishes between an opinion on a "point" and an opinion on a "différend." "*L'Evolution de la Procédure des Avis Consultatifs de la Cour Permanente de Justice Internationale*," in *Académie de Droit International, Recueil des Cours*, 1936, III, pp. 64-80.

⁶ Hudson, *op. cit.*, pp. 100-101. David Hunter Miller, *The Drafting of the Covenant*, gives the evidence. In fact, the British delegation, which was largely responsible for the drafting of the sentence, prepared a note which explained that "the opinion of the Court will have no force or effect unless confirmed by the Report of the Council or Assembly." Miller, *op. cit.*, I, p. 416.

⁷ In the discussions of the Advisory Committee of Jurists, Mr. Root took the view that it was a violation of all juridical principles for the Court to give an advisory opinion with reference to an existing dispute. Advisory Committee of Jurists, *Procès-verbaux* of the Proceedings, pp. 584-585. He seems to have been convinced, however, that the Covenant left no choice in the matter. M. de Lapradelle expressed the view that in actual practice judgments and advisory opinions of the Court in disputes would have the same force. *Ibid.*, p. 225.

putes the same respect that would be shown for judgments of the Court.⁸ While these provisions were omitted from the Statute as finally adopted, the omission does not appear to have been the result of serious opposition to the strengthening of the authority of the Court's opinions. In fact, one ground of opposition appears to have been that the authority of certain of the Court's opinions would be weakened thereby.⁹

A like concern for safeguarding the authority of the Court when acting in an advisory capacity was shown by the Court itself when engaged in the drafting of its rules. Though the Court was not prepared to go as far as Judge Moore proposed in seeking to discourage advisory opinions,¹⁰ the decisions actually taken and the procedural rules adopted were clearly in the direction of the assimilation of advisory to contentious procedure, and were bound to have the effect, as undoubtedly was intended, of breaking down the original distinction between the binding character of a judgment and the advisory character of an opinion. Thus it was decided that advisory opinions should always be given by the full Court.¹¹ The Court took a strong stand against the giving of secret advice to the Council.¹² In order to avoid all possibility of secrecy, and to make available full information on the question before the Court, it was provided (Article 73 of the Rules) that notice of a request for an opinion should "forthwith" be given to the members of the Court, to the members of the League and to states mentioned in the Annex to the Covenant, as well as to any international organization likely to be able to furnish information. Furthermore, the Court decided (Article 74) to publish the opinion in a special collection, and the view was expressed, to be followed in practice, that the opinions "should be read out at a public meeting of the Court."¹³

In its practice, and in the later revisions of the Rules based on that practice, the Court advanced steadily in the direction of assimilating advisory to contentious procedure. The Court early adopted the practice of sending a notice of the request for an advisory opinion to a state neither a member of the

⁸ Art. 36, par. 3, provided for the assimilation of advisory to contentious procedure in the case of an opinion sought on a question forming the subject of an existing dispute. Art. 36, par. 2, provided that on a question not relating to an existing dispute, the opinion should be given by a special commission, so as not to bind the Court. *Ibid.*, pp. 730-732.

⁹ The subcommittee of the Third Committee of the First Assembly recommended the elimination of the provisions on the grounds that opinions should be given by the same quorum of judges as required for judgments, that there were certain practical difficulties involved in making the proposed distinction, and that in any case this was a matter of procedure to be regulated by the Rules of the Court. Records of the First Assembly, Meetings of the Committees, I, p. 534.

¹⁰ Judge Moore, in his memorandum, argued that there should be no special regulation concerning advisory opinions for the reasons that it was incompatible with the general character and purpose of the Court to require it to give advice which could be rejected, that Art. 14 was permissive, and that it was not desirable to encourage requests by making any special provision for them. P.C.I.J., Series D, No. 2, pp. 383-398.

¹¹ *Ibid.*, p. 98.

¹² *Ibid.*, p. 160.

¹³ *Ibid.*

League nor mentioned in the annex but nevertheless specially interested in the question before the Court.¹⁴ Furthermore, in the Mosul case, the Court differentiated between the states notified in such a way as to suggest slightly the distinction made under its contentious procedure between the parties to the dispute, states entitled to intervene under Articles 62 and 63 of the Statute, and other states.¹⁵ The Court, however, refused, in the Acquisition of Polish Nationality case, to grant the request of the Rumanian Government that it should be allowed to be heard under Articles 62 and 63 of the Statute and Articles 58, 59, and 60 of the Rules relating to intervention.¹⁶

From the very beginning the Court followed the practice of receiving written statements and documents from states, members of the League and international organizations which had been notified by the Court, and of hearing at a public sitting representatives of any government or international organization which within a fixed time expressed the desire to be heard. Thus the advisory procedure came to have its written and oral phases. Furthermore, it was the practice of the Court to communicate submitted memoranda to interested governments in order that they might reply in oral statements.

The extent to which the provisions of the Statute and of the Rules governing contentious procedure were applied by analogy to advisory procedure was clearly indicated by the Registrar in his report of December 28, 1925, when he proposed that Article 73 of the Rules be amended to provide expressly for the application by analogy to advisory procedure of Articles 39, 42, 44-51 and 54-58 of the Statute, and Articles 33, 34, 37, 38, and 41-56 of the Rules.¹⁷ This proposal, it was explained, was only intended to reduce to writing what had been the practice of the Court.¹⁸ While the Court did not accept the proposal, it was made clear that it was because of its desire to retain its freedom of action, and not because the proposal represented an inaccurate description of its practice.¹⁹

The practice of the Court in assimilating its advisory to its contentious

¹⁴ This was done in the cases of Eastern Carelia, German Settlers in Poland, Acquisition of Polish Nationality, Exchange of Greek and Turkish Populations, and Mosul. This practice was questioned by Poland in the case of German Settlers in Poland, but the Court held that the enumeration in Art. 73 was not exhaustive. P.C.I.J., Series E., No. 1, p. 263.

¹⁵ The Registrar informed members of the League that "having regard to the nature of the questions put, and their possible bearing on the interpretation of the Covenant, the Court would no doubt be prepared favorably to receive an application by any Member to be allowed to furnish information calculated to throw light on the questions at issue." The notifications to Great Britain and Turkey were further based on the principle "in accordance with which a question referred to the Court for advisory opinion is communicated to governments likely to be able to supply information in regard to it." P.C.I.J., Series B, No. 12, pp. 7-8.

¹⁶ It took the view that these articles applied only to contentious procedure, though it indicated its willingness to hear the Rumanian representative under Art. 73 of the Rules. P.C.I.J., Series E, No. 1, p. 252; Series C, No. 3, Vol. III, pp. 1089-1090.

¹⁷ P.C.I.J., Series D, No. 2, addendum, p. 315.

¹⁸ *Ibid.*, p. 226.

¹⁹ *Ibid.*, pp. 226-227.

procedure was strikingly illustrated in its refusal to give an opinion in the Eastern Carelia case. In addition to basing its refusal on the lack of jurisdiction of the Council, and the difficulty of determining the facts with Soviet Russia absent, the Court stated: "Answering the question would be substantially equivalent to deciding the dispute between the parties. The Court, being a Court of Justice, cannot, even in giving advisory opinions, depart from the essential rules guiding their activity as a Court."²⁰

In the 1926 revision of the Rules, the Court did little more than state its practice as it had developed during the first four years.²¹ A proposal to admit national judges to the Court under certain conditions in advisory cases was voted down, only to be accepted in the following year when the Court adopted the rule that "on a question relating to an existing dispute between two or more States or Members of the League of Nations, Article 31 of the Statute shall apply."²²

The practice of the Court in assimilating advisory to contentious procedure received confirmation in the proposals of the 1929 Committee of Jurists, appointed by the Council under the 1928 Assembly resolution to consider the questions of amendment of the Statute and American adherence. Primarily to give further assurance to the United States with regard to the matters covered in the first part of the fifth Senate reservation, the 1929 Committee proposed the transference to the Statute of the substance of Articles 72, 73 and 74 of the 1926 Rules. The committee also recommended the addition of an article providing that the Court, in the exercise of its advisory functions, should be guided by the other provisions of the Statute "to the extent to which it recognizes them to be applicable."²³ These proposals, as slightly

²⁰ P.C.I.J., Series B, No. 5, p. 29. In the Mosul affair, it would appear superficially that the Court had refused to follow this principle. It must be borne in mind, however, that in that case the question related solely to the competence and jurisdiction of the Council, and that the Turkish Government had given certain information.

²¹ P.C.I.J., Series E, No. 3, pp. 222-227. Provision was made for a "special and direct communication" to any member of the League or state or international organization considered "as likely to be able to furnish information on the question," and in the case of a state or member not so notified, for an application to be heard which the Court would decide. This was considered by the Court as adapting the principles of Arts. 62 and 63 of the Statute to the requirements of advisory procedure. P.C.I.J., Series D, No. 2, addendum, p. 225.

²² P.C.I.J., Series E, No. 4, pp. 72-73.

²³ The first part of the fifth Senate reservation provided that "the Court shall not render any advisory opinion except publicly after due notice to all States adhering to the Court and to all interested States and after public hearing or opportunity for hearing given to any State concerned." U. S. Sen. Doc. No. 45, 69th Cong., 1st Sess., p. 2. While the 1926 Conference of Signatories was of the opinion that this matter was covered by the opinion of the Court in the Eastern Carelia case and by Arts. 72-74 of the Rules of the Court, the Government of the United States took the position that these were "subject to change at any time." Letter from the Government of the United States of America to the Secretary-General of the League, Feb. 19, 1929, League of Nations Doc. C.514.M.173.1929.V, p. 69. The 1929 Committee of Jurists recommended the transfer to the Statute of the provisions of the Rules in question "in order to give them a permanent character, which seems particularly

modified by the 1929 Conference of Signatories, became Articles 65, 66, 67 and 68 of the Revised Statute, which entered into force on February 1, 1936.

In the 1936 revision of the Rules, the practice of assimilating advisory to contentious procedure was again confirmed. In his report of June, 1933, the Registrar had indicated the articles of the Statute and Rules which had been applied by analogy to advisory procedure up to that time.²⁴ The Court, however, again decided not to attempt to enumerate the specific articles of the Statute and Rules which were applicable to advisory proceedings by analogy because of the belief that it was unwise to restrict the freedom of the Court in this way.

The question which received most attention and regarding which it was found to be most difficult to reach a general agreement was that raised by the Fourth Commission as to whether in the Rules of the Court, and particularly as regards the application by analogy of the rules relating to contentious procedure, a distinction should be made between a request for an opinion upon a "question" and a request for an opinion upon a "dispute."²⁵ The text finally agreed on, embodied in Article 82 of the present Rules, after referring to the expressly applicable provisions of the Statute and the Rules, states that the Court "shall also be guided by the provisions of the present Rules which apply in contentious cases to the extent to which it recognizes them to be applicable, according as the advisory opinion for which the Court is asked relates, in terms of Article 14 of the Covenant of the League of Nations, to a 'dispute' or to a 'question.'"²⁶ Thus, in effect, the Court has been left with the discretion it formerly possessed, subject to the express provisions of the Statute and other articles of the Rules, to decide each individual case the extent to which the procedure shall be assimilated to contentious procedure, the only effect of the new Rule being to require the Court to take into account the nature of the question, whether it is a "dispute" or "question" in the sense of Article 14 of the Covenant. The fact that the line between "dispute" and "question" has been by no means clearly defined further weakens the restrictive effect of the rule.

In conclusion, it may be said that, according to the practice of the Court and under the provisions of the Statute and the Rules as now in force, advisory procedure is closely assimilated, in fact as closely assimilated as is

desirable today in view of the special circumstances attending the possible accession of the United States to the Protocol of Signature of the Statute of the Court." *Ibid.*, C.142.M.52. 1929.V, p. 9. The discussions of the 1929 Committee of Jurists and of the 1929 Conference of Signatories evidence the general desire of those participating to make it possible for the United States to accede to the Statute, but there is nothing to indicate that in the absence of this consideration there would have been any serious opposition to the addition of the proposed articles to the Statute as the practice of the Court in assimilating its advisory to its contentious procedure had come to be generally accepted as fully and firmly established.

²⁴ P.C.I.J., Series D, No. 2, 3rd addendum, pp. 835-837.

²⁵ *Ibid.*, pp. 782, 792, *et seq.*

²⁶ *Ibid.*, p. 1022.

possible, to contentious procedure.²⁷ The effect of this assimilation has been, as was undoubtedly intended, to increase the authority of the Court's opinions.

II

Up to the present time the Court has given 27 advisory opinions. What has been the nature of the questions upon which opinions have been requested? Article 14 of the Covenant distinguishes between "disputes" and "questions." This distinction in practice has not been easy to make, and the Court in drafting the amendment to Article 71 of its Rules in 1927 preferred to distinguish between questions "relating to an existing dispute" and questions not so relating. This has permitted the Court to include in the first category questions constituting elements in disputes pending before the Council or Assembly or elsewhere.²⁸ This distinction would seem to be more significant than the one made in Article 14. It is in accord, too, with the fairly common practice in arbitration of submitting to arbitral decision a defined legal question while leaving other elements in the dispute to be handled by ordinary diplomatic or other means.

In determining whether a question relates to an existing dispute,²⁹ the Court has first considered whether the states concerned when the dispute was before the Council were invited to sit as members *ad hoc* under Article 4 of the Covenant.³⁰ If this criterion cannot be applied, the Court decides the case on its merits. The fact that the provision for national judges in advisory cases has only been in force since 1927, the fact that the criterion can only be applied where the dispute comes before the Council and one of the self-claimed parties is not a member, and the fact that the question arises for Court decision only when one of the parties to the alleged dispute is not represented on the Court, explain why the Court has given a decision on the nature of the question in only a small minority of the total cases.

Seventeen of the opinions that have been given would seem to have been on questions relating to existing disputes between states.³¹ Ten opinions

²⁷ Without attempting an exhaustive statement of the extent to which this assimilation is carried, attention is called to the following: Full publicity for requests (Art. 66 of the Statute); opportunity to be heard (Art. 66 of the Statute); right to national judge (Art. 83 of the Rules); written and oral proceedings (Arts. 66 and 68 of the Statute; Art. 82 of the Rules); opinions given by full Court, after secret deliberation and by majority vote (Arts. 82 and 84 of Rules); opinions read in open Court after notice given (Art. 67 of Statute); Court may refuse to give an opinion (application of Art. 36 of Statute by analogy). For the texts of the Statute and Rules of the Court now in force, see P.C.I.J., Series D, No. 1, 3rd ed.

²⁸ Report of the Registrar, June, 1933, P.C.I.J., Series D, No. 2, 3rd addendum, p. 838.

²⁹ In its judgment in the *Mavrommatis Palestine Concessions* case, the Court defined a dispute "as a disagreement on a point of law or fact, a conflict of legal views or interests between two persons." P.C.I.J., Series A, No. 2, p. 11. As the term is used here, it is necessary to add that the dispute must be between states and must involve a conflict of alleged state rights and interests.

³⁰ P.C.I.J., Series E, No. 7, p. 303.

³¹ Nos. 4 (4) *Nationality Decrees in Tunis and Morocco*; 5 (7) *Status of Eastern Carelia*; 8 (9) *Polish-Czechoslovakian Frontier (question of Jaworzina)*; 9 (13) *Monastery of Saint-*

would seem to have been given on questions not relating to existing disputes between states.³² In most instances the classification is obvious. There are some opinions, however, whose proper classification is debatable. The question submitted in No. 11 (Polish Postal Service in Danzig) was clearly similar to that before the Court in No. 15 (Jurisdiction of the Courts of Danzig), which was expressly recognized by the Court as relating to an existing dispute.³³ No. 19 (Access to German Minority Schools in Upper Silesia) is included in the first category for the reason that, while the matter involved the League guarantee of minority rights, the agreement whose provisions were in dispute was between Germany and Poland. Furthermore, Germany was responsible for bringing the matter before the Council and appeared there as a party in interest. On the other hand, in Nos. 6 (Settlers of German Origin) and 7 (Acquisition of Polish Nationality), Germany was not a party to the minority treaty in question nor a member of the Council, and no state, member of the Council, appeared as a party to an actual dispute with Poland over the meaning of the treaty. In No. 26 (Minority Schools in Albania), where the circumstances were similar, the Court was not forced to give a decision on the point, but the Registrar was instructed to convey to those concerned, without committing the Court, the view that there was some uncertainty as to whether the Court could sanction the appointment of judges *ad hoc* by the Greek and Albanian Governments.³⁴

Of the seventeen questions relating to actual disputes submitted to the Court, thirteen related to disputes actually before the Council.³⁵ Four of the

Naoum; 10 (15) Exchange of Greek and Turkish Populations; 11 (16) Polish Postal Service in Danzig; 12 (20) Frontier between Turkey and Iraq (Mosul question); 14 (23) Jurisdiction of the European Commission of the Danube; 15 (29) Jurisdiction of the Danzig Courts; 16 (35) Interpretation of the Greco-Turkish Agreement of Dec. 1, 1926; 17 (37) Greco-Bulgarian "Communities"; 19 (40) Access to German Minority Schools in Polish Upper Silesia; 20 (41) Customs Régime between Germany and Austria; 21 (39) Railway Traffic between Lithuania and Poland; 22 (44) Access to and Anchorage in the Port of Danzig for Polish War Vessels; 23 (42) Treatment of Polish Nationals at Danzig; and 24 (45) Caphandaris-Molloff Agreement of Dec. 9, 1927. The first numbers given indicate the chronological order in which the opinions of the Court have been given and correspond to the numbers given by Hudson, *op. cit.*, p. 457 *et seq.*, as far as his list goes. The numbers in parentheses are the numbers which the cases have in the General List as given in the Annual Report for 1936-37. P.C.I.J., Series E, No. 13, pp. 92-107.

³² Nos. 1 (2) Nomination of the Workers' Delegate to the International Labor Conference; 2 (1) International Labor Organization and the Conditions of Agricultural Labor; 3 (3) International Labor Organization and the Methods of Agricultural Production; 6 (6) German Settlers in Poland; 7 (8) Acquisition of Polish Nationality; 13 (21) The International Labor Organization and the Personal Work of the Employer; 18 (38) Danzig and the International Labor Organization; 25 (48) Employment of Women during the Night; 26 (62) Minority Schools in Albania; and 27 (63) Constitution of the Free City of Danzig.

³³ P.C.I.J., Series C, No. 14, I, p. 9.

³⁴ P.C.I.J., Series E, No. 11, p. 151. Apparently the sole question considered was whether there was a dispute between Albania and Greece. P.C.I.J., Series C, No. 76, p. 205.

³⁵ Nos. 4, 5, 8, 9, 11, 12, 15, 19, 20, 21, 22, 23, and 24. See note 31, *supra*, for further description.

questions relating to actual disputes came to the Court by way of the Council, but originated with international bodies not having the right to address direct requests to the Court.³⁶ Of the ten opinions given on questions not relating to actual disputes, four have been on questions originating with the Council and arising in connection with the performance of what might be called its administrative functions.³⁷ Six opinions have been given on questions relating to the organization, jurisdiction and work of the International Labor Organization.³⁸ Of these, four have been on questions originating with the Governing Body of the International Labor Organization, the Council simply serving as an intermediary. In two instances, however, the requests originated with the Council, following the action of the French Government in asking that certain questions relating to the competence of the International Labor Organization be submitted to the Court.³⁹ The procedure followed in these two cases would seem to have been highly irregular.

In all cases but one,⁴⁰ the question has been put to the Court following an actual disagreement between states or within an international organ with regard to the interpretation and application of some text or rule of law. The requests submitted to the Court have had as their purpose the obtaining of authoritative statements as to what the law is. In some cases, the question or questions have related to concrete factual situations.⁴¹ In other cases, the question put has been more general in character and has called for the interpretation, in general terms, of specific texts, without reference to specific factual situations.⁴² Where the question has related to a specific situation of fact, the customary practice has been for the facts to be set forth in the request and in the supporting documents, as the Court does not consider it expedient under ordinary circumstances that the facts should be in controversy and that it should be left to the Court to ascertain what they are.⁴³

It would appear that in all the cases where advisory opinions have been asked upon questions relating to existing disputes between states, that the

³⁶ No. 10 (The Mixed Commission set up under Art. 2 of the Convention concerning the Exchange of Greek and Turkish Populations, signed at Lausanne, Jan. 30, 1923); No. 14 (Advisory and Technical Committee for Communications and Transit); No. 16 (same as No. 10); and No. 17 (Greco-Bulgarian Mixed Commission provided for under the Greco-Bulgarian Convention of Nov. 27, 1919).

³⁷ No. 6 (Guarantee of Minority Rights under Polish Minorities Treaty of June 28, 1919); No. 17 (same); No. 26 (same under Albanian Declaration of Oct. 2, 1921); and No. 27 (Guarantee of Special Régime for the Free City of Danzig under Article 103 of the Treaty of Versailles).

³⁸ Nos. 1, 2, 3, 13, 18, and 25. See note 32, *supra*, for further description.

³⁹ Nos. 2 and 3.

⁴⁰ No. 3 (Competence of the International Labor Organization—Agricultural Production).

⁴¹ As, for example, in Nos. 1, 4, 5, 6, and 7.

⁴² As, for example, in Nos. 2, 3, 10, and 13. In the case of No. 1, the factual situation was used "solely in order to fix clearly the state of facts to which the interpretation has application." P.C.I.J., Series B, No. 1, p. 17.

⁴³ P.C.I.J., Series B, No. 5, p. 28.

questions submitted to the Court have been not only of a legal nature but also comparable in character to the questions which the parties might have voluntarily agreed to submit to arbitration. In all these cases, the questions submitted to the Court appear to have constituted the substance of the disputes, or to have been important legal elements, the elimination of which would be conducive to final agreement. In four⁴⁴ of the ten cases where the questions have not related to existing disputes between states, the questions have constituted important legal elements in actual cases which were before the Council in its administrative capacity. Here, too, the questions had to be decided before the affairs to which they related could be satisfactorily settled. Furthermore, in at least three⁴⁵ of these four cases, the alleged infringements of international obligations were capable of developing into actual disputes between states which might be submitted to the Court for judgment, even if one assumes, as we are doing, that that stage had not yet been reached.

III

In considering the action taken on the opinions rendered,⁴⁶ we must distinguish between the action of the Council, that of those international organs which in certain cases have moved the Council to act, and that of interested states.

In considering the action of the Council, it is necessary, furthermore, to define the capacity in which the Council acts. Where the Council acts as an intermediary in requesting an opinion,⁴⁷ the practice has been for the Council to take note of the opinion and to instruct the Secretary-General to communicate it to the administrative head of the organ which had solicited it.⁴⁸ Of the opinions given on questions originating with the Council, six related to matters before the Council under provisions of the Covenant. In two instances the Council did not find it necessary to take action.⁴⁹ In three of the remaining four cases, the opinion appears to have been accepted by the Council.⁵⁰ In the remaining case (Eastern Carelia), the Council was faced

⁴⁴ Nos. 6, 7, 26, and 27.

⁴⁵ Nos. 6, 7, and 26.

⁴⁶ For information in summarized form on the action taken, see Hudson, *The Permanent Court of International Justice: A Treatise* (1934), pp. 457-466.

⁴⁷ As it did in Nos. 1, 2 (in effect), 3 (in effect), 10, 13, 14, 16, 17, 18 and 25.

⁴⁸ Of course, in Nos. 2 and 3 the questions had been raised by the French Government directly, but as they related to the competence of the International Labor Organization, the opinions were communicated to the Director of the International Labor Organization.

⁴⁹ In No. 4 (Nationality Decrees in Tunis and Morocco), the British and French Governments had agreed that if the opinion was favorable to the British contention, the dispute would be referred to arbitration or judicial settlement. *League of Nations Official Journal*, 1922, pp. 1206-1207. In No. 20 (Austro-German Customs Union), the German and Austrian Governments had already renounced the intention to pursue the project at the time the opinion was given. *League of Nations Official Journal*, 1931, pp. 2185-2190.

⁵⁰ No. 8 (Polish-Czechoslovakian Frontier); No. 9 (Monastery of St.-Naoum); and No. 21 (Railway Traffic between Lithuania and Poland). In No. 21, the Council took note of the opinion. *League of Nations Official Journal*, 1932, p. 481.

with the necessity of deciding what action it should take in face of a refusal by the Court to give an opinion. This refusal involved an important interpretation of the Covenant which there was some inclination on the part of members of the Council to challenge.⁵¹ It is significant, however, that the Council finally decided not to appear to take action which would "contradict the findings of the Court."⁵²

In the four cases where opinions were given by the Court on questions relating to matters before the Council under minority treaties and declarations, the Council appears to have accepted the opinions as providing the legal basis for action taken.⁵³ In each of the five cases where the Court has given opinions upon questions relating to matters before the Council involving the Free City of Danzig, the Council appears to have adopted the opinion, though in one case (No. 15) the Council limited itself to taking note of the opinion, the need for further action being eliminated by agreement reached between the parties.⁵⁴ In the two cases where the Court has given opinions on questions relating to matters before the Council under treaty provisions other than those already referred to, the Council appears to have formally adopted one opinion and taken note of the other.⁵⁵ It thus appears that opinions relating to matters that have been before the Council for action have been uniformly accepted and have provided the legal basis for the action taken where the matter has not been withdrawn from the consideration of the Council by the action of the interested parties.

International organs, other than the Council, which have submitted through the medium of the Council requests for advisory opinions, have uniformly

⁵¹ League of Nations Official Journal, 1923, pp. 1335-1337.

⁵² *Ibid.*, p. 1337.

⁵³ Though the final settlement reached in the German Settlers in Poland case may not have provided full compensation for those illegally expelled from their properties, it was based on full acceptance on points of law of the opinion of the Court. See League of Nations Official Journal, 1924, pp. 359-366, 548, 926-927. The question of the nature of the action to be taken by the Council to give effect to Poland's legal obligations was not before the Court. In the Acquisition of Polish Nationality case, the opinion was adopted by the Council, though the final settlement reached involved elements of compromise. *Ibid.*, 1923, pp. 1333-1335; League of Nations Treaty Series, XXXII (1925), pp. 333-353; Hudson, *op. cit.*, p. 459. Opinion No. 19 (Access to German Minority Schools in Polish Upper Silesia) was expressly accepted by the Council (League of Nations Official Journal, 1931, pp. 1151, 2263), and in the case of No. 26 (Minority Schools in Albania), acceptance was implicit in the action taken (*ibid.*, 1935, pp. 626-627, 1185-1186; 1936, pp. 115-117).

⁵⁴ For No. 11 (Polish Postal Service in Danzig), see League of Nations Official Journal, 1925, pp. 882-887, 1371-1377; No. 15 (Jurisdiction of the Danzig Courts), see *ibid.*, 1928, p. 433; No. 22 (Access to the Port of Danzig for Polish War Vessels), see *ibid.*, 1932, pp. 488-489; No. 23 (Treatment of Polish Nationals in Danzig), see *ibid.*, 1932, pp. 522-523; No. 27 (Constitution of the Free City of Danzig), see *ibid.*, 1936, pp. 121-125.

⁵⁵ Opinion No. 12 (Mosul Question) was adopted by the Council by unanimous vote, excluding the parties to the dispute. League of Nations Official Journal, 1926, pp. 120-129. The Council was not required to take action on Opinion No. 24 (Caphandaris-Molloff Agreement) beyond taking note of the opinion, because of the conclusion of the Athens Agreement of Nov. 11, 1931. *Ibid.*, 1932, pp. 1185-1187.

accepted these opinions and acted upon them in so far as empowered to do so. Thus the opinions given on questions relating to the International Labor Organization have been constantly accepted by the constituent organs of that organization and have provided the basis for action taken. In his report to the fourth session of the International Labor Conference, M. Albert Thomas laid stress on certain practical consequences of Opinion No. 1, and in particular upon certain indications to be derived from the reasoning of the opinion which might be usefully borne in mind by states in selecting their workers' delegates.⁵⁶ In the same report, he analyzed Opinions Nos. 2 and 3, noted that the position maintained by the International Labor Organization had received legal confirmation, and stated that the Office would proceed with the task it had undertaken.⁵⁷ The Court's opinion to the effect that Danzig was incapable of becoming a member of the International Labor Organization (No. 18) was accepted and followed.⁵⁸ Opinion No. 25 was accepted by the International Labor Conference in adopting the revised convention in June, 1934, concerning employment of women during the night.⁵⁹

The action of other international organs on advisory opinions has not been as clear-cut as that of the International Labor Organization. At the time Opinion No. 10 (Exchange of Greek and Turkish Populations) was communicated to the Mixed Commission set up under the Lausanne Convention of January 30, 1923, for the exchange of Greek and Turkish populations, the two governments were engaged in negotiations covering a number of matters, including the definition of "*établis*." The agreement reached on this point took the form of a decision of the Mixed Commission of March 19, 1927, which certainly did not correspond with the opinion of the Court. It must be emphasized, however, that the question was considered in the course of these negotiations "no longer as a legal question but as a political question subject to solution by concession and compromise."⁶⁰ Opinion No. 16 (Interpretation of the Greco-Turkish Agreement of 1926) was communicated to the President of the Mixed Commission in the course of negotiations for the final liquidation of all pending questions which were being carried on at Angora. Consequently, the opinion "did not serve any practical purpose."⁶¹ In both cases the matter in controversy had really been taken out of the hands of the commission by the action of the parties. As regards Opinion No. 17 (Greco-Bulgarian "Communities"), the delegates of both the Greek and Bulgarian Governments on the Mixed Emigration Commission recognized the soundness of the opinion, but when it came to drafting a decision enabling the commis-

⁵⁶ P.C.I.J., Series E, No. 1, p. 188. The opinion has guided governments in making appointments under Art. 389 of the Statute, and Conferences in examining credentials. The International Labor Organization: The First Decade (1931), p. 59.

⁵⁷ P.C.I.J., Series E, No. 1, p. 193.

⁵⁸ The International Labor Organization: The First Decade, p. 47.

⁵⁹ P.C.I.J., Series E, No. 10, pp. 128-129.

⁶⁰ Ladas, *The Exchange of Minorities: Bulgaria, Greece and Turkey* (1932), pp. 408-409.

⁶¹ *Ibid.*, p. 539.

sion to apply the principles laid down in the opinion, it was apparent that the delegates of the two governments gave different interpretations to important passages of the opinion. In the circumstances, it was decided that the neutral members of the commission should find a practical solution, "taking the Court's opinion as a basis, and adopting the same generous methods as had been employed by the Commission in regulating the liquidation of private property."⁶² The solution finally adopted would seem to have been broadly in conformity with the opinion of the Court.⁶³ Opinion No. 14 on the jurisdiction of the European Commission of the Danube, though requested by and communicated to the chairman of the Advisory and Technical Committee for Communications and Transit, was in reality requested on the basis of an agreement between the Governments of France, Italy, Great Britain and Rumania, and the action taken on the opinion was by these governments. The committee, in other words, acted as an intermediary as did the Council.

Finally, we have to consider the action taken by states upon the advisory opinions of the Court, which, admittedly, in many cases, is difficult to distinguish from the action of international organs, particularly where action by the latter requires unanimous consent. We may first distinguish between those cases where the international organ soliciting the opinion, directly or indirectly, has power of decision in the matter at issue by less than unanimous vote, and those cases where no such power of decision exists. Where the international organ has power of decision, and adopts the opinion of the Court, that becomes binding upon states by virtue of the power to decide possessed by the international organ in question. Thus opinions relating to the International Labor Organization, once adopted by the Governing Board and the Conference, become binding upon member states to the extent that those organs have power to determine conference agenda and to draft and adopt resolutions and conventions. In the Mosul case, the question presented to the Court was whether the Council had the power of final decision, and, if so, under what conditions, by less than a unanimous vote. The Turkish representative maintained that a unanimous vote of the Council, including the parties to the dispute, was necessary to any binding interpretation of the Council's power, and therefore to the adoption of the Court's opinion. The Council took the view that it could take a decision by a unanimous vote, the parties excluded, thereby deciding that it could proceed on the legal basis of the Court's opinion in accepting that opinion.⁶⁴ The Turkish Government refused to accept the decision, and therefore refused to accept the opinion of the Court. The treaty of June 5, 1926, between the United Kingdom, Iraq and Turkey, fixed the boundary line at the so-called Brussels line adopted by the Council, with a slight modification, but there was no

⁶² Report of the Commission, December, 1931, in P.C.I.J., Series E, No. 8, p. 213.

⁶³ *Ibid.*, pp. 213-214. Compare with P.C.I.J., Series B, No. 17, especially pp. 33-35.

⁶⁴ League of Nations Official Journal, 1926, p. 128.

reference in the treaty to the Council decisions of December 16, 1925, and March 11, 1926.⁶⁵

Of more significance is the distinction to be made between those cases where the request for an opinion has been made with the consent of states directly interested in the dispute or affair under consideration and those where such consent has not been forthcoming. It is to be noted that in all except three cases the request for an opinion has been made with the consent of the interested states. The Russian Soviet Government refused categorically to participate in the League proceedings on the Eastern Carelia question, and in a telegram to the Court protested against the propriety of League and Court action.⁶⁶ For reasons already described, the Court refused to give an opinion on the question put to it. The Council resolution providing for a request to the Court for an advisory opinion on the question of the interpretation of Article 4 of the Polish Minorities Treaty was adopted over the protest of Poland, which insisted that points of view of other states similarly situated should be heard.⁶⁷ When the opinion of the Court came before the Council for adoption, the Polish representative abstained from voting.⁶⁸ The matter was finally settled by direct agreement between Poland and Germany, the Court's interpretation being incorporated in substance into the agreement. In the Mosul case, while it is not clear from the records of the Council whether Turkey agreed or not to the request for an advisory opinion from the Court, the Turkish representative did make it clear that he would not consider such an opinion as affecting in any way the rights of Turkey.⁶⁹ We have already seen that the Turkish Government refused to accept the opinion.

In all the other cases where states have had interests of such a nature as to entitle them to representation on the Council under Article 4, paragraph 5, of the Covenant, the reference to the Court has been made with the consent of the parties. In some cases, consent has taken the form of a direct agreement between the parties, as in No. 4 (Tunis-Morocco Nationality Decrees) and No. 14 (Jurisdiction of the European Commission of the Danube). In other cases, the consent has been expressed through formal statements before the Council, as in No. 8 (Polish-Czechoslovakian Boundary) and No. 9 (Monastery of Saint-Naoum). In other cases, consent has been expressed through acceptance of the report or resolution submitted to the Council proposing that a request be addressed to the Court for an advisory opinion.

That consent to a request for an opinion does not legally carry with it any obligation to accept the opinion itself was emphasized by M. Titulesco in his statement on the proposal before the Council to request an advisory opinion on the question of the jurisdiction of the European Commission of the Danube.⁷⁰ In two cases, however, the interested states have undertaken in

⁶⁵ League of Nations Treaty Series, LXIV (1927), pp. 380-395.

⁶⁶ P.C.I.J., Series B, No. 5, pp. 12-14.

⁶⁷ League of Nations Official Journal, 1923, pp. 934-935.

⁶⁸ *Ibid.*, pp. 1334-1335. ⁶⁹ *Ibid.*, 1925, pp. 1377-1382. ⁷⁰ *Ibid.*, 1927, pp. 151-152.

advance to accept the opinion of the Court.⁷¹ In these cases, the opinions were accepted without question. In other cases, the situation has not been at times so clear. In No. 6 (German Settlers in Poland), the Polish representative on the Council refused to commit his government to acceptance of the Court's opinion when the matter was under consideration by the Council.⁷² As we have seen, however, the settlement finally reached adopted the opinion of the Court as its legal basis. In No. 7 (Acquisition of Polish Nationality), the Polish representative abstained from voting on the Council resolution which proposed the adoption of the Court's opinion.⁷³ The final settlement reached on the bases of direct negotiations between Germany and Poland constituted an adoption of the opinion with certain qualifications.⁷⁴ As has already been explained, Opinions Nos. 10 and 16 were practically without effect, as the parties proceeded on the basis of negotiations to substitute in each case a political for a legal settlement. Opinion No. 17 was, as we have seen, accepted by the parties as the basis of a final settlement, though in its practical application "generous methods" were used.

The reception given by the interested parties to Opinion No. 14 (Jurisdiction of the European Commission of the Danube) deserves special attention. When the resolution proposing that an advisory opinion be requested was before the Council, the Rumanian representative specifically called attention to the fact that such an opinion, unlike a judgment, was not obligatory, and reserved the rights of his state. This declaration was referred to by M. Antoniadu when the Council had under consideration the proposal to communicate the opinion of the Court, which was adverse to Rumania's contention, to the chairman of the Advisory and Technical Committee for Communications and Transit.⁷⁵ After extended negotiations had failed to produce a definitive agreement, Rumania maintaining its original position, a *modus vivendi* was finally agreed to on May 27, 1933, defining the jurisdiction of the European Commission of the Danube. By an appended declaration, it was made clear that with the termination of the *modus vivendi*, each of the four governments (Rumanian, British, French and Italian) reserved the right "to revert to its previous legal position."⁷⁶ While the Rumanian Government thus appears to have refused to accept the opinion of the Court, it is to be noted that this action was taken following an express statement before the Council reserving the rights of Rumania at the time the proposal to request the Court to give an opinion was under consideration.

The remaining opinions relating to actual disputes or matters before the

⁷¹ No. 4 (Tunis-Morocco Nationality Decrees) and No. 8 (Jaworzina Boundary). In No. 8 the undertaking was not as express as in No. 4, but seems nevertheless to have been given.

⁷² League of Nations Official Journal, 1923, p. 1333; 1924, p. 359.

⁷³ *Ibid.*, 1923, pp. 1334-1335.

⁷⁴ League of Nations Treaty Series, XXXII (1925), p. 331 *et seq.*; Hudson, *op. cit.*, p. 459.

⁷⁵ League of Nations Official Journal, 1928, pp. 399-400.

⁷⁶ P.C.I.J., Series E, No. 9, pp. 115-117.

Council in its supervisory capacity appear to have been definitely accepted by the interested states. Opinion No. 8 (Polish-Czechoslovakian Boundary) was accepted by the two parties "in its entirety."⁷⁷ In the Monastery of Saint-Naoum case, the Albanian Government, and apparently the Yugoslav Government, though under protest, accepted the opinion of the Court.⁷⁸ Opinions Nos. 11, 15, 22, and 23, relating to relations between Poland and the Free City of Danzig were accepted by both parties as defining the legal relations between them.⁷⁹ A Council report adopting Opinion No. 19 (Access to German Minority Schools in Upper Silesia) was accepted by the Polish representative, who announced that Poland had already complied with the opinion.⁸⁰ Opinion No. 21 was apparently accepted by both Lithuania and Poland, as their representatives joined in accepting the Council's report. Opinion No. 24 was likewise accepted, though the Greek and Bulgarian representatives indicated some difference of opinion as to the significance to be attached to the reasoning of the Court.⁸¹ Opinions Nos. 26 and 27 were accepted by Albania and Danzig respectively.

Further evidence that the opinions of the Court are ordinarily accepted by interested states, and what is more, that there is a feeling of obligation to do so in the absence of express statement to the contrary, is to be found in views expressed in the Council on proposals, not adopted, to request the Court to give advisory opinions. When the proposal was made in the Council that the Hungarian Optants question be referred to the Court for an opinion, the Rumanian representative (M. Titulesco) objected.⁸² Though certain members of the Council felt that the proposal could be adopted without the consent of Rumania, it was deemed unwise to do so.⁸³ When the matter came before the Council again in 1928, following the action of Rumania in withdrawing the Rumanian member from the Mixed Arbitral Tribunal, the proposal was repeated. The Rumanian representative (M. Titulesco) again opposed, and part of his argument was highly significant. "Such a procedure," he said, "would render international justice compulsory, whereas it is only optional and exists only subject to the consent of the parties. We are all aware of the moral value attaching to an opinion of the Court, and that it is somewhat difficult not to defer to such an opinion." After quoting the report of the Committee of Three appointed by the Court in 1927 to consider the matter of national judges, he continued:

⁷⁷ League of Nations Official Journal, 1924, pp. 345-348, 356-358.

⁷⁸ *Ibid.*, pp. 1369-1372. The line fixed by decision of the Conference of Ambassadors in accordance with the opinion was later modified by agreement of the parties so as to give the monastery to Yugoslavia, following the invocation by Yugoslavia of a new fact of a decisive nature. P.C.I.J., Series E, No. 2, pp. 137-138.

⁷⁹ Opinion No. 15 was accepted in advance of Council consideration, and an agreement was signed in conformity with the opinion. League of Nations Official Journal, 1928, p. 433. The conclusions of No. 23 were incorporated into the agreement of Nov. 26, 1932. P.C.I.J., Series E, No. 9, p. 118.

⁸⁰ League of Nations Official Journal, 1931, p. 2263.

⁸¹ *Ibid.*, 1932, pp. 1185-1187.

⁸² *Ibid.*, 1923, p. 608.

⁸³ *Ibid.*, pp. 904-908.

In face of the constant practice of the Council and this interpretation of the Court itself, I am obliged to say that, if the Covenant leaves me the right to refuse arbitration except with my own consent, you cannot by a side-track oblige me to go to arbitration by means of an advisory opinion, in view of the fact that the Court itself declares that, in its view, an opinion amounts to the same thing as a decision.⁸⁴

Following the Corfu incident, the proposal was made that certain questions of law should be referred to the Court for an opinion. M. Salandra (Italy) opposed on the ground that while theoretically the Council would remain free to accept or reject the opinion, in practice it would be difficult for the Council to have a different opinion.⁸⁵ When the case of the cruiser *Salamis* was before the Council in 1927, it was argued by M. Scialoja that the question of requesting an advisory opinion was simply a matter of procedure which could be decided by a majority opinion and that the Council was always free to accept or not accept the opinion given. M. Titulesco contended that in asking for an opinion the Council in actual fact ceased to deal with the question and substituted for itself the Permanent Court, and that for that reason unanimity was necessary.⁸⁶ It is significant that in the absence of unanimous agreement a request for an advisory opinion was not made. In the matter of the Finnish claims against Great Britain, before the Council in 1932, it was suggested by a committee of the Council that certain legal questions be referred to the Court for an opinion. Lord Robert Cecil took the position that Great Britain was not bound to submit the matter to the Court or to arbitration, and objected to a proposal for achieving arbitration by somewhat circuitous means.⁸⁷ It is quite clear that the view that a request for an advisory opinion requires a unanimous vote of the Council, or at least the same vote that is required in the circumstances for a decision of the Council, is based in large measure on the consideration that an opinion of the Court is usually treated as conclusive and, in fact, should be so regarded in view of the authority of the tribunal which gives it.

IV

From an examination of the nature of the questions submitted for advisory opinions, the practice of the Council in requesting them, the practice of the Court in giving them, and the action taken upon the opinions that have been given, it seems clear that these opinions frequently have in practice a character quite different from their theoretical nature.

The advisory opinion, as it has developed in English-speaking countries, has been utilized as an aid to the administrative and legislative authorities in advance of litigation and for the better assurance of the legality of proposed administrative or legislative measures.⁸⁸ It had its origins in England in the relations which existed between the judges and the Crown and the

⁸⁴ *Ibid.*, 1928, pp. 424-425.

⁸⁵ *Ibid.*, 1923, pp. 1339-1340.

⁸⁶ *Ibid.*, 1927, pp. 1473-1474.

⁸⁷ *Ibid.*, 1932, pp. 507-508.

⁸⁸ Borchard, *Declaratory Judgments* (1934), p. 51.

House of Lords.⁸⁹ The practice spread from there to the United States and the Dominions and has recently been adopted in many other countries.⁹⁰ In national law, the usual practice is as follows: The opinion is requested by a coördinate branch of the government, the executive or the legislative. It usually relates to a proposed measure or action, without reference to specific facts. There are no parties or litigants in the commonly accepted sense. Arguments are often not heard. The answers are given by the judges collectively, or *seriatim*. The opinions are not binding, though the views expressed have considerable weight in later litigation.⁹¹

It is obvious that opinions thus given differ markedly from the great majority of the advisory opinions of the Permanent Court. In form they are similar, but once we go back of the form to the actual substance of things, important differences appear. In the first place, opinions that are given by the Court relate in the majority of cases to actual disputes, with the result that there are parties with conflicting views and interests. Under these circumstances, the procedural form that is used becomes simply a device for getting questions before the Court which the interested states for one reason or another have not chosen to bring directly. In fact, the questions submitted to the Court for advisory opinions have, in the great majority of cases, been questions of the same kind as have been submitted to the Court by application, or to the Court or arbitral tribunals by special agreement.⁹²

In the second place, the questions upon which advisory opinions have been sought have related in a considerable number of cases to specific situations of fact. It is true, of course, that the questions have in most cases been more generally stated than have questions coming before domestic courts in the course of actual litigation. It must be borne in mind, however, that this has been characteristic of international litigation, and that a considerable number of the questions that have been submitted to arbitration or judicial settlement in the past have been of an equally general character, especially where they have related to the interpretation of treaty provisions.⁹³ It is true, of course, that the Court has expressed its unwillingness to enter into the determination of facts, but that does not mean that the questions submitted have not related many times to definite situations of fact.

⁸⁹ Frankfurter, "Advisory Opinions," in *Encyclopedia of the Social Sciences*, Vol. I, pp. 475-476.

⁹⁰ *Ibid.*, pp. 476-477; Hudson, *The Permanent Court of International Justice* (1925), pp. 136-152; and Hudson, "*Les avis consultatifs de la Cour Permanente de Justice Internationale*," *Académie de Droit International, Recueil des Cours*, 1925, III, pp. 382-400.

⁹¹ Frankfurter, *loc. cit.*, pp. 477-478.

⁹² Compare, for example, the questions submitted to the Court for judgment in the cases of Minorities in Upper Silesia, Statute of Memel, and Jurisdiction of the Oder Commission, with the questions submitted for advisory opinions in the cases of German Minorities Schools in Upper Silesia, Jurisdiction of the European Commission of the Danube, and the numerous Danzig cases.

⁹³ See, for example, the questions submitted to the decision of the Hague Tribunal in the Japanese House Tax, the Muscat Dhows, and the North Atlantic Fisheries arbitrations.

In the third place, the Court, in its proceedings, has definitely attempted to assimilate its advisory to its contentious procedure, with the result that proceedings on requests for advisory opinions are hedged about by the same judicial safeguards, especially where the question relates to an actual dispute between parties, which go to command respect for the judgments of the Court. And finally, not only are opinions read in open court, as judgments are, but in practice they have had quite different effects from those attached to advisory opinions in national law. In addition to having value as precedents, equal in the opinion of some to that to be attached to judgments,⁹⁴ they have in fact not only been generally accepted by the international organs, directly or indirectly, requesting them, but they have also been accepted, save in certain exceptional cases, by the interested states as conclusive on the questions of law on which they have been given.

In certain respects, the great majority of the advisory opinions of the Permanent Court have a closer resemblance to the declaratory judgments of national law than to the advisory opinions of national law. The distinctive feature of the declaratory judgment in national law, as compared with the ordinary court judgment or decree, is the absence of the coercive element.⁹⁵ The purpose of an action for a declaratory judgment is to secure the definition of a right, not the execution of any act either in the way of specific performance or reparation. That, as it has worked out in practice, has been the purpose and effect of requests to the Permanent Court for advisory opinions. In other respects, the action for declaratory judgment does not differ from the action for ordinary judgment or decree, except that actions may be brought under certain circumstances where no other form of relief is available. We have already seen that in most respects the advisory procedure of the Court has been assimilated to the Court's contentious procedure. Furthermore, while in form the questions that have come before the Court for advisory opinions have been addressed to it by the Council, in fact the majority of the questions have not only related to actual disputes but have been submitted with the consent of the parties, either as expressed in direct agreement, or as expressed in the unanimous vote of the Council. The fact that such requests for opinions have not originated as a rule in the application of one state, is not surprising in view of the fact that, except where the Permanent Court has compulsory jurisdiction, submission can only be made, as in the case of arbitration generally, by agreement of the parties.

It is, however, dangerous to attempt to press too far any analogy drawn between institutions and practices of national law and those of international law. The peculiar facts and needs of international society have given rise to institutions and practices that are unique. Thus it is with the advisory opinions of the Court. If there were an international legislature possessing

⁹⁴ De Visscher, "*Les avis consultatifs de la Cour permanente de Justice internationale*," *Académie de Droit International, Recueil des Cours*, 1929, I, p. 60.

⁹⁵ Borchard, *Declaratory Judgments*, pp. 23-24.

power to bind the states of the world, and an international executive with power to enforce the international will as expressed in law and preserve the peace, we might expect international advisory opinions to follow closely the national analogy. But the Assembly and Council are not that. They are primarily organs for the promotion of undifferentiated coöperative action, action which ranges indiscriminately over the fields, more specialized in national law, of law-making, law-enforcement, law-interpretation, and maintenance of the peace. So far as disputes are concerned, their action is in the direction of conciliation and of collective mediation. The Permanent Court represents an attempt at specialization of function in the international field. It is interesting to note that it was the courts which first appeared with specialized functions in the history of English institutional development.

Where the questions referred to the Court have arisen in connection with the Council's action as an executive agency, no actual dispute between states being involved, or where the questions, though referred to the Court by the Council, have arisen in connection with the activity of some international organ not engaged in the settlement of international disputes but in the promotion of international coöperation in law-making and administration, there being no actual dispute between states in the commonly accepted sense of the term, opinions given by the Court take on a character closely akin to that of advisory opinions in national law. Even here, the judicial safeguards employed by the Court, the fact that there usually are interested states, and the possibility that the situation may develop into an actual dispute between states,⁹⁶ give to the opinions of the Court a more conclusive character than is usually enjoyed by advisory opinions in national law.

Where the questions referred to the Court have arisen in connection with actual disputes before the Council, or before some other international organ, the Council acting only as an intermediary, the opinions of the Court assume a somewhat different character. In such cases, the Council, or the international organ which is acting through the Council, exercises a dual mediatory function, first, in getting agreement between the parties upon the reference and upon the text of the question to be referred, and secondly, in bringing about a final settlement of the dispute, in view of the determination of legal rights given by the Court in its opinion.⁹⁷ With the opinion coming to be

⁹⁶ The German Settlers in Poland, Acquisition of Polish Nationality, and Minority Schools in Albania cases, for example.

⁹⁷ The agreement to refer may be reached by the parties to the dispute directly, the Council being asked to act as intermediary for the parties themselves in referring the question to the Court. In their report to the *Institut de Droit International* at Stockholm in 1928, MM. de Lapradelle and Negulesco suggested the use of the term "*arbitrage consultatif*" to describe this procedure. *Annuaire de l'Institut de Droit International*, 1928, p. 453. At its 1937 session, the *Institut* adopted a resolution recommending that where states do not find it possible to submit a dispute to the Court by contentious procedure, they bring it before the Council requesting that the Court be asked to give an opinion on the legal points involved. *Revue de Droit International et de Législation Comparée*, 1937, p. 830.

EDITORIAL COMMENT

CONFISCATORY EXPROPRIATION

The issue between the Governments of the United States and Mexico concerning the conditions under which, as tested by international law, the expropriation of agrarian properties of aliens may be properly effected by the latter, is of utmost importance and goes to the very root of suppositions and conceptions that have long prevailed in this and other countries. The controversy has also produced a secondary issue concerning the existence of a contractual obligation on the part of Mexico to adjust by arbitration a dispute with the United States which it has been found impossible to settle by diplomacy. The opposing contentions merit analysis.¹

The primary issue may be stated thus. The Government of the United States contends that expropriation unaccompanied by provision "for adequate, effective, and prompt payment for the properties seized"² is internationally illegal. That of Mexico contends that there is no rule universally accepted in theory or carried out in practice which makes obligatory the payment of immediate compensation, or even of deferred compensation, for expropriations of a general and impersonal character.³ It is declared that while "Mexico admits, in obedience to her own laws, that she is indeed under obligation to indemnify in an adequate manner," the Mexican doctrine is "that the time and manner of such payment must be determined by her own laws."⁴ The Mexican position is in substance that when an alien, however lawfully, acquires land within Mexican territory, he does so subject to the condition that the territorial sovereign, when embarked upon a policy

¹ The views of the two Governments are set forth in communications of Mr. Hull, Secy. of State, to the Mexican Ambassador at Washington, July 21, 1938, Dept. of State, Press Release, No. 354, July 21, 1938; Mr. Hay, Mexican Minister of Foreign Relations, to the American Ambassador at Mexico City, Aug. 3, 1938, translation given to American press, Aug. 4, 1938; Mr. Hull, Secy. of State, to the Mexican Ambassador at Washington, Aug. 22, 1938, Dept. of State, Press Release, Aug. 25, 1938; Mr. Hay, Mexican Minister of Foreign Relations to the American Ambassador at Mexico City, Sept. 2, 1938, *id.*, No. 413, Sept. 3, 1938. These notes are printed in the Supplement to this JOURNAL, p. 181.

Concerning the expropriation and seizure by the Mexican Government of oil properties belonging to American citizens, which is not here discussed, see Frederic R. Coudert, "The Mexican Situation and Protection of American Property Abroad under International Law," address before American Bar Association at Cleveland, July, 1938.

² Secy. Hull's note of Aug. 22, 1938.

³ Mr. Hay's note of Aug. 3, 1938. In the same note it is added: "There does not exist, in international law, any principle universally accepted by countries, nor by the writers of treatises on this subject, that would render obligatory the giving of adequate compensation for expropriations of a general and impersonal character." It may be suggested in this connection that the existence of a principle of international law is not necessarily dependent upon universality of acceptance. The dissent of a few states from what the great body of states acknowledges to be the law cannot modify its character as such, still less destroy its value in testing the propriety of state conduct.

⁴ *Id.*

of social betterment through agrarian reform, may have recourse to expropriation on such terms as it may devise so long as they are impartial in application as between nationals and aliens; and it is contended that the future of the nation when committed to such a policy may not be halted by the impossibility of paying immediately the value of properties belonging to a small number of foreigners seeking "only a lucrative end."⁵

Is this a correct proposition? The test is to be found in the practice of states as they have developed their international law. A significant feature of that development has been the widespread acceptance of the view that there is an obligation between state and state demanding respect for acquisitions of property by the nationals of one validly acquired within the territory of another. Such acceptance has been natural because of its complete harmony with the conception prevailing within and revealed by the domestic laws and institutions of interested states. It is thus irrelevant whether at the moment the soundness of that conception is being challenged in Mexico or in a few other countries that may be restive under restraints which it entails. The point to be emphasized is that the international obligation to respect alien-owned private property has been and was so strongly woven into the fabric of international law when American citizens acquired agrarian properties in Mexico, that it may be reasonably claimed that the territorial sovereign thereof in permitting them (and perhaps in some instances encouraging them) to make such acquisitions, gave, by necessary implication, its assurance that there would be no taking that would be without compensation. It was the condition of the law of nations and the character of the thought and practices responsible for it, that sustain such a contention. They justify the assertion that when the acquisitions were made neither the acquirers nor their country had reason to suppose that the territorial sovereign would have recourse to a form of expropriation that ignored that assurance and involved bad faith.⁶

It must be acknowledged that the alien acquirer of immovable property is to be deemed to anticipate that the territorial sovereign may not unreasonably and without violating any obligation towards the state of which the alien is a national, exercise a broad control over the uses to which the property may be put, and the terms under which continued enjoyment may be had. Moreover, such assertion of control may serve to diminish values and make onerous the retention of ownership. Instances need not be cited. When, however, that sovereign essays to divest the owner of title without adequate compensation, not by way of a penalty duly imposed on account of a violation of the local law, but simply as the normal consequence of a program of social reform, the action is of a different kind and marks an abuse of

⁵ Mr. Hay's note of Aug. 3, 1938.

⁶ See the views of Chief Justice Marshall in discussing the reasons for the immunity of a foreign public ship from the jurisdiction of the United States, in the *Schooner Exchange v. McFaddon*, 7 Cranch 116, 144, and 146.

power.⁷ To defend it is to maintain that the law of nations yields to the individual state freedom to confiscate the property of the alien (as well as of the national) if through appropriate legislative enactment it duly manifests its will to do so. Secretary Hull did no injustice to the Mexican pretension when he declared on August 22:

Reduced to its essential terms, the contention asserted by the Mexican Government, as set forth in its reply and as evidenced by its practices in recent years, is plainly this: That any government may, on the ground that its municipal legislation so permits, or on the plea that its financial situation makes prompt and adequate compensation onerous or impossible, seize properties owned by foreigners within its jurisdiction, utilize them for whatever purpose it sees fit, and refrain from providing effective payment therefor, either at the time of seizure or at any assured time in the future.

I do not hesitate to maintain that this is the first occasion in the history of the Western Hemisphere that such a theory has been seriously advanced. In the opinion of my government, the doctrine so proposed runs counter to the basic precepts of international law and of the law of every American republic, as well as to every principle of right and justice upon which the institutions of the American republics are founded. It seems to the Government of the United States a contention alien to the history, the spirit and the ideals of democracy as practiced throughout the independent life of all the nations of this continent.⁸

In support of its position, the Mexican Government further contends that the Government of the United States "demands in reality, a special privileged treatment which no one is receiving in Mexico," and is thus pressing for an unequal treatment that is at variance with the "principle" of equality between nationals and foreigners. It is declared that "the foreigner who voluntarily moves to a country which is not his own in search of a personal benefit, accepts in advance, together with the advantages which he is going to enjoy, the risks to which he may find himself exposed."⁹ This is but a half-truth. When a state metes out to its nationals treatment that falls below what the international standard of the time makes or causes to be requisite, it is not permitted to test the propriety of its conduct towards aliens by the character of its domestic practices.¹⁰ The numerous conven-

⁷ Nor does such action gain support from the latitude as to terms of compensation which a belligerent may be expected to claim when as a matter of military necessity, as on grounds of self-defense, it proceeds to expropriate alien property situated within a war zone.

⁸ He added: "If such a policy were to be generally followed, what citizen of one republic making his living in any of the other twenty republics of the Western Hemisphere could have any assurance from one day to the next that he and his family would not be evicted from their home and bereft of all means of livelihood? Under such conditions, what guarantees of security could be offered which would induce the nationals of one country to invest savings in another country, or even to do ordinary business with the nationals of another country?"

⁹ Statement of Mr. Hay, Aug. 3, 1938.

¹⁰ Declared Mr. Root, April 28, 1910: "The rule of obligation is perfectly distinct and settled. Each country is bound to give to the nationals of another in its territory the benefit of the same laws, the same administration, the same protection, and the same redress

tions, bipartite and multipartite, that make reference to the equality of treatment with respect to privileges to be enjoyed by nationals and aliens do not contemplate that the latter are to be subjected with impunity to treatment that is at variance with the requirements of the international standard in case a contracting party departs from it in dealing with its nationals.

Secretary Hull disclaimed, however, having requested privileged treatment for American citizens, declaring that the "doctrine of equality of treatment, like that of just compensation" was of ancient origin. But he protested against its invocation as a "ground of depriving and stripping individuals of their conceded rights," implying that there was in the instant case impropriety in dealing with Mexicans and Americans alike, and that the treatment accorded the former could not be employed as a test of the obligation towards the latter.¹¹ In reality he was demanding, as did his predecessor, Secretary Root, in 1910, that the test of that obligation should be sought and found in an international standard reflecting the common opinion of the international society. Yet the form of his statement led the Mexican Government, in its rejoinder of September 2, 1938, to assert in substance that the rights of the individual as such were not attributable to international law but to the domestic law, with the intimation that in dealing with its own nationals (and by inference also with aliens) the validity of its achievement must be found in the domestic law.¹²

for injury which it gives to its own citizens, and neither more nor less; provided the protection which the country gives to its own citizens conforms to the established international standard.

"There is a standard of justice very simple, very fundamental, and of such general acceptance by all civilized countries as to form a part of the international law of the world. The condition upon which any country is entitled to measure the justice due from it to an alien by the justice which it accords to its own citizens is that its system of law and administration shall conform to this general standard. If any country's system of law and administration does not conform to that standard, although the people of the country may be content and compelled to live under it, no other country can be compelled to accept it as furnishing a satisfactory measure of treatment to its citizens." (Proceedings, Am. Soc. Int. Law, 1910, pp. 16, 20-21.)

¹¹ Note of Aug. 22, 1938. He said in this connection: "It is contended, in a word, that it is wholly justifiable to deprive an individual of his rights if all other persons are equally deprived, and if no victim is allowed to escape. In the instant case it is contended that confiscation is so justified. The proposition scarcely requires answer. . . . The statement in your Government's note to the effect that foreigners who voluntarily move to a country not their own, assume, along with the advantages which they seek to enjoy, the risks to which they may be exposed and are not entitled to better treatment than nationals of the country, presupposes the maintenance of law and order consistent with principles of international law; that is to say, when aliens are admitted into a country the country is obligated to accord them that degree of protection of life and property consistent with the standards of justice recognized by the law of nations."

¹² Declared Mr. Hay: "Mexico has maintained that the so-called rights of man, among others, the right to property, with its modalities, are not principles of international law, but that their validity is derived from municipal law. The fact is not disregarded that the

At the present time it would be difficult to maintain that, as tested by the practice of states, there is, in the absence of agreement, an international obligation resting upon a state, when embarking upon a policy of social or other reform, to deal with the individual who is its national in a particular way.¹³ This circumstance emphasizes the unfortunate effect of introducing the doctrine of equality of treatment as between nationals and aliens in international discussions concerning the propriety of state conduct towards the latter. If that conduct is to be tested by an international standard, it becomes wholly irrelevant whether the national is dealt with according to any less exacting one. If the doctrine of equality of treatment be invoked or referred to, the limitations of it need to be explained and accentuated. By itself it offers no helpful guidance.

In his note of July 21, 1938, Secretary Hull proposed the submission to arbitration pursuant to the provisions of the General Treaty of Arbitration, signed at Washington, January 5, 1929, of the question whether there had been compliance by the Mexican Government with the rule of compensation as prescribed by international law in the case of American citizens whose farm and agrarian properties in Mexico had been expropriated after August 30, 1927, and if not, the amount of, and terms under which, compensation should be made by the Mexican Government.¹⁴ The Mexican response was ingenious, if unconvincing. It was declared that arbitration under the Washington Treaty should be reserved for irreducible differences in which the juridical principle under discussion or the act giving origin to the arbitration were of such character that the two peoples at variance did not find a more obvious way of coming to an agreement. "Such," it was said, "is not the present case, for while it is true that Mexico does not consider that payment of an indemnification for properties which the state expropriates on grounds of public utility is an invariable and universal rule of international law, it is also true that Article 27 of her Constitution ordains payment in such cases and, therefore, the Mexican Government has never denied such obligation." Therefore, it was declared that there was no subject-matter for the arbitration proposed. It was added that arbitration was unnecessary with respect to the conditions under which payment should be made, and would be improper under the terms of the treaty "since the procedures of execution for

contrary opinion upheld by your Government has defenders, but it must be admitted that the point of view of Mexico, far from constituting an unusual theory, lacking substance and without a juridical basis, has in its turn the most solid supports."

¹³ Declared Secy. Hull in his note of July 21, in reference to the Mexican program: "We cannot question the right of a foreign government to treat its own nationals in this fashion if it so desires. This is a matter of domestic concern. But we cannot admit that a foreign government may take the property of American nationals in disregard of the rule of compensation under international law."

¹⁴ The primary question for adjudication thus appeared to call for a decision concerning what the rule of international law might be.

the carrying out of obligations already recognized by Mexico can not be a subject for arbitration and would have to be established in accordance with her economic conditions."¹⁵

In his rejoinder of August 22, 1938, Secretary Hull emphasized the fact that the provisions of the Mexican Constitution and laws had been already "negatived in practice" and in the latest Mexican note seemed to have been "abrogated in practical effect"; and he adverted to the fact that the issue, in the mind of his Government, had become "impossible to adjust by diplomacy."¹⁶ He declared that the Government of the United States maintained that in the treatment of its nationals, the Government of Mexico had "disregarded the universally recognized principles of international law," and that its failure to make adequate, prompt, and effective payment for properties expropriated constituted the breach of an international obligation. "It follows," he said, "that the controversy which has thus arisen is not one which the Mexican Government can refuse to arbitrate upon the ground that its economic situation impedes it from abiding by the principles of international law, or upon the ground that its municipal legislation provides for a different procedure."

Adverting to a Mexican proposal for the appointment of representatives of the two countries to fix within a brief period of time the value of the properties affected and the manner of payment, said to be a part of "a general plan for the carrying out of her obligations in this respect, both in favor of nationals and foreigners,"¹⁷ Secretary Hull belittled the value of continuing discussions of past takings while the Mexican Government proposed to continue the policy of taking property without payment.¹⁸ If, however, the Mexican Government still refused to arbitrate, Secretary Hull, by way of alternative, reiterated a proposal informally made through Undersecretary Welles on June 29, 1938, to which was attached an itemized list of claims of American property owners referred to in that note. That proposal contem-

¹⁵Note of Mr. Hay, of Aug. 3, 1938.

¹⁶According to the first paragraph of Art. I of the Treaty of Washington: "The High Contracting Parties bind themselves to submit to arbitration all differences of an international character which have arisen or may arise between them by virtue of a claim of right made by one against the other under treaty or otherwise, which it has not been possible to adjust by diplomacy and which are juridical in their nature by reason of being susceptible of decision by the application of the principles of law."

¹⁷The proposal was set forth in the Mexican note of Aug. 3, 1938.

¹⁸Note of Aug. 22, 1938. He asked, in this connection: "In tendering the proposal so made, is the Government of Mexico prepared to agree that no further taking will take place without payment? Can it hold out any reasonable measures of certainty that a determination of the value of the properties affected and of the manner of payment for them can be had within a brief period of time? Pending the reaching of an agreement between the commissioners on all of these points, will the Government of Mexico set aside sufficient cash in order to assure prompt payment in accordance with the terms of an agreement so reached? Is the Government of Mexico prepared to offer satisfactory commitments on these two points?"

plated the use of a joint commission which in the event of disagreement should be superseded by the decision of an arbitrator.¹⁹

In his note of September 2, 1938, Mr. Hay declared that the Mexican Government found itself legally incapacitated to prevent the application of the agrarian law, a circumstance causing it to "limit itself" in each case to the consideration by commissioners of the "amount and terms of the respective indemnifications." He announced, however, acceptance of the American proposal that—to quote his words—"approval of the value of expropriated lands as well as the terms of payment therefor, be submitted to a commission constituted by one representative of each party," and that in case such representatives should not arrive at an agreement, a third representative chosen by the Permanent Commission then be designated, as established by the Gondra Pact, whose seat was at Washington, and which was composed of the three diplomatic agents who had been accredited there the longest. This suggestion or proposal did not fully respond to the American demands. It failed to intimate that there would be a discontinuance of expropriations without payment; and it failed also to make clear whether or to what extent Mexico was in fact prepared to pay what the commissioners or an umpire might decree to be due to American nationals on account of expropriations already effected. The gulf between the views of the two Governments is thus seemingly still a wide one.

In his latest note, the Mexican Minister of Foreign Relations states that the "discussion" has fortunately "not disturbed the good relations between our Governments and our peoples." He may forget that there can be no really good relations between two countries when the people of the one regard the conduct of the other as both unfair and contemptuous of international law unless or until the latter agrees to defend its course in some international forum, and to abide by the result of the adjudication. No relationship not

¹⁹ He said: "It was then suggested that the amount of compensation, together with any subsidiary questions such as the extent of the area expropriated, be determined by agreement by two commissioners, one appointed by the Government of Mexico, the other by the Government of the United States, and that, in the event of disagreement between the two commissioners regarding the amount of compensation due in any case, or of any other question necessary for a determination of value, these questions be decided by a sole arbitrator selected by the Permanent Commission at Washington provided for by the so-called Gondra Treaty, signed at Santiago, May 3, 1923, to which both our Governments are parties.

"It was likewise suggested that in order to advance a settlement of the matter the Governments of Mexico and the United States name immediately their respective commissioners and request the Permanent Commission to name concurrently the sole arbitrator.

"This Government further proposed that as an indispensable part of the act of expropriation and compensation, the Government of Mexico should set aside monthly in escrow in some agreed upon depository a definite amount for the exclusive purpose of making compensation for expropriated property as and when definite determinations of value have been arrived at in each case; and that should the determination of compensation show a reduction from the amounts now claimed the monthly deposits would be scaled down accordingly."

resting on the rock foundation of fairness can create a friendship between peoples or individuals that is worthy of the name.

CHARLES CHENEY HYDE

GERMANY'S RESPONSIBILITY FOR AUSTRIA'S DEBTS

In an article published in the July number of this JOURNAL,¹ entitled "Questions of State Succession Raised by the German Annexation of Austria," the author of this note summarized the practice and the opinion of jurists regarding the rules of state succession in the matter of the debts of annexed states. Applying these rules to the present case, the author stated his conclusion to be that Germany was bound by the vast preponderance of practice, including her own, as well as by the almost unanimous opinion of the writers on international law, to assume the payment of the foreign debts which Austria owed at the time of her annexation by Germany, or to provide her creditors with some sort of guarantee which would insure them a reasonable prospect of reimbursement. Soon after the article in which this proposition was put forward had gone to the press, the German Reich Minister of Economics, Herr Walther Funk, made a speech at Bremen (June 16), in which he emphatically rejected the validity of this proposition and asserted that "neither by international law nor in the interests of economic policy, nor morally, is there any obligation on the part of the Reich to acknowledge the legal responsibility for Austria's Federal debts."² The reasons advanced by the Minister in support of his conclusion seem so lacking in foundations, legal, economic and moral, that the author of the article in the July number of the JOURNAL feels that he cannot allow those reasons to pass unnoticed.

As reported in the press dispatches, the reasons relied upon by Minister Funk in defense of Germany's irresponsibility for the Austrian debts, fall into three groups: *first*, the inapplicability of the rule of state succession in the case of the self-extinction of a debtor state; *second*, the "political" character of the debts, which, in his opinion, removes them from the category of legal obligations to which the law of state succession applies; and *third*, the existence of certain historical instances in which other states, notably Great Britain, France and the United States, declined to assume responsibility for the payment of the debts of states which they had conquered or annexed. If, therefore, according to the Minister, it was permissible for them to repudiate the debts of states which they had annexed, they cannot justly complain if Germany now adopts the same policy in similar circumstances.

Taking up in turn Herr Funk's several lines of argument, he is reported in the London *Times* summary of his speech to have denied any legal obligation on the part of Germany to assume the payment of Austria's debts, for the

¹ Vol. 32, p. 421 ff.

² A *résumé* of his speech so far as it relates to Germany's obligations in respect to the Austrian debts, together with an analysis by Otto D. Tolischus, Berlin correspondent of the New York Times, will be found in that newspaper for June 17, 1938. A somewhat shorter summary is published in the London Times of June 17, p. 16.

reasons that there is no succession where the debtor state voluntarily extinguishes its own juridical existence by merging itself with another state, by an act representing the "will of the people expressed in peaceful and legal terms," as he claims to have been the fact in the case of the German annexation of Austria. Even if it were true, as he asserts, that the joining of Austria to Germany was a purely voluntary act which represented the freely expressed will of the Austrian people—an assertion which all the world knows to be contrary to the facts—that would be no justification for Germany's refusal, as the successor state, to assume the payment of Austria's debts or to see to it that they are paid by what remains of Austria. So far as is known to the author of this note, no such distinction as he makes between the applicability of the law of state succession in the case of "self-extinguished" and forcibly annexed states has ever been made by any jurist or statesman. In fact, in the majority of cases in which annexing states have assumed the debts of states annexed by them, they have been cases of voluntary annexation, that is, cases of "self-extinction", as Herr Funk would put it. If the validity of his argument were admitted, the law of succession in the matter of debts would apply only in cases of forcible annexation, that is, where the existence of the debtor state was terminated not by its own deliberate and voluntary act but by the act of the annexing state. There appears to be no support for this distinction, either in doctrine, practice, morals, or public policy. It would seem as logical to argue that while the heir of a deceased person may be liable for the latter's debts in case he had been murdered, he would not be, if the deceased came to his death by his own hand.

In the second place, regarding Herr Funk's argument based on the "political" character of the Austrian debts, it is clear that what the Minister had in mind when he characterized the foreign loans to Austria as being "political" rather than "commercial," was the condition which was attached to some of them, that Austria should introduce certain budgetary reforms and economies in her financial administration, and particularly that she should refrain from any engagement which might impair her independence. This latter condition was undoubtedly directed against the proposed *Anschluss* between Germany and Austria, which it was the policy of the governments guaranteeing the loans to prevent. And it was this condition which the Nazis, after having forcibly annexed Austria, seem to think is a good and sufficient reason why Germany may justly repudiate Austria's debts. Herr Funk in his speech even went to the length of asserting that these so-called "political" loans were not really made for the purpose of assisting Austria economically, but in order to prevent her from uniting with Germany.³

Regarding this contention several observations may be made. In the first place, all of the various collectively guaranteed loans made to Austria

³ In the London Times *résumé* of his speech, Herr Funk is reported to have referred to the Dawes and Young "loans" as "political" debts. But since they were in no sense debts of Austria, it is unnecessary in this note to deal with them.

between 1923 and 1933 were made in response to urgent appeals from her government, and their main purpose, especially as to the first loan (the so-called League Loan of 1923), was to save Austria from complete collapse and bankruptcy, to rehabilitate her, to enable her government to meet pressing financial obligations, and to rescue the nation from the economic ruin which threatened it. Austria voluntarily accepted the loan condition which was intended to keep her from being annexed by Germany, and for the prevention of which Dollfuss was assassinated by the Nazis in 1934, and for which Schuschnigg is now apparently awaiting trial for treason. These loans were "political" only in an incidental sense. Foreign loans with similar conditions attached have certainly not been lacking in the past, and there appears to be no instance in which it was ever argued that the ordinary laws of state succession did not apply to them. The fact is, the object of the Austrian loans was more humanitarian than either commercial or political, and the attempt of the Nazis to prove that their sole purpose was not to aid Austria economically or financially, but to prevent her from uniting with Germany, has no basis of fact upon which it can be supported. Had the loans been imposed upon Austria against her will with a political condition attached, the Nazi interpretation would have some basis; but considering that they were sought by Austria, that she willingly accepted the condition relative to the non-union with Germany, and from first to last regarded them as legally binding and continued, until her independence was terminated by Germany, to make regular payments on them in accordance with their terms, what right, it may be asked, has the German Government to impute to them a character and a consequential invalidity which the Austrian Government never attributed to them?

It must also be added that not all of the Austrian foreign loans possessed the "political" character which Reich Minister Funk attributed to them. This was certainly true of the debt to the United States Government of some \$24,000,000 for food sold to the Government of Austria in 1920. The only condition attached to that loan was that the debt should be secured by a first charge on all the assets and revenues of the Austrian State. Clearly that did not give it the character of a "political" debt. The Act of Congress which authorized it, declared that its purpose was to relieve the food wants of the Austrian people. It of course had the form of a commercial transaction, but in spirit it was primarily humanitarian. Governments are not in the habit of making loans to foreign states for the purpose of commercial investment, especially to those which are on the verge of financial collapse and bankruptcy. In this case its object was the generous one of assisting in the rescue of the people of a former enemy state from threatened starvation and distress. Yet this loan appears to be included by Herr Funk in the category of "political" debts; at any rate it is one for which the Nazi Government denies any legal or moral responsibility. In fact it appears that of the various guaranteed loans made under the auspices of the League of Nations,

only that of 1932—the so-called Lausanne Loan—contained the condition that Austria must abstain from any negotiations of an economic character calculated to compromise its independence.

This brings us to the third line of argument put forward by the Reich Minister in support of his denial of Germany's responsibility for Austria's debts, namely, the fact that some of Austria's creditors have in isolated instances in the past declined to assume the debts of states or rebellious organizations which they had conquered during the course of war. Since the United States was supposed to have a perfect record in respect to the assumption of the debts of annexed states, it is something of a shock to be told by the German Minister that this is not the fact. The instance cited was the repudiation by the United States of the Civil War debts of the Southern Confederacy and of the States which composed it! The United States having been guilty in 1865 of refusal to assume the debts of a revolted group which it had conquered in war, what right had it to complain if Germany refused in 1938 to assume the debts of a state which it had annexed? So far as is known to the author of this note, this is the first instance in which any responsible person ever put forward the claim that a parent state is under some sort of obligation to pay the debts incurred by an organization or group in revolt against its authority when the proceeds thereof were used for the purpose of overthrowing the established government and achieving the independence of those engaged in the revolt. Certainly there is no historical instance in which any government ever assumed the payment of a debt incurred for such a purpose as this. Could the Minister have meant to reproach the United States for refusing to assume the payment of debts which were incurred as a part of an effort to overthrow its own government? If so, he might reproach equally Great Britain for not assuming the debts incurred by the United States and the individual States during the Revolution. What, it may be asked, would have been the reply of the German Government if after the Herreros of Southwest Africa, during their revolt against its authority, had succeeded in obtaining a loan from some foreign source, the proceeds of which were used for the purpose of carrying on their insurrection, the creditors had, after the defeat of the rebels, demanded that Germany assume the payment of the loan?

Not only is the unbroken practice of the past against the idea of state responsibility for rebel war debts, but it is repudiated by what appears to be the unanimous opinion of writers on international law. Most of them indeed apply the rule of irresponsibility not only to rebel war debts but to all war debts, whether incurred by rebellious groups or organizations or by defeated independent enemy states. Of the many authorities to this effect who might be quoted, it is sufficient to cite Westlake, one of the most highly respected, who says:

Those who lend money to a state during a war, or even before its outbreak when it is notoriously imminent, may be considered to have made

themselves voluntary enemies of the other state; and can no more expect consideration on the failure of the side which they have espoused than a neutral ship which has entered the enemy's service can expect to avoid condemnation if captured.⁴

Even Lord Robert Cecil in his argument in the case of the West Rand Gold Mining Company, while maintaining that a conquering state is bound by the rules of international law to assume the payment of the debts of the conquered state, expressly excepted debts which have been incurred by the latter state for the purpose of carrying on war against the former.

German writers, both "Aryan" and "non-Aryan," are likewise in general agreement that a state is under no obligation to assume the payment of war debts incurred by an enemy, and especially rebel war debts. Among them may be mentioned Holtzendorff, Gareis, Ullman, F. F. Schmidt, J. Kohler, and Franz von Liszt.

It may be remarked in passing that treaties of peace containing provisions for the assumption of a proportionate part of the debts of dismembered states, by the states acquiring a portion of their territory, have usually by their express terms excluded from the obligation the debts of the dismembered state which were incurred in the prosecution of the war resulting in the loss of their territory. As is well known, all the treaties of peace following the conclusion of the World War expressly made such exceptions. In the light of this review of the opinion and the practice, only one conclusion is possible regarding Minister Funk's reproach of the United States for its failure to assume responsibility for payment of the Civil War debts of the Confederacy, namely, that there is not a shred of authority in law, practice or morals upon which his criticism can be justified.

The Minister is further reported in the speech referred to above to have charged Great Britain with failure to assume the payment of the debts of the Boer Republic following its defeat and annexation in 1901. Here again

⁴ International Law, Vol. I, p. 78. In the same sense see Phillipson, Termination of War and Treaties of Peace, p. 43; Fauchille, *Traité de Droit Int. Pub.*, Pt. I, p. 352; Jèze, *Le partage des dettes publiques au cas de démembrement du Territoire* (1921), p. 11; Lawrence, Principles of International Law (7th ed.), p. 91; Hyde, International Law, Vol. I, p. 212; the report of the Transvaal Concessions Commission, 1901 (The Lyttelton Commission), and Lord Alverstone's opinion in the *West Rand Gold Mining Company v. the King*, [1905] 2 K. B. 391. See also the opinions and the citations of Feilchenfeld, Public Debts and State Succession, p. 393 ff., and Sack, *Les Effets des Transformations des États sur Leurs Dettes publiques*, etc., p. 165 ff. Sack, however, excludes war debts from the rule of state succession only when the lender knew that the proceeds of the loan were intended to be used by the borrowing belligerent for the purpose of carrying on the war (*op. cit.*, p. 1680). Oppenheim appears to have been one of the few writers who did not except war debts from the general rule requiring a successor state to assume the debts of an annexed or conquered state. International Law, 3rd ed., Vol. I, sec. 82. But his opinion was so obviously unfounded that the distinguished editor of the 5th edition of his work (Lauterpacht) took the liberty of omitting it from that edition with the statement that it was "open to very grave doubt." Vol. I, p. 150, n. 2.

it may be said of Great Britain what was said above of the United States, namely, that her record in respect to the assumption of the debts of annexed states is very nearly perfect and it is believed to be generally, therefore, above reproach. When the Transvaal was annexed in 1877, she assumed responsibility for the payment of its debt. She did likewise when Upper Burma was annexed in 1886. Although the British Government denied any legal liability for the payment of the debts of the South African Republic and the Orange Free State, in fact it provided for the payment of their debts, including a deficit amounting to about £1,500,000.⁵ The only debts which appear to have been excluded were those incurred during the period of hostilities, the proceeds of which were devoted to the prosecution of the war against Great Britain. Even as to contracts and concessions to which the South African Republic was a party—the obligation to respect which stands on a less favorable footing than debts—the policy of the British Government was remarkably liberal. While denying a legal obligation to do so, the British Government in fact took over and maintained them all with a few apparently justifiable exceptions. Thus in the case of certain German share and bondholders in the Netherlands South African Railway Company, the British Government compensated them *ex gratia*, and against the settlement thus made the German Government did not protest or avail of an offer of arbitration which the British Government made.⁶

France of course did not escape Herr Funk's sweeping indictment. The charge against her was that she "disclaimed" Madagascar's debts. It is true that by the treaty of 1895 following the establishment of the French protectorate over Madagascar, it was agreed that France was not to assume any responsibility for the payment of Madagascar's debts previously incurred; but the treaty also provided that Madagascar should remain charged with the payment of its own debts whose amortization was to be met out of Madagascan revenues. The French Government also promised to lend its assistance to the government of the protectorate in meeting the payments on its debts. The solution of the problem adopted by France in this case was one which is by no means uncommon, namely, instead of the annexing state assuming directly the payment of the debts of the annexed state, the latter remains responsible, and to enable it to discharge its responsibility, it is left with its fiscal autonomy intact and with its own budget of revenues and expenditures, its financial administration being subject more or less to the

⁵ The actual procedure was this: While the British Government declined to admit responsibility for the debts of the South African Republic, it nevertheless satisfied the creditors as a matter of grace, and by the Act of Union passed by the British Parliament in 1909, it was provided that the Government of the Union of South Africa should assume the debts of the component states. Feilchenfeld, *op. cit.*, p. 384.

⁶ The details concerning the policy of the British Government in respect to the assumption of the debts of annexed states may be found in Feilchenfeld, *op. cit.*, pp. 379-393; Sack, *op. cit.*, pp. 62-64; Cobbett, *Leading Cases in International Law*, 4th ed., Vol. II, p. 354; and Phillipson, *op. cit.*, p. 327.

control and assistance of the annexing state. This was the procedure which France had already adopted in the cases of Tunis, Annam, Tonkin, and Cambodia when they came under French protection. This arrangement appears to have been satisfactory to the creditors, with whom it was immaterial who paid the debts so long as they were paid, and they did not therefore insist that the French Government itself should assume directly the responsibility for their payment. No international controversies or complaints arose out of this policy of France in respect to Madagascar's debts as there did regarding the French attitude toward Madagascan concessions.⁷ Herr Funk's criticism of French policy regarding Madagascar's debts does not therefore appear to be well founded. If, following the annexation of Austria, Germany had announced a similar policy in respect to Austria's debts and thus insured her creditors a reasonable prospect of payment, it is doubtful if there would have been any demand upon Germany that she herself assume the responsibility for their payment. But instead of this, Austria was deprived of her fiscal autonomy and sources of revenue and left, with no means by which she could pay the debts herself, assuming that she were allowed by Germany to do so. If therefore Germany refuses to assume the payment of them, they will not be paid. This result will be tantamount to the extinction by Germany of just debts which were the result of loans extended to Austria at her request, which the Austrian Government had regarded from first to last as perfectly lawful, upon which it had continued to make payments until Germany put an end to the juridical existence of the Austrian state, and which it might even now discharge if it were left with the necessary fiscal autonomy and financial resources.

A final reason which Minister Funk advances in support of his argument that Austria's creditors are not entitled to look to Germany for payment of their debts, is that they repudiated the debts of Germany's colonies which were taken away from her at the close of the World War. Since these territories were merely colonial possessions without fiscal autonomy and without debts of their own, the Minister could only have meant to charge the mandatory Powers with refusal to assume any portion of the German debt which was chargeable to the colonies, or to reimburse Germany for the expenditures which she had made on them. It is of course quite true that the Treaty of Versailles (Art. 257) did relieve the mandatory Powers of all obligation to assume any portion of the German debt which, according to German book-keeping, was charged to the account of the colonies. Against this decision of the Allied and Associated Powers Germany protested, and asserted that she should at least be reimbursed for the expenditures which she had made on behalf of the colonies.⁸ It must be said that in the case of the dismemberment of states, the Powers which received the territory detached from them have sometimes assumed a portion of the debt of the dismembered state,

⁷ Feilchenfeld, *op. cit.*, p. 373, as to the details. See also Sack, *op. cit.*, p. 260 ff.

⁸ Comments by the German Delegation on the Conditions of Peace, pp. 47, 48.

although this practice has never been as common as it has been in the case of total annexations where the entire debt of the annexed state was usually taken over by the annexing state. As is well known, the treaties of peace following the close of the World War provided that the Powers to which territory detached from the defeated states was annexed, should assume a certain proportion of the debt of the dismembered state. But in all of them certain exceptions were made, notably in the case of France which received back Alsace-Lorraine and which was relieved of any obligation to assume any portion of the German debt because of the re-annexation. Likewise, as stated above, the Powers which received mandates of German colonies were also relieved of a similar responsibility in respect to the assumption of a portion of Germany's debt. In the case of the re-annexation of Alsace-Lorraine, the exemption of France was justified on the ground that Germany had refused to assume any portion of the French debt when in 1871 she took those territories from France.⁹ What, therefore, the Germans regarded as just treatment of France in 1871 must be considered as equally just for Germany in 1919. The refusal of the Allies to provide for the reimbursement of Germany for her expenditures on behalf of her lost colonies was based on the ground that their inhabitants had never derived any real benefit from the expenditures, that they had been neglected by Germany, and that the colonial budget had without apparent exception always shown a deficit. It would therefore be unjust to saddle upon the people of the colonies the burden of reimbursing Germany for expenditures which had been made mainly in her own imperial interest and which had been of little benefit to them, and it would be none the less unjust to the mandatory Powers to charge them with the responsibility.¹⁰ The German debts chargeable to them were somewhat analogous to the so-called Spanish "Cuban debt" which the United States refused to assume at the close of the Spanish-American War, and which Cuba likewise declined to take over for the same reason. The reasons given by the Allied Powers for their refusal to reimburse Germany for her expenditures on the colonies may not be altogether convincing, since it was not established that the inhabitants had not derived any benefits from the expenditures, while the fact that the colonial budgets had shown a deficit was not necessarily a conclusive reason why Germany should not be reimbursed for her expenditures. Nevertheless the practice in respect to reimbursement in such cases had been very unusual, so rare, in fact, that it certainly could not be said that there was any obligation under international law to do so. It may also be added that while the policy of Germany herself, so far as it related to the assumption of the debts of states which had been totally annexed by her, had for the most part been irreproachable, her policy in respect to the taking over of a proportionate part of the debts of states which she had partially dismem-

⁹ See the Reply of the Allied and Associated Powers to the Comments by the German Delegation on the Conditions of Peace, Pt. III, sec. 5.

¹⁰ *Ibid.*, Pts. IV and IX.

bered, had been less liberal than that of any other Continental state which had annexed territories belonging to other states. In fact it does not appear that Germany ever assumed any portion of the debts of those states against which she made war in 1864, 1866, and 1870, and from whom she had taken parts of their territory. As regards that part of the debt of Denmark which was common to herself and the Duchies of Schleswig-Holstein and Lauenburg, which provinces Germany and Austria annexed in 1864, it was provided that there should be an apportionment between Denmark and the Duchies of their common debt in proportion to their respective populations, but it does not appear that Austria and Prussia assumed any portion of the debt of Denmark which they had so grievously dismembered. Nor was there any such assumption by Prussia of a portion of the debts of the German States, which were required to cede parts of their territory to her in 1866. And, of course, no portion of the debt of France was assumed by Germany following the annexation of Alsace-Lorraine in 1871. In the light, therefore, of Germany's own practice, quite apart from other reasons, Minister Funk's reproach of the Allied Powers for their refusal to reimburse Germany for the expenditures made by her on the German colonies, or to assume the payment of that part of the German debt which had been made a charge on the colonies does not seem to be justified either upon considerations of law or practice. In any case, their failure to assume any responsibility on account of Germany's financial obligations chargeable to her colonies, affords a very poor justification for her refusal to assume any responsibility for the payment of the debts of Austria, which are totally different in their nature and purpose. This and the other reasons put forward by Minister Funk in defense of his thesis that Germany is under no obligation, moral or legal, to guarantee the payment of Austria's debts, impress one as being belabored excuses rather than solid arguments based on considerations of law, justice and morality. Against him, as already stated, is the almost unanimous practice of modern states, including that of Germany herself, and the overwhelming preponderance of juristic opinion, including that of German jurists prior to the establishment of the present Nazi régime.

It is well known that the Nazis, like the Bolsheviks, do not recognize certain of the canons of international law which are regarded as fundamental in democratic states, and that they are turning away from some of the traditional conceptions to which Germany herself has hitherto been attached.¹¹ Perhaps the rule of succession in regard to the debts of annexed states may

¹¹ As to the Nazi conceptions of international law, see Preuss, "National Socialist Conceptions of International Law," *American Political Science Review* (1935), p. 594 ff.; Bristler, "La Doctrine Nationale Socialiste du Droit des Gens," in the *Revue Int. de la Théorie du Droit*, 1938, p. 115 ff., and the same author's *Die Völkerrechtslehre des National Sozialismus*, 1938; Carl Schmitt, *National Sozialismus und Völkerrecht*, 1934; Rogge, *Hiller's Friedens Politik und das Völkerrecht*, 1935; and Walz, *National Sozialismus und Völkerrecht*, 1934. See also Gott, "The National Socialist Theory of International Law," this JOURNAL, *supra*, p. 704.

prove to be one of them. If so, it will be a matter of regret, not only because it will bring Germany into conflict with other states, but because it may prove in the long run to be detrimental to her own national interests, for the reason that she cannot be sure that in the future her annexations of territory will exceed in number and importance her own territorial losses. In case they do not, the balance of advantage which flows from the rule of state succession in the matter of debts may turn out to be against her. But quite apart from any consideration of the individual gain or loss which the rule may bring to particular states, it is one which undoubtedly serves the general interests of international justice, equity, morality, mutual convenience and sound economic policy. It is for these reasons that the rule in modern times has received the almost unanimous support of jurists, international courts and of governments in actual practice. Quite aside from these considerations which have caused the rule to be generally accepted and observed in practice, one other important disadvantage which would result from its abandonment may be mentioned, namely, the difficulty which it would create for states which are dependent on foreign loans for the promotion of various national objects for which their own financial resources are inadequate. Naturally, money-lenders would hesitate to make loans to foreign states if there were a rule of law or practice under which their loans could, and probably would, be repudiated in case the creditor states should happen to be transferred to another sovereignty before their debts had been discharged. Considering the large number of such transfers of territory that have taken place during the past century, and the strong reason for believing that they will not be lacking in the future, a rule which would deprive creditors of their right to look to successor states either for the payment of their debts or for any sort of guarantee of payment would, manifestly, prove to be a serious handicap to the processes of international finance, which have played so important a rôle in modern international relations, and which will continue to be essential, even more so in the future.

JAMES WILFORD GARNER

INTERNATIONAL LAWLESSNESS

(Sovereignty was the corner-stone of international law; it is now the stumbling-block. Grotius and his predecessors attempted cautiously to define and delimit the rights of sovereigns in international intercourse. They also ventured to indicate the obligations of sovereigns towards each other. The rights of aliens were subordinate to the rights and prerogatives of their own sovereigns. No matter how seriously they might be injured in their interests in other lands, they had no valid international claims unless and until their sovereign saw fit to assert such claims as his very own. This archaic doctrine has persisted to the present day except for a few lone voices appealing for a more liberal and a more democratic interpretation of the law of nations as being the law of peoples rather than of sovereigns. There can be no denying of the melancholy fact that sovereignty is stronger than ever. It

is so strong that not a few nations are demanding a freedom from all restraints that amounts to sheer lawlessness.

The most glaring evidence of this lawlessness is the "undeclared war" whereby sovereign states intent on their own selfish ends are unembarrassed by the constraints of the laws of belligerency and neutrality. They can go as far as they please or recede when necessary without observing the injunctions imposed by the laws of peace and war. Such is the horrendous monster engendered unwittingly by the inept Kellogg Peace Pact.

Another indication of this increasing lawlessness is the lowering of respect for ordinary international obligations. To all intents and purposes England and France have repudiated their financial engagements with the United States and thus struck a serious blow at the sanctity of agreements among nations. Germany might well feel less compunction in freeing herself from the obligations imposed by the Treaty of Versailles. Italy and Japan likewise have taken bold, independent action in cynical defiance of the League of Nations. Mexico unblushingly announces a policy of expropriation of the property and the livelihood of foreigners amounting to confiscation and robbery. And other nations are intimating that they too will resort to similar methods of international brigandage.

It is not entirely exact to attribute this trend towards lawlessness simply to the amazing rise of dictatorships throughout the world, though this may make it easier to flout the usages of nations. What is most disquieting is the fact that the masses of people living under dictatorships are indifferent to this trend. In some instances they openly and enthusiastically favor the repudiation of any obligations, moral or legal, which stand in the way of arbitrary national action. The attitude of the Russian people is differentiated and accentuated only by the amazing claim that there can be no binding international law apart from the class interests of the proletariat. They are not interested in preserving a law which they insist has been created and fostered by a capitalistic civilization.

That international law is seriously discredited and on the defensive is all too evident. That it is rapidly being jettisoned without any indication of a desire to create a substitute system of law between nations is increasingly apparent. The blatant demands of national egoism are producing inevitably another epoch of lawlessness which, because of the disillusionments of a more enlightened age, may prove worse than the Dark Ages. The race for armaments and strident threats of war are tragic evidence of this. National sovereignty, as expressed by authoritarian, totalitarian, corporative, or communist states, has become the stumbling-block of international jurisprudence. Any state that absorbs the interests and rights of individuals and competes with private enterprise is bound to collide with other states similarly intent on advancing selfish national interests. Attempts in various lands to curb private monopolies and still safeguard individual initiative have been none too felicitous. There is obviously less reason to believe that it

will be possible to restrain the totalitarian state in its international operations.

The time has come for jurisconsults frankly to acknowledge this desperate state of affairs and to undertake the renovation of international law or the creation of an entirely new system of law adequate to the demands of a new social order. It is futile to denounce the violations of international law or reaffirm principles now being derisively ignored or brazenly repudiated. Something much more constructive and even revolutionary is required.

We must first be prepared to recognize that the spread of international lawlessness is due not solely to lower ethical standards but mainly to the irresistible pressure of the Social Revolution which is sweeping the entire world and undermining many established institutions and principles of our western civilization. The workers of the world have become articulate and are now voicing ancient grievances against a civilization which too long has been indifferent to the legitimate claims of mankind. They have little interest in legalistic forms and systems. They are seeking a new freedom that looks to the creation of a new social order which transcends the arrogant claims of national sovereignty.

It would be presumptuous to attempt to predict what the bases and the guiding principles of that new order will be. Socially organized states necessarily will have interests of a different kind from what the world has yet known. What these interests and controlling principles may be, should be the immediate concern of the international jurisconsult. He is in a most embarrassing situation: either he must move along with the rising tide of Social Revolution or be overwhelmed by it.

One single lighthouse throws a faint gleam to warn and to guide in this enterprise: the principle that the main object of this revolution is the protection of the individual in his eternal struggle for freedom of personality. Any system of law that exalts the community or the sovereign state, whether corporative or otherwise, above the individual is bound to fail. Man is neither a "political animal" in the Aristotelian sense—the product of the State—nor is he an economic unit in the Marxian sense—the irresponsible, helpless victim of materialistic forces. He is infinitely more than that. He senses within him a restless aspiration for absolute freedom of the spirit. The corporative, authoritarian, totalitarian, and communist states are all alike doomed to failure because they fatuously seek to place fresh chains on man. He is bound to keep up the endless fight for complete freedom.

This would seem to be the direction in which international law will have to evolve: the protection of the individual in his fight for freedom, wherever he may be and whatever his national or racial allegiance. His interests no longer can be subordinated with safety to the claims and the whims of sovereign states. The stumbling-block of sovereignty must be removed from the international highway. In the meanwhile we must possess our souls

and our sanity of outlook in great patience and faith during this dark era of lawlessness into which we are now entering.

PHILIP M. BROWN

NEUTRALITY AND UNNEUTRALITY

Before 1914, it was hard to find much difference of opinion among American citizens about the proper policy of the United States in relation to foreign wars or even foreign affairs. That policy, with respect to Europe, was dictated by geographical factors and by a colonial and continental history that left little room for debate. Detachment from Europe's political entanglements, non-intervention in its internal affairs, and neutrality in its wars were the keynotes. After 1898 the acquisition of Asiatic possessions turned America to a Pacific orientation marked by uncertainty and the assumption of unnecessary risks. The desire to play a leading part, without adequate equipment thereto, led to poorly comprehended commitments on the Open Door, and exposed the United States to temptations to intervene which even the proposed withdrawal from the Philippines has not suppressed. On the American continent, a more natural political interest, accentuated by propinquity in Central America, prompted occasional intervention and a standing warning to Europe against political encroachment.

After 1914 a marked change occurred, especially in relation to Europe. For a variety of causes set out in numerous books, the most recent of which is Tansill's *America Goes to War*, America lost its bearings. The magnitude of the European contest, the association of cultural and economic interests with one side, and extraordinary ineptness in dealing with the legal problems involved, ultimately induced a state of hysteria which plunged the nation into war. The European feud, more senseless than its predecessors of earlier centuries, was pictured as a struggle between morality and immorality, and in the search for an explanation to the American public for the country's departure from its fundamental traditions, there was invented at the last minute that curious battle-cry of making the world "safe for democracy." This must have surprised some of the Allied Governments. It was in that era that there was born the ideal of allied force in the service of righteousness, later called "collective security," which has done so much to prolong the world's misery by viewing the world through the doctrinaire spectacles of political theology instead of the open-minded detachment of a physician seeking a correct diagnosis of a social disease. The war produced a psychosis, continued in the Treaty of Versailles and its aftermath, of which Articles 10 and 16 of the Covenant were an exemplification rather than an antidote. Historians and psychologists will in due course explain why some of the principal governments of the western world so long divorced themselves from reason and experience, and immersed in illusions, permitted the corrosion of the political and economic structure.

For it is an unfortunate fact that the attempt to maintain the adventitious *status quo* of 1919 through devices of the Covenant and by more formal military alliance resulted in an intensification of nationalism almost unprecedented. At the same time the less informed were led to believe that phrases such as "collective security," interpreted by the League of Nations, manifested a growing internationalism and disposition to adopt peaceful processes in the adjustment of international differences. The disintegration, however, was a fact, the pacification but a fiction. When we consider the progress that had been made in the 19th and early 20th centuries in the development of arbitration and conciliation, it seems deplorable that since 1917 the world's moving forces should have come under the domination of a psychology which encouraged treaties and pacts signally devoid of conditions essential to international appeasement, while cherishing the delusion that peace was being promoted by arrangements for the use of combined force against any revolter against the *status quo*, vilified in advance by the opprobrious name of "aggressor." Of this process perhaps the most unfortunate phase was the popular illusion that peace might be assured by bestowing seductive names such as "collective security," "preventing war," "international coöperation," on contrivances, like sanctions, which were hostile and warlike in character. In defense of this form of deception, it can only be said that it was not new. Article 47 of the Treaty of Westphalia, 1648, embodied a similar device. As Judge John Bassett Moore has said, all human history is characterized by the tendency to seek salvation in phrases rather than in acts.

We were told during the World War that the balance of power and military alliances were the source of the world's ills and that these ills could be cured by replacing alliances with a League of Nations—once inadvertently called a "disentangling alliance." But just as an alliance is a combination of two or more nations seeking certain common ends, so the "collective security" of the League was marked by an identical characteristic—that it sought the attainment of common ends by the use of coercion and military force. But it is to be feared that the education of men's minds to the compulsive features of "collective security" has had disastrous effects. It has diminished appreciation and respect for the less dramatic peaceful processes of effecting change and settling disputes. It has led to a disparagement of the century-old peace-preserving institution of neutrality, with which the theory of united coercion is incompatible. It has induced a revival of ancient and unworkable theoretical distinctions between a just and an unjust war. It has caused a denunciation of tried experience and detachment in seeking sensibly to understand and hence intelligently to conciliate conflicting claims. It has brought about a practice of passing moral judgments upon national ambitions and mass movements, in the name of a supposedly ideal scheme the real character and practical effect of which its votaries failed adequately to analyze. One of the sad concomitants of this tragedy of errors is the neglect of those elementary considerations of human experi-

ence which distinguish friendship from hostility, peace from war, conciliation from intransigence, negotiation from dictation. Indeed, it was not uncommon to hear the developments of the 19th century decried and depreciated as international anarchy, because forsooth the European War broke in 1914, whereas the "new" system of "enforcing peace" was extolled as the embodiment of wisdom, justice and righteousness. This "new" system was pictured as the "new" international law; hence all the old law that conflicted with the ideal had to be attacked as obsolete if not indeed obstructive. Neutrality, a hard-won institution which since the 16th century had served to keep a large part of the world at peace under the regulation of law, an institution which peacemakers had cherished as one of the most constructive achievements of a slowly developing civilization, fell under the ban of the "new" school of peace through combined force. And so effectively did this false theory help to prevent the rebirth of the process of appeasement that the world now stands aghast before the new disasters which threaten.

In a less hysterical age, the "new" theory could not have gained so many adherents. For its perpetuation, it was necessary to keep up the fictions of the war and to disregard time-tested axioms concerning the origin, the nature, the growth and administration of international relations. Disregarded were the fundamental differences between the formulation of municipal law within a state, handed down by a recognized superior alone possessing the instruments of societal coercion, and the growth of the more primitive international system which develops by custom and treaty among equals, in which there is no superior legislator, no authorized enforcing agent for the group, no disarmament of the constituent members. These differences were glossed over, and a scheme was devised for judging fellow members and enforcing the judgment by combined coercion.

Such a system postulates a mature society with an authorized law-giver, obligatory adjudication, willingness to accept adverse judgments or societal coercion. It assumes that the judges are unbiased, actuated only by objective considerations. Among sovereign nations such a system is a wishful dream. So long as it seemed to serve the interests of certain states, nothing was done to puncture the illusion; but the moment that the system came up against the ambitions of strong Powers, in or outside the League, the sorry truth was revealed. And now, even its original sponsors and supposed beneficiaries have turned their backs upon the illusion, hoping against hope to recover the lost ground of negotiation, conciliation and appeasement as the only practical methods of preventing war.

But for the fact that the unfortunate ideology of Articles 10 and 16 preached oblivion for neutrality, and especially American neutrality, it would not be necessary to spend so much time and space in exposing the dangers of the "new" system. But its devotees were fond of drawing the analogy to a private legal system or to personal relations, and asked, "If a bully

assaults Mr. Milquetoast, you wouldn't stand by in safe neutrality and watch the unfair assault, would you?" This seemed to the propounders unanswerable. But only slight examination will disclose the impropriety of the analogy. Nations, like all living organisms, are subject to the laws of evolution and life. At any given time, some will flourish, others decay. If a nation is virile and prolific, if the doors to emigration are largely shut, if it lacks raw materials and markets, if it sees less sturdy neighbors in possession of colonial resources, the urge to expansion may become irresistible—even though expansion be unwise and unprofitable. These are biological considerations, in which ethics play only a minor rôle. Unless then the world is prepared to recognize and satisfy such a country's needs or assumed needs by negotiation, an explosion is quite possible. Some weakly held territory or aging state is then in danger. This has been the traditional, if unfortunate, method of readjusting the tenure of the earth's crust, and until we find a better method, the old one will be hard completely to outlaw. Should third states venture to intervene, they would risk the welfare of their own people and would be morally obliged to furnish a solution for the problem of overpopulation, poverty, lack of markets, etc. We may leave aside for the moment the equally potent psychological causes of conflict. Heretofore, experience has shown that it is not wise to interfere in such issues, unless some national interest is at stake. This may not seem altruistic, but it has proved the only practical way of avoiding even greater evils. Had the Hoare-Laval compromise been accepted by the emotional adherents of collective security in England, some of the humiliations and disasters that subsequently developed might have been avoided. It may be better under some circumstances to permit a political readjustment, even territorial, than to seek to endow an existing *status quo* with moral sanctity. State ethics and personal ethics are not identical. A government is responsible for the life and prosperity of its own people, and dares not risk their very existence on the adventurous effort to right distant "wrongs", the origin of which it may not understand and should not seek to oversimplify. Intervention is a delicate instrument. Ineptly employed, it might be calamitous. Hence experience has dictated its reservation for exceptional cases only, in which vital interests are at stake. The theory that war anywhere justifies intervention, that "peace is indivisible", is merely the thoughtless jargon of "collective security."

But it is a fact that the destructiveness of modern war makes it more important than ever to avoid its recurrence. What has been done since 1917 is no contribution to that end. The interdependence of a narrowing world might have been remembered not merely before but after Versailles. If the constant danger of war is to be surmounted, thought should be given to the revival of the well-tried methods of restoring trust among the nations and then working to develop the existing institutions for coöperative effort to appease, conciliate and adjust conflicting claims. The task is now infinitely

more difficult than it was before April 6, 1917, when the United States officially abandoned neutrality.

EDWIN BORCHARD

CANADA AND THE MONROE DOCTRINE

On August 18, at Kingston, Ontario, President Roosevelt, upon receiving the honorary degree of Doctor of Laws from Queen's University, referred to the "common inheritance" of democratic ideals in Canada and the United States and to the "dangers from overseas" threatening that inheritance. Canada and the United States, as part of an international civilization, were resolved, he said, to leave no pathway unexplored which might contribute to the peace of the world; but if that hope were disappointed, they might assure each other "that this hemisphere at least shall remain a strong citadel wherein civilization can flourish unimpaired." Continuing, the President used these significant words:

The Dominion of Canada is part of the sisterhood of the British Empire. I give to you assurance that the people of the United States will not stand idly by if domination of Canadian soil is threatened by any other empire.

For many years it has been assumed by publicists and statesmen that Canada was included within the scope of the Monroe Doctrine; but not until the President's address at Kingston had an explicit official statement been made to that effect. On November 27, 1936, on his way to the Conference at Buenos Aires, President Roosevelt had, as he expressed it at Kingston, "included Canada in the fellowship of the Americas"; but, inasmuch as Canada was not represented at the Conference, it meant no more than that Canada was part of a sort of mystical "family of American states." At Kingston, for the first time, Canada was formally promised the protection of the United States against an attack from any other source than the empire of which it is itself a part.

Did the President's statement amount to an "expansion" of the Monroe Doctrine? Was the assurance given to Canada more than a new application of an established policy? The question was raised by press correspondents within a few hours of the statement. In answer the President insisted that his words did not imply any enlargement or expansion of the doctrine, and that he did not interpret the doctrine as excluding Canada from the American states, colonies and dependencies which the doctrine sought to protect from foreign invasion or resettlement.

To raise a question as to the meaning and scope of the Monroe Doctrine is to create an academic field-day for scholars. Forth come the precedents of the past and the new issue of Canada must be tested by them. If Canada cannot be brought under the original Monroe Doctrine, can it be fitted into any of the subsequent developments of the doctrine? The issue is important only because the Monroe Doctrine has come to hold so sacred a place in the

foreign policy of the United States that to maintain that it includes Canada is to end all public criticism of the wisdom of the President's statement; whereas if the promise made by the President to Canada is an extension of the doctrine into a new field, then the promise may be debated upon its own merits without fear of touching the ark of the covenant.

That the Monroe Doctrine of today has far outgrown the precise terms in which it was formulated by President Monroe, no one would question. Monroe was confronted with a specific problem. The "Allied Powers," as he described them, were threatening to give aid to Spain to restore her colonies to their former allegiance, just as they had given aid to Ferdinand of Spain to restore the monarchy. If this were done, and if the new governments of America, which had declared their independence of Spain and which had been recognized as independent by the United States, were to be suppressed, not only would the United States lose the benefit of the new commercial relations which had been established with those states, but it would find the armaments of the Allied Powers at its very door. It was a matter of vital importance, therefore, for the United States that the Allied Powers should be kept on their side of the ocean. It was not altruism, it was not sympathy with the struggle of the American states for their independence that dictated the doctrine, although such sympathy, repeatedly appealed to in the orations of Henry Clay, played a large part in building up public opinion in support of the new policy. Rather it was the fundamental law of self-defense that lay at the basis of the doctrine; and in that essential respect the doctrine went back beyond the time of Monroe to Washington and Jefferson.

The actual terms in which the Monroe Doctrine was formulated were limited, therefore, to the situation to be met. At the time Monroe read his message, the doctrine applied only to the American governments which had declared their independence and had been recognized as independent by the United States. Monroe expressly stated that "with the existing colonies or dependencies of any European power we have not interfered and shall not interfere." Even in respect to the governments that had been recognized, it was announced that the United States would remain neutral so long as it was a question of war between them and Spain. It was only when other European Powers sought to "interpose" between Spain and her former colonies, either to oppress them or to control in any other manner their destiny, that the United States uttered a warning. In more general terms, any attempt on the part of the Allied Powers "to extend their system to any portion of this hemisphere" would be considered by the United States as "dangerous to our peace and safety."

But if the original Monroe Doctrine applied only to the American states whose independence the United States had up to that date recognized, the phrasing of the declaration was broad enough to permit it to cover the new states of America as one by one they declared their independence and were recognized as independent by the United States. When Brazil was recog-

nized as independent in 1824, the doctrine applied to it as much as if it had been recognized with Buenos Aires (Argentine Republic) and others during the months preceding the announcement of the doctrine. When the Republic of Colombia divided itself into New Granada, Ecuador and Venezuela, the Monroe Doctrine applied to all three separately as it had applied to them in unison. So also the doctrine applied not only to the Federation of Central American States in 1824, but to the five separate members of the Federation when they became independent states a generation later.

But the Monroe Doctrine soon broadened beyond the original terms in which Monroe had formulated it. Two decades went by before it was put to a test, and by that time it was interpreted to mean that there must be no transfer of American territory from one European Power to another, quite apart from the wishes of the inhabitants of the colony involved in the transfer. Moreover, no American state, to avoid domestic difficulties, might offer its sovereignty to a foreign Power. Still later it was decided that no European Power might assist one faction in an American state to maintain itself in power against the will of the majority of the population. (By the close of the century the Monroe Doctrine was extended to ban the encroachment upon the territory of an American state by a European Power possessing an adjacent colony.) The opening of the twentieth century saw a prohibition of the occupation of the soil of an American state for the purpose of collecting debts.) In 1912 a Senate resolution extended the Monroe Doctrine to include the lease by a private company of a harbor upon the western coast of Mexico when it appeared that the possession of the harbor by the company would give to Japan "practical power of control for national purposes." Asiatic Powers were thus added to the earlier European Powers. (At the present day it may be said that the Monroe Doctrine extends to any attack by any non-American Power upon an independent American state, and any attack upon a colony or dependency of a European Power by a non-American Power other than its sovereign.) The terms of the Buenos Aires Convention for the Maintenance, Preservation and Reestablishment of Peace are broad—"in the event that the peace of the American Republics is menaced . . ."—but they do not go beyond the existing scope of the Monroe Doctrine.

Does the fact that Canada is a member of the British Commonwealth of Nations and, as such, is within the larger group of the British Empire, preclude it from being brought within the terms of the Monroe Doctrine? Hitherto there has never been any suggestion but that the defense of the British Empire might safely be left to Great Britain. But there is little doubt that if at any time during the nineteenth century there had been question of the enforced transfer, say, of Jamaica to a stronger European Power in consequence of a defeat of the British Navy, the United States would have intervened to prevent the danger to its own peace and safety. The change of circumstances which now makes it necessary to consider the possibility that Great Britain, in the event of war in Europe or in the Far East, might not

be able to assure the defense of Canada, is merely the occasion for the application to Canada of a policy long since developed to meet similar situations.

What is novel in the case of Canada is the fact that while Canada, since the Statute of Westminster of 1931, is practically an independent sovereign state, yet it is, under the forms of law, a part of the British Empire and is, moreover, bound to the Empire by very strong ties of sentiment. Neither of these considerations would seem, however, to bear upon the question at issue. All of the Latin American Republics have been at one time or another members of the League of Nations and, as such, under obligation to regard a resort to war against one member of the League as an act of war committed against themselves, with the resulting obligation of severing all trade and financial relations with the covenant-breaking state. Yet the United States, while modifying its neutrality legislation to take account of Latin American states' being engaged in war with a non-American state when cooperating with the League of Nations, has never regarded such a situation as modifying in any degree the necessity of preventing European or Asiatic encroachment upon the same American states. For the Monroe Doctrine, it must be remembered, is a doctrine of long-range self-defense. Not so long-range as if it sought to prevent aggression in any part of the world, but clear and definite as to aggression against the states of America. Even the fact that the American state may have been to some degree responsible for creating the conditions that led to the aggression against it has not altered the determination of the United States to keep any nations that might seek to play the part of the original "Allied Powers" from extending their system to any portion of this hemisphere.

It would seem that the formal application to Canada of the policy of the Monroe Doctrine should properly lead to the formal inclusion of Canada in the circle of "American Republics" and to participation by Canada in the coming Eighth International Conference of American States at Lima. Elsewhere¹ the writer has expressed the view that Canada as a member of the International American Conferences would not only add to the list of states which are carrying on the traditions of democratic government believed by the United States to be essential to peace, but might be expected to take a constructive part in the development of new principles of law to meet the changing conditions of American life.

C. G. FENWICK

THE TRAIL SMELTER ARBITRATION—UNITED STATES AND CANADA

A unanimous decision was handed down on April 16, 1938, by the Mixed Arbitral Tribunal, constituted under the Convention of Ottawa,² signed April 15, 1935, between the Government of the United States and the Government of the Dominion of Canada. The Tribunal was established to pass upon the claim of the United States for damages to American citizens, alleged to have

¹ See this JOURNAL, Vol. 31 (1937), p. 473.

² U. S. Treaty Series, No. 893. Reprinted in this JOURNAL, Supp., Vol. 30 (1936), p. 163.

occurred since January 1, 1932, by reason of noxious fumes emanating from the stacks of the Consolidated Mining and Smelting Company of Canada, Limited, located at Trail, British Columbia. The Tribunal was also asked to determine whether the smelter should be required to refrain from causing damage in the future in the State of Washington, and if so, to what extent.

The smelter (principally of copper and zinc ores), is described in the opinion of the Tribunal, as "one of the best and largest equipped smelting plants on this Continent." It is located about seven miles in a direct line from the United States boundary. Owners of timber and farm lands, as well as of urban properties in Stevens County, State of Washington, have complained for many years of the serious damage caused by the emanations from the smelter. The potentially widespread character of the damage may be realized by the fact that two stacks of the plant are over 400 feet high, and, as stated in the opinion, have emitted as much as 10,000 tons of sulphur in a single month.

The difference between the two governments over the Trail Smelter is one of long standing. The problems involved were first referred to the International Joint Commission, United States and Canada, pursuant to Article 9 of the Convention of January 11, 1909, between the United States and Great Britain. The International Joint Commission, by its decision of February 28, 1931, awarded damages caused to the United States up to and including January 1, 1932, in the sum of \$350,000. It also recommended a method of indemnifying persons in the State of Washington for damage which might be caused by the smelter after January 1, 1932, and it indicated the manner in which the smelter should be operated after that date with a view to abating the nuisance. Two years later, the United States Government was again obliged to make representations to the Dominion Government because the damage was still continuing and existing conditions were entirely unsatisfactory. Accordingly, under the Convention of 1935, a Mixed Arbitral Tribunal was constituted, consisting of three "jurists of repute," one to be appointed by the United States, one by the Dominion of Canada, and a chairman chosen jointly, who should be neither a British subject nor a citizen of the United States. The members of the Tribunal thus chosen were as follows: By the United States, Charles Warren of Massachusetts; by the Dominion of Canada, Robert A. E. Greenshields of the Province of Quebec; by the two governments jointly, Jan Frans Hostie of Belgium.

The first question submitted to the Tribunal was: "Whether damage caused by the Trail Smelter in the State of Washington has occurred since the first day of January 1932, and, if so, what indemnity should be paid therefor?" In answer to this question the Tribunal found that damage had so occurred, and made an award of \$78,000 for such damage from January 1, 1932, to October 1, 1937, for cleared and uncleared land. It failed to uphold the contention of the United States, however, that damage had occurred in respect to livestock or to property in the town of Northport, or to business enterprises.

The second question submitted to the Tribunal was: "In the event of the answer to the first part of the preceding question being in the affirmative, whether the Trail Smelter should be required to refrain from causing damage in the State of Washington in the future, and if so, to what extent?" The Tribunal decided that the smelter should refrain from causing further damage to the extent set forth in the decision, until October 1, 1940, and thereafter, to such an extent as the Tribunal should determine.

The third question submitted was: "In the light of the answer to the preceding question, what measures or régime, if any, should be adopted or maintained by the Trail Smelter?" As to this, the Tribunal decided that it was not able to agree upon a permanent régime with the information at hand. It therefore established a temporary régime to be put in operation by May 1, 1938, to cover the remainder of the crop-growing season of 1938, and the crop-growing seasons of 1939 and 1940, and for three months after October 1, 1940. This régime is to be under the technical supervision of two experts who will act under the authority of the Tribunal, the expenses to be undertaken by the Dominion of Canada.

The fourth question submitted to the Tribunal concerns the indemnity or compensation, if any, to be paid on account of any decision rendered relating to future damage. The answer to this question is reserved for the final decision.

The present decision is notable in that it establishes a procedure for the maintenance of a régime for controlling industrial operations in one country which are likely to cause continuing damage in another. The questions involved here are not merely concerned with the operation of the plant, but with meteorological conditions in the Columbia River Valley. The Tribunal indicated that an extension and improvement of the methods of operation of the plant may be necessary in close relation to such meteorological conditions. Detailed reports are to be made to the Tribunal by the technical consultants to enable it to arrive at a final decision within three months after October 1, 1940.

The Agent of the United States, Mr. Swagar Sherley, has expressed disappointment at the small indemnity awarded for damages which continued over a period of more than five years and which affect an area of many square miles. Particularly does he emphasize the failure of the Tribunal to make any positive declaration of the injury done to the United States as a nation by the violation of its sovereignty, and also the failure to award costs and expenses incidental to the proof of the damage complained of. The Tribunal drew a distinction between this case and cases involving damage to individual claimants, where it might be appropriate for an international tribunal to award costs and expenses as an incident to other damage proven. The Tribunal was of the opinion that

such costs and expenses should not be allowed in a case of arbitration and final settlement of a long-pending controversy between two inde-

pendent Governments, such as this case, where each Government has incurred expenses and where it is to the mutual advantage of the two Governments that a just conclusion and permanent disposition of an international controversy should be reached.

We cannot follow the reasoning of the Tribunal in this respect. The reasoning might be appropriate if the amount of the award had been arrived at by negotiation and compromise between the two governments; but the compromise in this case consists precisely in the reference to arbitration of an issue intended to be decided by a judicial process. One of the parties having been found at fault, the costs and expenses of assembling and presenting the large amount of technical evidence might very well have been considered incidental to the indemnity to be paid. The argument that such expenses might have been awarded if incurred by individual claimants instead of by the complaining government does not seem cogent.

On the other hand, the decision does not appear to be fairly open to criticism merely because no separate award was made for a violation of sovereignty. This element of injury must be taken to have been merged in the *compromis*. The Tribunal was restricted in its jurisdiction to answering the questions presented. It is true a separate award of this nature was paid by the United States to the Dominion of Canada under the decision in the case of the British ship *I'm Alone*.³ In that case, however, the injury was caused directly by the act of officials of the United States Government, and not, as here, by persons or a corporation acting in an individual capacity.

It is worthy of note that under Article IV of the Convention, it is provided: "The Tribunal shall apply the law and practice followed in dealing with cognate questions in the United States of America. . . ." The Tribunal therefore was not troubled to determine the nature of the law to be applied. This provision is in accord with the rule of the *lex loci delicti* and also with the principle that where an act begun in one state causes an injury in another state, "the place of the wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place."⁴

The really important issue still to be settled is the abatement of a serious nuisance endangering international good relations in the regions affected. The members of the Tribunal have performed their functions with painstaking care, especially in respect to the detailed régime of observation and report to be made by experts as to the present and future operation of the plant. It is to be hoped that the final decision, when rendered, will eliminate the possibility of future dispute.

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³ See this JOURNAL, Vol. 29 (1935), p. 331.

⁴ See Restatement of the Law of Conflict of Laws, § 377.

CURRENT NOTES

THE NEW SCANDINAVIAN NEUTRALITY RULES

On May 27, 1938, representatives of the Governments of Denmark, Finland, Iceland, Norway and Sweden signed at Stockholm a significant declaration, setting forth their intention of applying similar rules of neutrality in the event of war between foreign Powers and stating the rules which each of them had agreed to apply within its own jurisdiction.¹

The present accord is based upon the Declaration and Rules of Neutrality adopted by the Governments of Denmark (implicitly including Icelandic territory), Norway and Sweden on December 21, 1912,² and may be said to represent a revision and restatement of these rules in the light of World War experience and of the developments since then. Being based upon the 1912 Declaration, and pledging the signatories to act "conforming to what is provided by the Convention Concerning the Rights and Duties of Neutral Powers in Naval War, signed at The Hague, October 18, 1907," it may be said that the Declaration amounts to a renewed acceptance of the provisions of The Hague Convention, amplified by the new rules, as constituting contemporary international law.

It is interesting to observe that while Finland is a signatory, The Netherlands and other states which have coöperated with the Scandinavian Powers in various matters under the title of the Oslo Group are not represented. Noticeable also is the fact that none of the new states on the south side of the Baltic are associated, and further that the Declaration contains no provisions whatsoever for the future adherence of states other than the original signatories.

The texts of the Rules of Neutrality adopted by each of the five states in 1938 are, for the most part, identical. Article 1 in the Swedish Rules contains a note not found in the others, specifying that Swedish jurisdiction shall extend seaward a distance of four marine miles from the coast. In the Danish and Swedish Rules there appear in Article 2, paragraphs 2 and 3, and in Article 8, paragraph 1, special provisions regarding jurisdiction and freedom of passage in the Sound, the Great and Little Belt, and in the Kattegat. The major variation is to be found in Article 2 of the Icelandic Rules, where the otherwise uniform provisions regarding the exclusion of

¹ A translation of the Declaration and of the Annexed Rules will be found in the Supplement to this issue of the JOURNAL, p. 141.

² The French text of this Declaration and of its Annexed Rules will be found in Martens, *Nouveau Recueil Général de Traités*, 3rd Series, Vol. VII, pp. 81-90. An English rendition of the Declaration appears in the Naval War College, *International Law Documents*, 1917, pp. 183-184, while translations of the Rules adopted by Denmark and Norway will be found in *ibid.*, 1916, pp. 49-52, and *ibid.*, 1917, pp. 184-186. The Br. and For. St. Papers, Vol. 106, p. 916, contain only the French text of the Declaration.

belligerent warships from closed ports, protective coastal defense zones, and from inner waters whose entrance is barred by mines or other means of defense, are omitted altogether. Article 6 of the Swedish Rules contains a phrase ("according to the same rules as those applied or to be applied to warships in time of peace") not inserted in the same article in the other texts. This appears to have been copied directly from Article 6, paragraph *a*, of the 1912 Swedish Rules, which in turn was different in the same respect from the Danish and Norwegian Rules of that date. The only other difference is to be found in Article 12, paragraph 2, of the Rules of Iceland, which specifies that belligerents' mobile radiotelegraphic stations shall be used for communications with the police, instead of with naval vessels, a difference easily explained by the fact that Iceland possesses no naval vessels.

Comparing the 1938 Rules with those of 1912, considerable difference is to be noted, both in substance and in arrangement. The changes in substance are by way of additions or substitutions of slightly different phraseology. All of the principles of the 1912 Rules have been carried over into the contemporary documentation.

The principal additions appearing in the 1938 Rules are those which follow. In Article 2, paragraph 2 (excepting Iceland), the reference to closed protective zones of coastal defense installations is an innovation.³ No mention was made of submarines in the 1912 Rules, hence the provisions contained in Article 2, paragraph 3 (paragraph 1 in the Icelandic Rules), relating to the exclusion of belligerent "submarines armed for war" are new. While the statement regarding commerce destroyers appearing in Article 3, paragraph 1, was inserted in the old regulations, the exclusion of armed merchant ships carrying an armament "destined to ends other than their own defense," provided for by paragraph 2 of this article, is present for the first time.

There is considerable amplification of the stipulations relating to sojourn in neutral waters. Paragraph 4a of Chapter I of the earlier rules provided that belligerent warships might remain within the neutral territorial jurisdiction longer than 24 hours if damages or the condition of the sea necessitated this, or other regulations permitted them so to do. No limitation was placed upon this extension by the terms of the rules, and no provision was made to distinguish between injuries caused by ordinary marine hazards and those due to hostile activities. Article 4, paragraph 1, of the new rules has introduced measures better calculated to preserve a strict neutrality and to avert misunderstandings arising with the belligerents by stating, "No extension of the sojourn beyond 24 hours will be permitted, however, if it is manifest that the vessel cannot be rendered navigable within a reasonable delay, or when the damages shall have been caused by an act of war of the enemy." While not specified, it is presumed that internment shall follow if the belligerent

³ Attention may be called to the notice of the Agreement made by Finland and Sweden to repeal the 1921 Convention regarding the Demilitarization of the Aaland Islands. *New York Times*, Sept. 9, 1938.

vessel concerned cannot put to sea within the time limit specified by the competent authorities. Additional in the same connection, is the refusal of permission to obtain aid in the local territory for repairing damages caused by acts of war of the enemy, as set forth in Article 5, paragraph 1. New also is the provision for the division of the coasts into districts for the delimitation of the number of belligerent war vessels which may be present at any one time within the same area (Article 4, paragraph 2).

In the 1912 Rules regarding refueling in neutral ports it was provided that "warships of the belligerents may take on fuel only in quantities necessary to fill the real coal bunkers, including fuel tanks." (Chapter I, paragraph 5 d.) The present regulations amend this in the desirable manner laid down in Article 5, paragraph 4: "In Danish ports and anchorages warships of the belligerents will be subjected, so far as concerns refueling, to the same regulations as other foreign vessels. They may take aboard, however, only the quantity of fuel necessary for reaching the nearest port of their own country, and in no case a quantity exceeding that necessary for completely filling their own bunkers or their liquid fuel tanks." This addition properly fills up a lacuna in the 1912 laws and brings them into line with Article XIX of The Hague Convention. The 1938 Rules continue the former stipulation that, having fueled in the neutral port, a belligerent warship may not refuel within the territorial waters of the country for a period of three months.

Neither The Hague Convention nor the 1912 Rules of the Scandinavian States contain mention of aircraft. The provisions, therefore, in Article 8, paragraphs 1-2, Articles 13 and 15, paragraph 2, of the 1938 Rules, are entirely new. Although the substance of Articles 9, 11, and 14 appeared formerly, the wording has been revised to include references to aircraft in the pertinent places. All of these articles accord with the practice of The Netherlands, Switzerland, and the Scandinavian States during the World War, and seem to represent useful codifications of the accepted principles of law. Particularly well phrased and desirable is paragraph 2 of Article 15:

Any aircraft in a condition to commit an attack against a belligerent, or which carries apparatus or material the mounting or utilization of which would permit it to commit an attack, is forbidden to leave Danish territory if there is reason to presume that it is destined to be employed against a belligerent Power. It is likewise forbidden to perform work on an aircraft in order to prepare its departure for the above-mentioned purpose.

Such a paragraph might well be added to the neutrality laws of all states.

The final point of differentiation between the 1912 and 1938 Rules may be found in the measures relating to the employment of "mobile radiotelegraphic stations," embodied in Article 12, paragraph 2. Although the earlier laws forbade belligerents to establish radio stations on neutral territory or in neutral territorial waters, they did not originally make proper reference to ship radio stations. Worded as at present, the restriction would apply

equally well to radio installations in aircraft or in any other means of conveyance. The Scandinavian Rules do not yet go as far as the requirements of the United States during the World War, when vessels were required effectively to dismantle their radios. With the modern developments in the field of radio engineering which render external antennas unnecessary and which have greatly increased the power of very small sets, it may become extremely difficult for neutrals adequately to control the use of "mobile" radio equipment. Nevertheless, the above-mentioned rules may afford the necessary initial base for action.

Viewing further the new rules in the light of World War practices and experiences, it is interesting to observe that the Scandinavian States have rejected the stand taken by The Netherlands on the question of armed merchant ships, and have returned to the position held for so long by the United States of attempting to distinguish between merchant ships armed exclusively for their own defense and those armed for offense. The new rules attempt to set up no criteria for distinguishing the two activities, and they ignore the problem which so confounded our Department of State of what to do with vessels which, acting on Admiralty instructions, opened fire immediately upon sighting any periscope or submarine, without waiting to be summoned for visit or search or sighting a torpedo track.⁴ While the position adopted may be a pragmatic one from the point of view of politics, trade and administration, it may be said to make no useful contribution to the solution of the difficult legal problem involved.

Considering the tremendous strides being taken in the development of long distance aerial navigation, and the certain large-scale employment of aircraft in another European war, it would seem that there is a serious shortcoming and oversight in the new rules in their failure to make any provision for the sojourn, re-provisioning and refueling of belligerent aircraft in neutral territorial waters. Article 8 denies admission to neutral "territory," but it does not say that aircraft may not enter either neutral territorial waters or the air-space thereabove. If such an exclusion is intended, it would appear to be an arbitrary and unnecessary discrimination against belligerent aircraft not likely to stand the test of time. Yet, Articles 4 and 5 relating to sojourn and re-provisioning mention only warships. It is believed that consideration should be given to this matter in any international gathering which may be held for the further internationalization of rules relating to the rights and duties of neutral Powers in the event of maritime war, or in any state considering the revision of its own neutrality legislation.

Furthermore, it would seem that inadequate attention has been paid to the utilization of submarine mines by belligerents. While Article 9 requires belligerents to respect the neutrality of the several states, it does not state that the placement of anchored or floating contact mines within the belt of

⁴ See the informative article entitled "British Shipping Prepared for War," in the New York Times, Sept. 8, 1938.

territorial waters is unlawful. It may be presumed so to be. On the other hand, in serializing acts of hostility which are prohibited within such waters, in paragraph 2 of the article, no mention is made either of the sowing of such mines or the destruction of foreign vessels thereby. It is believed that nothing would be lost, and considerable would be gained, by specifically declaring that the sowing of any and all kinds of mines within neutral territorial waters is a prohibited act. This is not a matter which is likely to be improved by allowing it to continue in the realm of uncertainty.

A difficult and a useful task has been performed by these five states in revising their Neutrality Rules. To students of international law it is encouraging to note that the revisers of these rules have been able to retain their sane and correct interpretation of the status and duties of a neutral, and have not allowed themselves to become bogged in that hopeless morass of trying to unite legal neutrality with unneutral, politico-moral condemnation of and sanctions against aggressors. The proper duty of the neutral has ever been and still remains that of impartiality, non-discrimination, and non-participation. It cannot be otherwise.

Coming at such a time, the new Scandinavian Neutrality Rules afford a useful basis of study for those who contemplate another biennial revision of American neutrality legislation. Referring to and restating as they do the principles of the Convention on the Rights and Duties of Neutrals in Naval War, drawn up at The Hague in 1907, they add weight to the proposal being discussed in some quarters of seeking the convocation of a third Hague Conference. With the trend toward general war accelerating, there is need of scientific restatement of the rules of law and practice acceptable to the major maritime nations. The achievement of such an objective should be reasonably anticipated of a conference assembled in the benevolent and neutral atmosphere of The Netherlands, or of one of these Scandinavian States, provided the conferees might detach themselves from the heated and sanctionist philosophy of Geneva and of certain national capitals.

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DOES THE MONROE DOCTRINE COVER CANADA?

On August 18, at Kingston, Ontario, after receiving an honorary degree from Queens University, President Roosevelt made an address which, according to the press,¹ "stirred" the whole Dominion by its "promise of United States assistance against invaders." In the course of this speech, which has been regarded in Canada and elsewhere as an "application of the Monroe Doctrine to Canada,"² Mr. Roosevelt took occasion to say: "I give to you assurance that the people of the United States will not stand idly by if domination of Canadian soil is threatened by any other empire."³ Surely

¹ Toronto Globe and Mail, Aug. 19, 1938.

² N. Y. Times, Aug. 19, 1938.

³ *Ibid.*

Mr. Roosevelt could not have been unprepared for the reaction which his remarks prompted, yet on the following day, while not specifically denying the application of the Monroe Doctrine, he turned reporters aside by suggesting that they re-read the original pronouncement of President Monroe.

The response to Roosevelt's 1938 declaration stands in surprising contrast to a similar declaration two years previously which passed practically unnoticed. Speaking at Chataqua on August 14, 1936, the President in a "Good Neighbor" speech issued this warning: "If there are remoter nations that wish us not good but ill, they know that we are strong; they know that we can and will defend ourselves and defend our neighborhood."⁴ The presidential campaign of that year may have been responsible for the fact that the significance of that statement passed practically unnoticed. But even in Canada it did not provoke widespread comment, although it was stressed in two newspapers.⁵

The changed world situation of 1938 has therefore given a new significance to the Kingston message, which has been regarded in Canada, the United States and London, and perhaps in other capitals, as, in the words of the *Montreal Star*,⁶ "really a new version of the Monroe Doctrine." It was, according to the London *Daily Herald*,⁷ "a momentous pledge." In an Associated Press despatch from Washington, the *New York Times* stated that State Department officials interpreted the speech as an extension of the Monroe Doctrine, although in a special despatch of a *Times* correspondent on the same page, it was asserted that the statement was entirely the President's own and not prepared by the State Department. However, the despatch did refer to it as "a logical if somewhat startling statement of a fact long since regarded as accepted in practice if not written into the formal foreign policy of the United States."⁸

Therefore, it is somewhat idle to sidestep the issue as the President did when he referred his interrogators to the original doctrine. While the message of 1823 had reference to Latin American affairs, it can hardly be asserted that the doctrine of 1823 is the doctrine of 1938. In the intervening 125 years it has been continually re-interpreted so that today it may well be broadened to include this new interpretation.

(In Canada a formal pronouncement of this nature was particularly welcomed as a recognition officially of a long-standing fact upon which Canadian policy has been based. Canadians have long contended that their security rested upon friendship with the United States, and given that condition of friendship, their borders were safe since the United States strategically could not afford to see Canada invaded by a hostile force. Secure in the strong

⁴ N. Y. Times, Aug. 15, 1936.

⁵ Cf. F. H. Soward, "Canada and the Americas," in Canadian Papers, 1938, Series A, No. 3 (Canadian Institute of International Affairs, Toronto).

⁶ Montreal Star, Aug. 18, 1938.

⁷ Daily Herald, London, Aug. 18, 1938.

⁸ N. Y. Times, Aug. 19, 1938.

logic of that situation of geography, Canada had been content to neglect her defence forces so that its equipment was obsolescent and unsuitable for active service. In fact, her stock of field gun ammunition was less than 90 minutes' firing and she did not possess a single modern anti-aircraft gun.⁹ Under a more active Minister of National Defence the service is undergoing an overhauling which is reflected in increased expenditure authorized by Parliament. The reciprocal nature of this problem of protection is now recognized, and Canada, whether motivated by feelings of national pride or the sterner demands of necessity, is now embarked upon a defence policy.

The Canadian Prime Minister gave Mr. Roosevelt his reply a few days after the Kingston speech when Mr. MacKenzie King made the statement, more of a gesture than a negotiable pledge, (that Canada for her part would not permit any hostile force to cross Canada in an attack upon the United States. But whatever Canada may do single-handedly, the fact remains that the defence of Canada in the last analysis must rest upon the United States.¹⁰) This is officially recognized and has been guardedly stated in part by the Canadian Government when the Minister of National Defence, in the course of a debate on Canada's defence policy during the discussion of his estimates this year, remarked:

Just as the British Navy on the Atlantic is our greatest security in that quarter, so I think it might be reasonable to assume that in a major conflagration we should have friendly fleets upon the Pacific ocean, and the severity of raids upon our western seaboard would be limited by the strength and position of these friendly fleets. Our major defensive buffer on the Pacific coast is not the Pacific ocean alone but the existence there of friendly fleets. There is no commitment or understanding in regard to these matters, but at this time I think reasonable assumptions are justifiable.¹¹

It was undoubtedly with the same thought in mind that the Prime Minister, in a subsequent debate, declared relative to the possibility of an invasion of Canada,—

It ignores our neighbours and our lack of neighbours; it ignores the strategic and transportation difficulties of transoceanic invasion; it ignores the vital fact that every aggressor has . . . potential and actual rivals near at hand whom it could not disregard by launching fantastic expeditions across half the world. At present danger of attack upon Canada is minor in degree and second hand in origin.¹²

(It is apparent that strategically the United States could no more permit an invasion of Canada by a hostile force than an invasion of her own territory. Whether this be the Monroe Doctrine or the Roosevelt II Doctrine is beside

⁹ As of 1935. Statement of Minister of National Defence quoted in C. P. Stacey, "New Trends in Canadian Defence Policy," in Canadian Papers, 1938, Series A, No. 5.

¹⁰ Cf. David Martin, "Canada, Our Military Ward," Current History, Vol. XLIII, No. 6, p. 21 (June, 1938).

¹¹ House of Commons Debates, March 24, 1938.

¹² *Ibid.*, May 24, 1938.

the point—it is twentieth century strategy. This was rather well phrased in a *New York Times* editorial which stated:

It is true that the Monroe Doctrine has never been so stated and so recognized as to apply formally in the case of Canada. But it is equally true that throughout the whole history of the United States as an independent nation the American people have been fully aware of their enormous interest in the security of Canada. Certainly within the last half century any attempt by a foreign Power to plant its flag on Canadian soil would have been resisted with the full strength of the United States, and certainly that will be equally true tomorrow. What the President said at Kingston was not said on the authority of any act of Congress. But it was said on the authority of the long-standing traditions of this country and the inescapable facts of its geographical position.¹³

Much more serious than the question of the applicability of the Monroe Doctrine to Canada is the broader interpretation placed upon the Kingston speech by those who see it as something of an Anglo-American alliance. While it is significant that Mr. Roosevelt should have chosen the moment he did to make this statement and while he may therefore have hoped to back up Secretary Hull's admonition to European Powers, it does seem somewhat extravagant to declare that "His words were a pledge to defend a part of the British Empire" and "Read with the context, they come nearer than any previous utterance to a statement that this government may be counted on to stand with the British in a showdown."¹⁴ While this point of view was repeated abroad it ought not to be confused with wishful thinking or to raise false alarms. American isolationism is too potent to be easily swerved. President Roosevelt by his declaration at Kingston was making no new departure in foreign policy, he was merely saying what went without saying before.

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THE NEW COMMERCIAL TREATY WITH SIAM

The Treaty of Friendship, Commerce and Navigation between the United States and Siam, signed at Bangkok on November 13, 1937, and its ratification consented to by the United States Senate on June 13, 1938, is significant for its unusual provisions regarding the ownership of immovable property, believed to be the first of their kind ever written into a commercial treaty of the United States. This treaty supersedes a similar commercial treaty signed in 1920 and ratified in 1921. The 1920 treaty,¹ contained the following provisions (Art. I) regarding the ownership of immovable property:

The citizens or subjects of each of the High Contracting Parties shall have liberty to . . . carry on trade, wholesale and retail, to engage in

¹³ N. Y. Times, Aug. 20, 1938.

¹⁴ Anne O'Hare McCormick, *ibid.*, p.14.

¹ U. S. Treaty Series, No. 655, Washington.

religious, educational and charitable work, to own or lease and occupy houses, manufactories, warehouses and shops, to employ agents of their choice, to lease land for residential, commercial, religious and charitable purposes and for use as cemeteries, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects submitting themselves to the laws and regulations there established.

Article XV provided that nothing in the treaty would "affect, supersede, or modify any of the laws, ordinances and regulations with regard to trade, naturalization, immigration, police and public security which are in force or which may be enacted in either of the two countries."

In 1924, the United States placed additional restrictions on immigration, making citizens of certain Asiatic countries, including Siam, ineligible to citizenship. Also, certain states of the United States have passed laws prohibiting the ownership or leasing of agricultural lands by aliens. In the case of those citizens of Asiatic origin, who were ineligible to citizenship, this effectively barred their owning or leasing land for agricultural purposes. The 1920 treaty, however, did not include the ownership or leasing of land for agricultural purposes by citizens of either Siam or the United States, so that no discriminatory treatment resulted from the existence of the alien land laws of the states. There remained the possibility, however, that a state of the United States might, at some future date, enact laws further restricting the rights of aliens. A new treaty might not result in modification of these laws since they have been upheld by the courts. Yet as long as certain aliens are excluded from citizenship, new restrictions would essentially mean discrimination against this group. In other words, because of the character of the Federal Government and the rights of the states to enact their own legislation, the principles of equal treatment and non-discrimination written into the American-Siamese Treaty might be voided in practice by the several states.

If equal treatment were to be assured, either the 1924 Immigration Law had to be altered to permit Asiatics (including Siamese) to become citizens, or these Asiatic countries had to be permitted to set up reciprocal restrictions. A change in the immigration law being out of the question at the present time, the second alternative was attempted.

In preparing for the negotiations for the present treaty, it was found that seven states of the United States² prohibit the ownership or leasing of land for agricultural purposes by aliens. This fact raised no problem, however, since the 1920 treaty excluded citizens of either country from owning or leasing agricultural lands. It is apparent, nevertheless, that if any state further restricted the ownership of immovable property, discrimination would result. Yet to allow the Siamese Government the same rights of restriction as respects all citizens of the United States, would be to penalize the citizens

² *E.g.*, California, Arizona, Idaho, Louisiana, Montana, New Mexico and Oregon.

of those states which had no laws restricting ownership of immovable property by aliens.

The solution, which is apparently a new approach to the problem, not previously written into an American commercial treaty, is to allow the Siamese Government to place restrictions on the ownership of immovable property by citizens of those states of the United States which enact similar restrictions affecting citizens of Siam. The pertinent provisions of the new treaty are found in paragraphs seven and eight of Article I, as follows:

In all that relates to the acquisition, possession and disposition of immovable property the nationals, including corporations, partnerships, associations and other legal entities of each High Contracting Party shall in the territory of the other High Contracting Party be subject exclusively to the applicable laws of the situs of such immovable property. The applicable laws of the situs of immovable property as herein used shall in reference to the nationals of Siam be understood and construed to mean the laws applicable to immovable property of the state, territory or possession of the United States of America in which such immovable property is situate; and nothing herein shall be construed to change, affect or abrogate the laws applicable to immovable property of any state, territory or possession of the United States of America.

It is expressly agreed that nationals of the United States of America, including corporations, partnerships and associations, who are legal residents of or are organized under the laws of any state, territory or possession of the United States of America which accords to the nationals of Siam the right to acquire, possess and dispose of immovable property, shall, in return, be accorded all the rights respecting immovable property in Siam which are or may hereafter be accorded to the nationals, including corporations, partnerships and associations of any other country upon the principle of non-discriminatory treatment.

It was stated in the report of the Senate Foreign Relations Committee³ that the new treaty does not alter the present situation with respect to the ownership of immovable property by citizens of the United States or Siam, since ownership of agricultural lands is specifically excluded and this is the only restriction imposed by state laws at the present time.

The significance of the provisions cited lies in their future application, granting as they do the right to Siam to restrict ownership of immovable property by citizens of any of the states of the United States which may enact laws restricting such ownership by the citizens of Siam. The treaty is, therefore, an attempt to solve the problem of maintaining the principle of equal or non-discriminatory treatment in commercial treaties in the face of the fact that the Federal Government cannot legislate for the states nor easily restrict or over-ride state legislation by the treaty-making power. It may possibly open the way for other nations whose nationals are prevented from becoming citizens of the United States to treat citizens of the several states equally in the matter of ownership of immovable property. In the

³ Senate Executive Committee Report No. 6, 75th Cong., 3rd Sess.

case of future relations with China and Japan, the effect of such a treaty provision might be far-reaching, particularly if the tendency of some states to further restrict the rights of aliens continues. This solution to the problem in the case of Siam is admittedly an experiment and one which does not affect any vital interests of the nationals of either state at the present time.

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THE FIRST LEGISLATIVE PROPOSAL FOR PACIFIC SETTLEMENT

The printed histories of the idea of pacific settlement of international disputes in the United States assert that the adverse report to a memorial from the New York Peace Society made to the House of Representatives on June 13, 1838,¹ was the first instance of legislative consideration of the subject. For many years, however, there has been known an undated paper in the hand of Samuel Adams which embodied an instruction to somebody to use their influence "that national Differences may be settled & determined without the Necessity of War." On the original of this paper, which is in the New York Public Library, is indorsed in a nineteenth century handwriting the words "Instructions to the Senators in Congress." Whether the substance of the paper had ever been even committed to any one else by Adams was undetermined until a recent discovery of an engrossed version of the same text in the files of the Massachusetts Senate for the year 1785. What is now known of this earliest example of legislative concern with pacific settlement is here reproduced.

No sooner had the Treaty of Peace of September 3, 1783, made the independence of the "united States of America" real than Samuel Adams, "the Father of the Revolution," began giving thought to the future of the country. In November, 1784, he was elected by the General Court of Massachusetts to its delegation in the Congress of the Confederation, but was unable to serve. On November 30 Richard Henry Lee of Virginia was elected president of the Congress and to him Adams expressed his hopes for the country in a letter of that period in which he wrote:² "[My country] may long enjoy her independence if she will. It depends on her virtue. She has gained the glorious prize, and it is my fervent wish . . . that she may value and improve it as she ought."

In a further letter to Lee as President of Congress, Adams on December 23,

¹ House Report 979 of June 13, 1838, 25th Cong., 2d Sess., Cong. Docs., Serial 336.

The report advised the House of Representatives against "the establishment of a permanent international tribunal" but recommended the memorialists to persevere in fostering a public opinion disposed "habitually to the accommodation of national differences without bloodshed." It was founded on this interesting bit of reasoning:

"The truth is, that every war hereafter, will by the social disorders that are likely to accompany or follow such an event, throw additional obstacles in the way of future ones. The sword will thus prove to be the surest guaranty of peace."

² Wells, William V., *The Life and Public Services of Samuel Adams*, III, 175.

1784, elaborated this trend of his thought, laying stress upon honesty and fair dealing as essential ingredients of the national character of the newly free country.³

The writing of such bits of hope and advice evidently started Adams to considering how to put them into operation. In the fifth General Court of Massachusetts (May 26, 1784–March 18, 1785) Adams was president of the Senate. Toward the end of its final session, which began January 19, 1785, he laid before it a paper which, in the engrossed form of the Massachusetts Archives, is entitled by indorsement on the reverse "Report of a Letter of Instruction to the Delegates⁴ of the C[ommon] W[ealth] in Congress" and *literatim* reads as follows:⁵

Gentlemen

Altho the General Court have lately instructed you concerning various matters of very great importance to this Commonwealth, they cannot finish the business of the year untill they have transmitted to you a further instruction, which they have long had in contemplation; & which if their most ardent wish could be obtained, might in its consequences extensively promote the happiness of man

You are therefore hereby instructed & urged, to move the United States in Congress assembled to take into their deep & most serious consideration, whether any measures can with

by them be used, thro their influence with ~~such~~ of the nations in Europe, as whom or maybe

they are, connected by Treaties of Amity or Commerce, that national differences may be settled & determined without the necessity of War, in which the world has too long been deluged, to the destruction of human happiness, & the disgrace of human reason, and government

If after the most mature deliberation, it shall appear that no measures can be taken at present, on this very interesting subject, it is conceived, it would redound much to the honor of the United States that it was attended to by their great Representative in Congress; & be accepted, as a Testimony of gratitude for most signal favors, granted to the said States by Him, who is the Almighty & most gracious Father & Friend of Mankind

And you are further instructed to move that the foregoing letter of instructions be entered in the Journals of Congress, if it may be thot proper, that so, it may remain for the inspection of the Delegates from this Commonwealth, if necessary, in any future time.

No final action was taken on this instruction, as appears from the marginal notations on it. At the top of the obverse is this record, confirmed by the *Journal*:⁶

Commonwealth of Massachusetts

In Senate March 15th, 1785

Ordered that the Secretary of this Commonwealth be & he hereby is directed to make out

³ Wells, *op. cit.*, III, 214–17.

⁴ The delegates at the time were Elbridge Gerry, Samuel Holten and Rufus King.

⁵ Massachusetts Archives, Senate Documents, 1610.

The manuscript version in the Adams papers deposited in the New York Public Library, differs from the engrossed copy in minor particulars of phrasing, spelling and capitalization, and is without date. Edwin D. Mead in *The Principles of the Founders* (Boston, American Unitarian Society, 1903) quotes from this text.

⁶ Journal of the Senate, 5, 360.

an authentic copy of the following letter of Instructions and forward the same to the Delegates from this Commonwealth in Congress

Sent down for concurrence
S. Adams Prest

The action of the House is formally recorded in its *Journal* as "read and non-concurred" on March 17, 1785,⁷ but an indorsement on the reverse of the instruction itself timed as 4 p.m., March 17, 1785, indicates that a House committee had referred it to the "next Session."⁸ The fifth General Court was prorogued the next day and the proposal was not reintroduced in the sixth General Court.

No evidence has come to notice that this move of Samuel Adams had of itself any subsequent history. But it is interesting to note that at the very time when Adams must have been drafting his paper the St. Croix river boundary was agitating the Boston authorities. Various papers submitted by the Governor of Massachusetts to the Congress in 1785 on that subject were forwarded to John Jay, the Secretary for Foreign Affairs, who on April 21 reported "that in his opinion, effectual measures should be immediately taken to settle all disputes with the crown of Great Britain" relative to the boundary line. Those papers were transmitted by President Washington on February 9, 1790, to the first Congress under the Constitution with the comment that "it is desirable that all questions between this and other nations be speedily and amicably settled."⁹ On March 19, 1790, the Senate Committee on Foreign Relations reported and on March 24 the Senate adopted a resolution upon the appointment of commissioners for the solution of the boundary difficulty. Jay carried out the proposal in Article V of the Treaty of 1794.

DENYS P. MYERS

TWENTY-FOURTH SESSION OF THE INTERNATIONAL LABOR CONFERENCE

The Twenty-Fourth Session of the International Labor Conference opened on June 2 in Geneva and ended on June 22. Its President was Professor W. Falcao, Brazilian Minister of Labor, Industry and Commerce. On the agenda of this session were six questions: (1) Technical and Vocational Education and Apprenticeship; (2) Contracts of Employment of Indigenous Workers; (3) Recruiting, Placing and Conditions of Labor of Migrant Workers; (4) Hours of Work and Rest Periods in Road Transport; (5) Generalization of the Reduction of Hours of Work; (6) Statistics of Hours and Wages.

Except for the last, these questions came before the Conference for a first discussion. The question of statistics of hours and wages presented to the Conference the choice of the ordinary procedure of two discussions in successive years, and the urgent procedure of a single discussion. The Con-

⁷ Journal of the House of Representatives, 5, 361.

⁸ The committee signing the indorsement consisted of Ebenezer Davis of Charlton, John Bacon of Stockbridge, and Samuel Osgood of Andover.

⁹ American State Papers, Foreign Relations, I, 90, 94, 100.

ference chose the single-discussion procedure and by a vote of 125 to 0 adopted a draft Convention on the subject.¹ This was the only convention adopted by the Conference.

The draft Convention concerning wage and hour statistics provides for statistics of (a) average earnings and hours actually worked in mining and manufacturing industries;² (b) time rates of wages and normal working hours in the same industries;³ and (c) wages and hours in agriculture.⁴ One important feature of the Convention is that it takes account of the existing wide differences in methods of compiling statistics of wages and hours in different countries by allowing a country to exclude certain obligations from its general acceptance of the draft Convention by a declaration appended to its ratification, subject to furnishing annual reports as to the progress which it makes towards the eventual assumption of the obligations excluded.⁵ A second important feature of the draft Convention is that it does not require the exercise of compulsory powers by a ratifying government in the collection of the information. Governments are permitted to rely upon the voluntary coöperation of employers and their organizations, and of workers' organizations, with the government.⁶ A third feature worthy of special mention is that the Governing Body is authorized to formulate proposals and submit them to governments which, under the provisions of the Convention, agree to consider them and report on the extent to which the proposals are given effect.⁷

Three draft resolutions were adopted by the Conference to supplement the draft Convention on wage and hour statistics. The first of these requests the Governing Body to examine proposals of additional statistics of wages and hours in accordance with Article 23 of the Convention.⁸ A second resolution requests the Governing Body to consider the advisability of convening a special technical conference to examine further the methods of compiling statistics of the remuneration and hours of persons employed in agriculture, with a view to the improvement and amplification of the statistics to be compiled in pursuance of the draft Convention.⁹ The third relates to the compilation of data required for comparisons of real wages.¹⁰

The draft Convention on wage and hour statistics had its origin in the difficulties encountered by the International Labor Office in its researches in the coal industry in 1925-28¹¹ and in a proposed inquiry in the textile indus-

¹ Provisional Record, Int. Labor Conference, Twenty-Fourth Session, Geneva, No. 25, pp. 342-3.

² Part II. The text of the Convention as reported by the Drafting Committee and subsequently adopted without change by the Conference will be found in *Prov. Rec., op. cit.*, No. 19, Appendix. ³ Part III. ⁴ Part IV. ⁵ Part I, Art. 2.

⁶ *Id.*, Art. 4.

⁷ *Id.*, Art. 23.

⁸ *Prov. Rec.*, No. 21, p. 303. For text of the resolution, see *ibid.*, No. 17, p. XXXI.

⁹ *Ibid.*, No. 21, p. 303. For text of the resolution, see *ibid.*, No. 17, p. XXX.

¹⁰ *Ibid.*, No. 21, p. 303. For text of the resolution, see *ibid.*, No. 17, p. XXX.

¹¹ See *Wages and Hours of Work in the Coal-Mining Industry*, Int. Labor Office, Studies and Reports, Series D, No. 18 (Geneva, 1928), Preface, especially at pp. XIV-XV.

try in 1931.¹² Many useful and vital statistics in various countries were found to be lacking on both of these occasions. Furthermore, of the statistics available on both occasions, many were not comparable. The World Textile Conference, held in Washington in 1937, provided an opportunity of improving this situation as it existed in the textile industry. Indeed, the admission of the Office, in its White Report¹³ prepared for the Washington Conference, that useful information was lacking, and the attendance of a large number of textile experts at the Conference, spurred the Conference to meet the situation, and an agreement was reached for the collection of more adequate statistics on employment, wages and hours.¹⁴ The agreement reached at the Textile Conference was expanded at a meeting of official labor statisticians at Geneva in September, 1937, and a draft Convention on the subject of statistics in industry generally, as well as in mining and agriculture, was then prepared.¹⁵ It was this draft Convention which the Twenty-Fourth Session of the International Labor Conference expeditiously adopted.

That this action could occur so promptly after the Textile Conference is a demonstration of the usefulness of special technical conferences in the framework of the International Labor Organization. It is a demonstration, also, of the need of the continuous effort which is exerted by the International Labor Office in dealing with industrial questions, and, indeed, of the ability of the Organization as a whole to get important things done even in these days of unsettled international affairs. While the draft Convention on wage and hour statistics admittedly deals with a technical matter, it is unnecessary to point out to readers of these pages the importance of statistics in the development and administration of international labor conventions and other work of an international organization dealing with industrial and social problems. This one draft Convention can be taken as a prelude to other draft conventions which have been held in abeyance because of a lack of adequate information. From a long-range point of view it can be classified as among the important achievements of the Organization in its twenty years of existence.

The first question on the agenda of the Twenty-Fourth Session, dealing with technical and vocational education, came before the Conference for the

¹² World Textile Industry, Int. Labor Office, Studies and Reports, Series B, No. 27 (Geneva, 1937), p. 275.

¹³ See The World Textile Industry, White Report to the Technical Tripartite Conference, Washington, April, 1937 (Geneva, 1937), Proof Edition Foreword. The Foreword of the White Report is reproduced in The World Textile Industry, Studies and Reports, No. 27, *op. cit.*, Vol. I, Introduction.

¹⁴ Report of the Committee on Statistics, Technical Tripartite Conference on the Textile Industry, Washington, 1937, C.T.T.F./D.11, 15.4.37 (Mimeographed). Reproduced in The World Textile Industry, Studies and Reports, No. 27, *op. cit.*, Vol. II, p. 273 ff.

¹⁵ See second report of the Committee on Statistics, Int. Labor Conference, Twenty-Fourth Session, Prov. Rec., No. 17.

first time. Modern conditions of production make this a question of prime importance to workers, employers and the general public. Furthermore the depression has made this a question of some urgency in highly industrialized countries. For the last six years or more, prevalent unemployment has discouraged technical and vocational education, with the result that in many countries there is a real shortage of skilled workers in some industries.

On the subject of technical and vocational education, a recommendation and not a draft convention is contemplated for adoption next year. This recommendation will indicate the methods which, in the light of the varied experience of the different countries, seem most likely to solve the problem of providing adequate training for skilled workers. Governments are to be consulted in the interval between the twenty-fourth and twenty-fifth sessions on the many different aspects of the question, which begin with the life of the adolescent who looks forward to skilled employment, and which arise in the period of his compulsory school attendance, the period before entering employment, and the period of apprenticeship proper. The length of the course which should be given in the different stages of vocational training, the methods and programs which they should follow, the ways in which they should take into account changes in technique and methods of organization of work, the status and trend of the labor market, and national economic policy, the rôle of the employer in apprenticeship, the minimum age of admission to apprenticeship, the duration of apprenticeship, and the collaboration of the agencies responsible for its supervision, as well as such complementary questions as the qualifications of teachers, and international exchanges of students and apprentices to enable them to acquire a wider knowledge and experience, are included among the specific points on which the opinions of governments will be sought.

In regard to the second question on the agenda, relating to contracts of employment of indigenous workers, the International Labor Organization is continuing the fruitful work which it had already begun for the protection of colored workers in colonial or similar territories, by the adoption of the Forced Labor Convention in 1930 (No. 29),¹⁶ and the Recruiting of Indigenous Workers Convention of 1936 (No. 60).¹⁷ Governments will be consulted before the Twenty-Fifth Session of the Conference on the preparation of two draft conventions dealing with written contracts of employment and penal sanctions.

The third question on the agenda was a reflection of the recrudescence of migration, the first hesitant trickles of which have begun to appear, as an abatement of the world-wide depression occurs. This is a field in which the interests of at least two states are always involved: the state of the migrant's origin and the state of his destination. The proposed treatment of the question by the International Labor Organization is not simply to be based upon

¹⁶ Int. Labor Conference, Fourteenth Session, Geneva, 1930, Record of Proceedings, p. 480.

¹⁷ Int. Labor Conference, Twentieth Session, Geneva, 1936, Record of Proceedings, p. 399.

bilateral efforts made by governments in the past, but to coördinate these efforts toward a common goal, that of international social progress.¹⁸ By 126 votes to 0 the Conference decided to place this question on the agenda of the 1939 Session for second discussion, thereby continuing this valuable work of the Organization.¹⁹ A draft convention and one or more recommendations on this subject are contemplated for next year. In addition, a resolution adopted by the Twenty-Fourth Session asks the Governing Body to resume its study of the question of the simplification of formalities to be fulfilled by migrant workers previous to their departure from the country of origin, or in the course of the journey, or on arrival in the country of immigration.²⁰

The fourth question on the agenda dealt with a number of new problems created by the rapid development of road transport since the World War. The proposed draft convention on this subject contemplates special regulations for hours of work and rest periods of drivers in order to increase safety on the roads and to promote the development of international road transport services. The report adopted by the Conference requests the Office to consult governments on the provisions to be included in the proposed draft convention and recommendations. The International Labor Office has suggested an eight-hour day as the hours limitation in the proposed draft convention, but the governments will be at liberty to regard the limit as an open question and to make any suggestions which they desire with reference thereto. Governments will be consulted on the possibilities of extensions of the hours of work in such exceptional circumstances as accidents, unforeseen delays, replacement of absent staff, and shortage of skilled labor; authorization of overtime at increased rates of pay; an uninterrupted daily rest; night work; and weekly rest. Governments will also be consulted on the question whether they would prefer the reduction of hours to be achieved gradually; and whether they would like special provisions for certain countries which, by reason of the sparseness of their population or the stage of their economic development, find it impracticable to create the administrative organization necessary to secure effective enforcement of the proposed regulations.

As regards the reduction of hours, the Conference resumed its consideration of the question on quite a new basis. First of all, it determined a point of procedure of radical importance in voting for the proposal that, instead of an industry-by-industry approach in the development of hours conventions, the hours question should be approached in the following manner: one or two draft conventions on industry and on commerce and offices; a draft convention on coal mines; and one or more draft conventions on transport other than road transport, for which a separate convention was discussed (see

¹⁸ See the memorandum submitted by the Int. Labor Office to the Assembly of the League of Nations, reprinted in *International Labor Review*, Vol. XXXVI, No. 6 (December, 1937), p. 721 ff.

¹⁹ *Provisional Record*, *op. cit.*, No. 25, p. 344.

²⁰ *Ibid.*, No. 22, p. 328.

above).²¹ During the forthcoming year governments are to be consulted on the specific points to be incorporated in the one or two general draft conventions limiting hours in industry and in commerce and offices; and one or more preparatory technical tripartite meetings are contemplated to be held to map proposals for conventions limiting hours of work in transport. In accordance with the resolution adopted by the Technical Tripartite Meeting on the Coal Mining Industry, held in Geneva from May 2-10, 1938, the Conference placed the question of hours in coal mines on the agenda of the 1939 Session of the Conference as a separate item, for final discussion.²²

Various resolutions were adopted by the Conference, the more important of which concerned discrimination against workers belonging to certain races or confessions;²³ the investigation of conditions of forestry workers;²⁴ the fixing of maximum weight of loads to be transported by workers;²⁵ the indemnification of workers in cases of dismissal;²⁶ and the convocation of a second Regional Conference of American States.²⁷ These resolutions have no binding effect upon governments and are not subject to ratification. They either express the sentiment of the Conference or request the Governing Body to give its attention to the subject.

Of the above resolutions the one of the greatest immediate importance both to the Organization and the United States is that which requests the Governing Body to consider calling a second Regional Conference of American States. The first Regional Conference of the American States, held at Santiago, Chile, in January, 1936, has been widely regarded as an unusual success. The fact that French and English are the official languages of the I.L.O. and that most of its publications are printed only in these two languages; the fact that Geneva is a long distance from the American countries; and the growth of industrial and social problems in these countries with increased industrialization, had long demanded an increasing attention by the I.L.O. to the needs of American countries, and the first Regional Conference provided a mechanism for this.

As a matter of fact, as was pointed out by the Director of the International Labor Office in his Report to the Twenty-Fourth Session of the Conference, the center of gravity of the I.L.O. has been slowly shifting westward from Europe.²⁸ Although Europe has recovered some of the wealth destroyed in the World War, the economic development which has occurred both on the American and Asiatic Continents has inevitably had an effect upon the constitution and activities of the Organization. Not only has the Governing Body been enlarged so as to accord a fairer representation to non-European

²¹ For a review of the development of the hours program of the I.L.O., see Smith Simpson "What Hours To Work," *American Labor Legislation Review*, Vol. XXVIII, No. 2 (June, 1938), p. 79 ff.

²² *Prov. Rec., op. cit.*, No. 29, p. 446.

²³ *Ibid.*, No. 25, p. 332.

²⁴ *Ibid.*, p. 334.

²⁵ *Ibid.*, p. 335.

²⁶ *Ibid.*, p. 338.

²⁷ *Ibid.*

²⁸ Int. Labor Conference, Twenty-Fourth Session, Report of the Director, Chap. V.

countries, but a variety of events from year to year clearly indicate the growing importance of these two Continents in the scheme of international coöperation envisaged by the Organization. As the Director has pointed out:

The growing participation of extra-European countries in the work of the Conference, of the Governing Body and of technical committees, their insistent demands that greater attention should be paid to their problems, their frequent requests for the despatch of Office missions of contact, inquiry or advice, the rapid social progress which many of them have accomplished in the last twenty years, the spirit of bold and liberal experimentation which animates many of them—all these things indicate the changing equilibrium.²⁹

In the Director's belief this "blending of the long experience of Europe with the youthful vigor of America and the new-found energies of Asia is more likely to infuse new confidence and determination than to induce stagnation and decay." As a consequence, the life of the Organization is calculated to quicken rather than to slacken its pace.³⁰

Of the increasing regionalization of the Organization's work and of the great interest which countries on the American and Asiatic Continents are taking in the Organization there were many reflections in the Conference this year. Closer relations with the American countries were urged through an "enlargement of the activities" of the Organization.³¹ The Director's Report, it was said, should give more space to the economic and social conditions of Latin America;³² members of the Office should visit American countries more frequently;³³ the number of American members of the Office should be increased;³⁴ there should be more national correspondents in American countries;³⁵ all the technical publications of the Office should be published in Spanish and Portuguese;³⁶ monographs in Spanish and Portuguese should be prepared on all subjects which have been dealt with in conventions and recommendations previously adopted;³⁷ above all, a second Regional Conference of American States should be called "soon", and preferably within the next year.³⁸

If the American countries were the more vocal in the Twenty-Fourth Session of the Conference in demanding increased attention from the Organization to their regional problems, there were not lacking other countries which put in a word for special consideration of their regions. Egypt asked that attention be given to Near East problems.³⁹ The government delegate of

²⁹ Int. Labor Conference, Twenty-Fourth Session, Report of the Director, at p. 71.

³⁰ *Ibid.*, at p. 74.

³¹ Prov. Rec., *op. cit.*, No. 8, p. 49 ff.

³² *Ibid.*, No. 8, p. 60.

³³ *Ibid.*, No. 12, p. 191.

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ *Ibid.*, No. 11, p. 171; No. 12, p. 190; No. 13, pp. 226, 238 and 239. The election of John G. Winant to the Directorship of the Office strikingly reflects the increasing vigor of participation in the Organization by American countries; and the election was viewed by delegates to the Conference as cementing the ties of the Organization to the Conference. *Ibid.*, No. 10, p. 137.

³⁹ *Ibid.*, No. 10, p. 114.

Japan, in expressing his regret over the departure of Mr. Butler, trusted that Mr. Winant would follow the ideas of Mr. Butler and "take every possible occasion to render notable service in ensuring that the problems of the East are being systematically and impartially approached."⁴⁰ Requests for a conference on Asiatic countries were renewed at the Twenty-Fourth Session.⁴¹

The fact that only one draft convention was adopted by the Conference indicates, superficially, perhaps, a certain meagerness of result. However, examination of the reasons for this does not reveal any subsidence in the vigor or efficacy of the I.L.O. during the preceding twelve months. Rather does it seem to mark a turning-point in the development of the programs in which the I.L.O. will hereafter be most concerned. For the last seven years a great deal of the Organization's effort has been expended on the development of its forty-hour-week program. If relatively few draft conventions embodying the forty-hour principle seem to have been adopted during this period, the effort of the Organization in this direction has nevertheless been considerable. Special tripartite technical conferences have been held in such number as to tax the research and conference facilities of the Organization. Much time, thought and money have been given to this development.

As has been pointed out in other pages,⁴² the forty-hour program of the I.L.O. has not been meager in its direct results as might appear on first glance or to the more ardent of its advocates. The Textile Convention, alone, for example, would apply the forty-hour week to some 14,000,000 workers throughout the world, if ratified by the various textile-producing countries. In all, four conventions have been adopted by the Conference applying the forty-hour week: sheet glass,⁴³ glass bottles,⁴⁴ public works,⁴⁵ and textiles.⁴⁶ In the case of sheet glass and glass bottles, a concession was made to the continuous character of productive processes, and for these two industries a forty-two hour week was provided. The discussions at the various sessions of the Conference since 1932, furthermore, have had indirect results hardly less appreciable than their direct results. They have set in motion sympa-

⁴⁰ Prov. Rec., *op. cit.*, No. 11, p. 172.

⁴¹ *Ibid.*, No. 13, p. 243.

⁴² "What Hours To Work," *loc. cit.*

⁴³ Convention No. 43. Int. Labor Conference, Eighteenth Session, Geneva, 1934, Record of Proceedings, p. 286. This convention had quite a different origin from the hours conventions adopted subsequently. It began not in an effort to combat unemployment but to provide a weekly rest in undertakings using tank furnaces. The phenomenal growth of automatic machinery during the late 1920's completely altered the kind of undertakings to which the proposed convention was finally made applicable. The weekly-rest approach also was supplemented by the desire to provide compensation for overtime.

⁴⁴ Convention No. 49. Int. Labor Conference, Nineteenth Session, Geneva, 1935, Record of Proceedings, p. 691.

⁴⁵ Convention No. 51. Int. Labor Conference, Twentieth Session, Geneva, 1936, Record of Proceedings, p. 444.

⁴⁶ Convention No. 61. Int. Labor Conference, Twenty-Third Session, Geneva, 1937, Record of Proceedings, pp. 508-509.

thetic discussions of the forty-hour week in national legislatures. The importance of such national discussions cannot easily be over-emphasized in the progress of the movement toward shorter hours. The forty-hour week effort of the Organization undoubtedly has borne considerable fruit which will be ripening over the next decade, so that the indirect results of the forty-hour program seem substantial.

Nevertheless, though forty-hour conventions have been adopted one by one by successive sessions of the Conference, the rate of this progress has discontented those leaders of the Workers' Group of the Conference who have desired a more immediate application of the forty-hour week throughout the world. Instead of the industry-by-industry approach which has been followed during the last five years, the Workers' Group suggested at the 1937 Session a resumption of the former effort to blanket industry and commerce by two general conventions.⁴⁷ At the 1938 Session of the Conference this proposal was favored by a majority of delegates.⁴⁸ This marks a return to the Organization's procedure in 1933-1934.

However, it must be recognized that while the defeat of the industry-by-industry development of the Organization's hours program does not reflect any lessening in the vigor of the Organization, it does reveal an effect of the re-armament race. The defeat of specific forty-hour conventions for such industries as the iron and steel, coal and chemical, can be directly traced to the reluctance of governments to assume any limitation upon the productive possibilities of industries needed for war preparations.⁴⁹ That this same difficulty may soon be felt in all programs of social progress was emphasized by the Director in his Report to the Twenty-Fourth Session of the Conference.⁵⁰

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⁴⁷ For the text of the resolution (submitted by Mr. Mertens, Belgian Workers' Delegate, and Mr. Jouhaux, French Workers' Delegate), see Int. Labor Conference, Twenty-Third Session, Record of Proceedings, p. 787. For the discussion and vote on the resolution, see *ibid.*, pp. 492-496.

⁴⁸ Prov. Rec., No. 29, p. 449.

⁴⁹ For comment on the situation at the Twentieth Session of the Int. Labor Conference, when the 40-hour conventions for the iron and steel, and coal industries were up for a record vote, see Smith Simpson, "The I.L.O. Month by Month," *American Federationist*, Vol. 43, No. 8 (August, 1936), pp. 825-6. See also Report of the Director, 1938, *op. cit.*, especially at p. 56.

⁵⁰ *Ibid.*, Chap. I: "Prosperity Regained—and Lost?"

CHRONICLE OF INTERNATIONAL EVENTS

FOR THE PERIOD MAY 16–AUGUST 15, 1938

(Including earlier events not previously noted)

WITH REFERENCES

Abbreviations: *B. I. N.*, Bulletin of International News; *C. S. Monitor*, Christian Science Monitor; *Clunet*, Journal du droit international; *Cmd.*, Great Britain, Parliamentary papers; *Cong. Rec.*, Congressional Record; *Europe*, L'Europe Nouvelle; *Ex. Agr. Ser.*, U. S. Executive Agreement Series; *G. B. T. S.*, Great Britain Treaty Series; *I. L. O. B.*, International Labor Office Bulletin; *L. N. M. S.*, League of Nations Monthly Summary; *L. N. O. J.*, League of Nations Official Journal; *L. N. T. S.*, League of Nations Treaty Series; *P. A. U.*, Pan American Union Bulletin; *Press Releases*, U. S. State Department; *R. A. I.*, Revue aëronautique internationale; *T. I. B.*, Treaty Information Bulletin, U. S. State Department; *U. S. T. S.*, U. S. Treaty Series.

December, 1937

- 8 JAPAN—SIAM. Treaty of friendship, commerce and navigation, with final protocol, signed at Bangkok. *L. N. M. S.*, June, 1938, p. 155.

February, 1938

- 5 FRANCE—SWITZERLAND. Ratifications exchanged of the communications treaty, signed at Paris, Jan. 29, 1937. Text of convention: *Revue critique de droit int.* (Paris), 1938, v. 33: 312–314.

March, 1938

- 15 DENMARK—SIAM. Treaty of friendship, commerce and navigation signed at Copenhagen. *L. N. M. S.*, May, 1938, p. 115.
- 31 SWEDEN—UNITED STATES. Agreement concerning relief from double income tax on shipping profits was effected by exchange of notes at Washington. Text: *Ex. Agr. Ser.*, No. 121.

April, 1938

- 21 FINLAND—NORWAY. Two conventions signed at Oslo concerning fishing in the Pasvik and Tana Rivers. *L. N. M. S.*, May, 1938, p. 115.

May, 1938

- 4/12 CUBA—UNITED STATES. Agreement reached by exchange of notes for the exchange of official publications. *T. I. B.*, June, 1938, p. 191. Texts: *Ex. Agr. Ser.*, No. 123.
- 5 PERMANENT COURT OF INTERNATIONAL JUSTICE. Application received May 5 from Belgium instituting proceedings against Greece. It invokes the terms of the convention for conciliation, arbitration and judicial settlement of June 25, 1929. *L. N. M. S.*, May, 1938, p. 130. On June 3 the Court fixed certain dates for filing documents in the *Société Commerciale de Belgique* case (Belgium-Greece). *L. N. M. S.*, June, 1938, pp. 163–164.
- 10 INTERNATIONAL INSTITUTE OF AGRICULTURE. Germany gave notice that Austria is no longer a member of the Institute. *T. I. B.*, June, 1938, p. 168.
- 12 UNITED STATES—VENEZUELA. Provisional commercial agreement signed at Caracas. English text: *Press Releases*, May 21, 1938, pp. 602–603; *T. I. B.*, May, 1938, pp. 130–131. Texts: *Ex. Agr. Ser.*, No. 122.

- 12-August 3 MEXICAN OIL. President Cardenas announced his government will offer to the companies 60 per cent of the total oil production for the next ten years as compensation for expropriated properties. *London Times*, May 13, 1938, p. 16; *N. Y. Times*, May 13, 1938, pp. 1, 13. On May 26 the Mexican Ambassador handed to the State Department a proposal for payment of American expropriated properties. The terms were not made public. *N. Y. Times*, May 27, 1938, p. 9. The Mexican Government completed June 15 a deal for the sale of ten million barrels of largely expropriated American and British oil during the next six months from which 60 per cent of the payment will be derived from German materials and machinery. *N. Y. Times*, June 16, 1938, p. 10. The United States sent note challenging the alleged seizure by labor unionists of the American-owned Amparo mine in the State of Jalisco. *N. Y. Times*, July 16, 1938, pp. 1, 6. On July 26 the Mexican Supreme Court denied American and British oil companies' petition for an injunction against the expropriation decree. *N. Y. Times*, July 27, 1938, p. 8.
- 16 SPAIN (Franco)—VATICAN. Diplomatic representatives exchanged. *N. Y. Times*, May 17, 1938, p. 5; *C. S. Monitor*, May 16, 1938, p. 5.
- 18/June 24 JEWISH-OWNED PROPERTY IN GERMANY. The United States note formally protesting against recent decree, was acknowledged by Germany on May 13. *B. I. N.*, June 4, 1938, p. 495. Germany replied June 24. *N. Y. Times*, June 25, 1938, p. 4; *T. I. B.*, June, 1938, p. 173.
- 19 GREAT BRITAIN—HUNGARY. Ratifications exchanged at London of the convention relating to air navigation, signed at Budapest, March 22, 1937. Text: *G. B. T. S.*, No. 39 (1938), *Cmd.* 5765.
- 20 PHILIPPINE ISLANDS—UNITED STATES. The Joint Preparatory Committee on Philippine Affairs signed and submitted its report to F. B. Sayre, as Chairman of the Interdepartmental Committee on Philippine Affairs. *Press Releases*, May 21, 1938, pp. 603-604.
- 20-July 21 SWISS NEUTRALITY. Switzerland sent notes May 20 to Germany and Italy dealing with its neutrality. Germany replied June 21. Texts of Swiss note and German reply: *News in Brief* (Berlin), July 25, 1938, p. 120; *B. I. N.*, June 18, 1938, pp. 562-563. By exchange of notes with Germany, Switzerland gave notice of her resumption of unconditional neutrality and Germany pledged itself to respect that neutrality at all times. Texts of Swiss and German notes and summary of Italian note of July 21; *N. Y. Times*, June 25, 1938, p. 6.
- 21-July 20 ETHIOPIAN CONQUEST. Recognition of Italian sovereignty announced by Norway on May 21, and by Denmark on May 24. *B. I. N.*, June 4, 1938, pp. 492, 503; *N. Y. Times*, May 22, 1938, p. 35; May 25, p. 5. Bulgaria announced its recognition on May 31, and Portugal on July 20. *B. I. N.*, June 18, 1938, p. 525; July 30, p. 663.
- 22 ESTONIA—UNITED STATES. Treaty of friendship, commerce and consular rights, signed Dec. 23, 1925, prolonged for one year. *T. I. B.*, May, 1938, pp. 132-133.
- 23 AERIAL LEGAL EXPERTS. Sessions opened at Paris to engage in the codification of international private air law. *Press Releases*, May 14, 1938, p. 573; *T. I. B.*, May, 1938, p. 129. Drew up three draft conventions and a protocol. Texts: *T. I. B.*, June, 1938, pp. 196-209.
- 25 LEAGUE OF NATIONS—GUATEMALA. Withdrawal of Guatemala became effective. *London Times*, May 26, 1938, p. 15.
- 25-August 10 CHACO DISPUTE BETWEEN BOLIVIA AND PARAGUAY. Treaty of peace, initialed on July 9, was formally signed July 21 at Buenos Aires. It binds the

countries to submit to arbitration the 100-year boundary dispute. Text: *N. Y. Times*, July 22, 1938, p. 6; *Press Releases*, July 23, 1938, pp. 44-46; *P. A. U.*, August, 1938, pp. 453-454; *T. I. B.*, July, 1938, pp. 256-258. Both countries ratified the treaty on Aug. 10, providing mediation by six presidents of neutral nations. A decision must be submitted within 60 days. *C. S. Monitor*, Aug. 11, 1938, p. 1.

- 26-August 15 SPAIN. At a meeting of the Non-Intervention Committee held May 26 in London, France, Italy and Germany were in agreement on the British formulae for evacuating foreign "volunteers" from Spain. Russia opposed the plan. *N. Y. Times*, May 26, 1938, pp. 1, 10; *B. I. N.*, June 4, 1938, p. 508. General Franco suggested informally June 27 that a single port be designated, far from the seat of war, devoted solely to commercial traffic of a non-military character, in order to avoid bombing neutral ships. *N. Y. Times*, June 28, 1938, pp. 1, 8. The Subcommittee of the Non-Intervention Committee reached an agreement June 30 on the main points to be submitted on July 5. *London Times*, July 1, 1938, p. 16; July 6, p. 16; *N. Y. Times*, July 6, 1938, pp. 1, 3. The Spanish Ambassador informed Great Britain on July 26 of his Government's acceptance of the British plan of withdrawal, and on July 27 of its acceptance of the British plan for a British commission of inquiry to report on the bombardment of open towns. *B. I. N.*, July 30, 1938, p. 670; *London Times*, July 27, 1938, p. 13. Text of note of July 26: *London Times*, July 28, p. 13. The British Foreign Office announced acceptance with reservations by General Franco of the proposal for a two-man British commission to investigate bombings of Spanish civilian populations. *C. S. Monitor*, July 27, 1938, p. 1. France informed Great Britain on Aug. 10 that unless the non-intervention plan is accepted by the Burgos Junta, it will close the Pyrenees frontier. *C. S. Monitor*, Aug. 11, 1938, p. 6. Both sides in Spain accepted a 3-man British commission to mediate an exchange of prisoners. *C. S. Monitor*, Aug. 15, 1938, p. 5; *London Times*, Aug. 16, 1938, p. 12.
- 27 GREAT BRITAIN—TURKEY. Three credit accords signed at London. Brief summary: *N. Y. Times*, May 28, 1938, p. 4.
- 27-July 24 OSLO GROUP. Representatives of Sweden, Norway, Denmark, Iceland and Finland signed at Stockholm a declaration pledging their governments to a common neutrality policy in event of a war between other states. *N. Y. Times*, May 28, 1938, p. 5; *B. I. N.*, June 4, 1938, p. 492. A policy of peaceful collaboration with world Powers indorsed by the seven governments represented at a meeting in Copenhagen on July 23. *N. Y. Times*, July 24, 1938, p. 21; *C. S. Monitor*, July 23, 1938, p. 1. It denounced on July 24 the Covenant article compelling them to join economic and financial punitive measures. *N. Y. Times*, July 25, 1938, p. 7; *London Times*, July 25, 1938, p. 11; *B. I. N.*, July 30, 1938, p. 652.
- 28 GERMANY—ITALY. Agreement and treaties signed at Berlin, relating to financial, economic, shipping, and travel problems, arising from the annexation of Austria. *N. Y. Times*, May 29, 1938, p. 14; *London Times*, May 30, 1938, p. 13; *B. I. N.*, June 4, 1938, p. 496.
- 28 TREATY OBLIGATIONS. Secretary of State Hull issued a statement reminding Germany and Czechoslovakia of their obligations under the Kellogg-Briand Pact. Text: *N. Y. Times*, May 29, 1938, p. 1; *Cong. Rec.*, June 2, 1938, p. 10483; *Press Releases*, May 28, 1938, p. 619.
- 31 NORWAY—NEUTRALITY. Declaration, voted by Norwegian Parliament, reserved the right to maintain complete neutrality in any war resulting from action by the League of Nations not approved by Norway. *N. Y. Times*, June 1, 1938, p. 10.

- 31 ST. LAWRENCE SEAWAY. Secretary of State Hull submitted in the form of a draft treaty a plan for the development of the Great Lakes-St. Lawrence Basin. Summary: *N. Y. Times*, June 1, 1938, p. 15. Texts of note and treaty: *T. I. B.*, June, 1938, pp. 178-190.

June, 1938

- 1-July 6 JAPAN—UNITED STATES. Secretary of State Hull announced June 1 he had sent a note to Japan on May 3 demanding remedial measures respecting American rights in China. *C. S. Monitor*, June 1, 1938, pp. 1, 6. Text: *N. Y. Times*, June 2, 1938, pp. 1, 12; *Press Releases*, June 4, 1938, pp. 635-637. Japan agreed on June 2 to meet most of the demands. *C. S. Monitor*, June 2, 1938, p. 1; *N. Y. Times*, June 3, 1938, p. 1. On July 6 Japan replied to the note of May 31 regarding occupation of American property. Text: *Press Releases*, July 23, 1938, pp. 48-49; *N. Y. Times*, July 17, 1938, p. 20.
- 2 LEAGUE OF NATIONS—CHILE. Formal notice of withdrawal from the League given by Chile. *C. S. Monitor*, June 3, 1938, p. 3; *N. Y. Times*, June 3, 1938, p. 10; *L. N. M. S.*, May, 1938, p. 97.
- 2-8 INTERNATIONAL LABOR OFFICE. 24th session opened June 2 at Geneva. At the June 4 session John G. Winant was elected director in place of Harold B. Butler, resigned. *N. Y. Times*, June 5, 1938, p. 1; *C. S. Monitor*, June 4, 1938, p. 1. In general discussion on June 8 the delegates declared world peace to be the most pressing problem. *N. Y. Times*, June 9, 1938, p. 12.
- 3/5 AERIAL BOMBARDMENT. Acting Secretary of State Welles issued a statement on June 3 against the ruthless bombing of civilian populations. Text: *N. Y. Times*, June 4, 1938, p. 1. On June 5 Great Britain asked the United States to cooperate in preparing a small international commission to investigate bombings in Spain and China. *N. Y. Times*, June 6, 1938, p. 6.
- 7 CZECHOSLOVAKIA—UNITED STATES. Agreement concluded by an exchange of notes at Prague regularizing the treatment of American exposed motion-picture films. English texts of notes: *Press Releases*, June 11, 1938, pp. 661-664.
- 7-August 2 AUSTRIAN LOANS. British and French representatives joined the Bank for International Settlements in protest on June 7 against non-payment of loans by Germany. *N. Y. Times*, June 8, 1938, p. 3. Franco-German conversations opened in London on June 9. *London Times*, June 11, 1938, p. 11. United States sent note on June 9 to Germany regarding Austrian debt, requesting an early reply to its note of April 6, 1938. Text: *Press Releases*, June 18, 1938, pp. 694-695. On June 11, Germany proposed a plan to conclude a bilateral agreement for payment of at least part of the interest on the loans. *N. Y. Times*, June 15, 1938, p. 4. On June 16 Economics Minister Funk of Germany formally repudiated in principle any legal, economic or moral responsibility for the Austrian Government loans. Excerpts from speech: *N. Y. Times*, June 17, 1938, p. 3. Agreement signed July 1 in London by Great Britain and Germany, providing for continuance of the debt service of the loans, in force since the 1934 agreement. *N. Y. Times*, July 2, 1938, pp. 1, 5; *B. I. N.*, July 16, 1938, p. 621. On Aug. 2, France and Germany concluded an accord by which Germany agrees to reimburse the French Government for costs incurred from its guarantee of Austrian loans. *C. S. Monitor*, Aug. 3, 1938, p. 2; *N. Y. Times*, Aug. 3, 1938, p. 12; *London Times*, Aug. 3, 1938, p. 9.
- 7-August 2 CZECHOSLOVAK MINORITIES. The Sudeten German party in Czechoslovakia submitted to the Government a memorandum setting forth the "14 points" of its demands. Text: *B. I. N.*, July 30, 1938, pp. 639-640. Both sides accepted the British proposal to send Lord Runciman to Prague in the rôle of mediator in the

- dispute. *N. Y. Times*, July 26, 1938, p. 10; *C. S. Monitor*, July 26, 1938, p. 1. On July 28 the Government handed to the Sudeten party a draft of the principal features of the proposed Administrative Reform Bill. *London Times*, July 29, 1938, p. 14; *B. I. N.*, Aug. 13, 1938, p. 693. Lord Runciman left London for Prague on Aug. 2. *London Times*, Aug. 3, 1938, p. 10.
- 10 DENMARK—SWEDEN. Agreement signed at Stockholm regarding cooperation against foot and mouth disease. *L. N. M. S.*, June, 1938, p. 156.
- 10/July 19 MEXICAN CLAIMS COMMISSION. Special commission finished its three years work, allowing 1,358 claims in whole or in part out of 2,833 that had been filed. *N. Y. Times*, June 11, 1938, p. 4. The United States Treasury Department announced payment on awards of the Commission would be made on a proportional basis as payments were made by the Mexican Government. *N. Y. Times*, July 20, 1938, p. 10.
- 13-18 PERMANENT COURT OF INTERNATIONAL JUSTICE. The Court heard the oral proceedings in the Panevezys-Saldutiskis Railway Case. *L. N. M. S.*, June, 1938, pp. 163-164.
- 13-July 4 ALEXANDRETTA. Three agreements signed by France and Turkey on July 4 at Angora. *London Times*, July 6, 1938, p. 15; *N. Y. Times*, July 4, 1938, p. 6.
- 14 PERMANENT COURT OF INTERNATIONAL JUSTICE. Judgment delivered in the Phosphates in Morocco Case, deciding that the application of the Italian Government could not be entertained. *L. N. M. S.*, June, 1938, pp. 161-163.
- 14-24 WHALING CONGRESS. Whaling Congress met in London. *Press Releases*, June 14, 1938, p. 645. A protocol, extending protection, and a final act, were signed by delegates from the United States, Argentina, Australia, Canada, Germany, Great Britain and Northern Ireland, New Zealand, Norway and South Africa. *T. I. B.*, July, 1938, p. 250.
- 17-25 RED CROSS. 16th International Conference held in London. Brief account of proceedings, resolutions and summary of reports: *League of Red Cross Societies Monthly Bulletin*, July/Aug., 1938.
- 20 JAPAN—UNITED STATES. Parcel post agreement, signed at Tokyo, superseding the convention of June 30, 1904. *T. I. B.*, June, 1938, p. 190.
- 21 GERMANY—RUMANIA. Agreement signed at Berlin, settling trade questions which arose owing to the Anschluss. *B. I. N.*, July 2, 1938, p. 576.
- 21/July 11 CHINA—JAPAN. Japan warned other Powers of its intention to carry out intensive bombing operations and urged evacuation of the territory by neutrals. *N. Y. Times*, June 21, 1938, p. 10; *London Times*, July 12, 1938, p. 15.
- 23 HONDURAS—NICARAGUA. Upon the expiration on June 10 of the provisions contained in Art. 3 of the Pact of Dec. 10, 1937, agreeing to the suspension of armaments purchases for six months, the Mediation Commission made a proposal for the extension of this undertaking, which had been accepted. *Press Releases*, June 25, 1938, pp. 702-703; *T. I. B.*, June, 1938, p. 162.
- 26 CZECHOSLOVAKIA—GERMANY. Trade agreement signed in Berlin. *B. I. N.*, July 2, 1938, p. 577.
- 27 ITALY—NORWAY. Barter agreement signed regarding fish and bombing planes. *N. Y. Times*, June 29, 1938, p. 11.
- 30 GERMANY—GREAT BRITAIN. Protocol signed, bringing 1936 Naval Treaty into accord with the treaty recently signed with France and the United States. *N. Y. Times*, July 7, 1938, p. 12.

- 30 **NAVAL TREATY.** Protocol signed by France, Germany, Great Britain and the United States, establishing a new displacement limit of 45,000 tons for capital ships, the maximum gun caliber of 16 in. remaining unchanged. *N. Y. Times*, July 1, 1938, pp. 1, 12; *B. I. N.*, July 16, 1938, p. 621. Text: *Press Releases*, July 2, 1938, pp. 10-11; *G. B. T. S.*, No. 43 (1938), *Cmd.* 5781.

July, 1938

- 1 **GERMANY—POLAND.** Trade and clearing agreement, initialed at Berlin, to come into force Sept. 1. It is a revision of the clearing agreement of March 1, 1937, necessitated by the Anschluss. *B. I. N.*, July 16, 1938, p. 619.
 - 1 **HAITI—UNITED STATES.** Executive agreement signed at Port-au-Prince granting an extension for one year from Oct. 1, 1938, of a partial moratorium on debt payments. *Press Releases*, July 9, 1938, p. 28; *T. I. B.*, July, 1938, pp. 248-249. Text: *Ex. Agr. Ser.*, No. 128.
 - 2 **AUSTRALIA—JAPAN.** Trade agreement signed at Canberra. *Herald of Asia* (Tokyo), July 11, 1938, p. 294.
 - 5 **ITALY—JAPAN.** Treaty "regulating trade and payment" between Italy and Japan and Manchukuo, signed at Tokyo. *London Times*, July 6, 1938, p. 15; *B. I. N.*, July 16, 1938, p. 625; *N. Y. Times*, July 6, 1938, p. 12.
 - 5 **ITALY—MANCHUKUO.** Treaty of friendship, commerce and navigation signed at Tokyo. *B. I. N.*, July 16, 1938, p. 625.
 - 5 **LITHUANIA—UNITED STATES.** The nationality and military service treaty, signed Oct. 18, 1937, came into force. *T. I. B.*, July, 1938, p. 243.
 - 5 **SIAM—UNITED STATES.** Treaty of friendship, commerce, and navigation, signed Nov. 13, 1937, ratified by the United States. *T. I. B.*, July, 1938, p. 248.
 - 6 **FRANCE—JAPAN.** Announcement made on July 6 of Japanese note relative to the stationing of Annamite police in the Paracel Islands, occupied by France recently. *B. I. N.*, July 16, 1938, p. 626; *N. Y. Times*, July 5, 1938, pp. 1, 8; July 8, p. 8. The Chinese Ambassador to France announced that China considered the Paracel Islands Chinese possessions. *N. Y. Times*, July 7, 1938, p. 12.
 - 6 **GREAT BRITAIN—RUSSIA.** Protocol signed at London bringing the naval agreement of July 30, 1936, into line with the new 45,000-ton limit treaty. *N. Y. Times*, July 7, 1938, p. 12.
 - 6 **SPANISH GOLD.** Paris Court of Appeal rejected the claim of the Spanish Government that gold valued at 7½ million pounds, held by the Bank of France, should be handed over to the Bank of Spain. *B. I. N.*, July 16, 1938, pp. 616-617.
- 6-August 14 **REFUGEES.** The meeting of the Inter-Governmental Conference opened at Evian, France, on July 6 with 32 nations represented. *London Times*, July 7, 1938, p. 16; *N. Y. Times*, July 7, 1938, pp. 1, 8; *B. I. N.*, July 16, 1938, p. 608. Mr. Myron C. Taylor of the United States was elected president. *London Times*, July 8, 1938, p. 15; *N. Y. Times*, July 8, 1938, p. 1. Resolutions were signed July 14 establishing the Inter-Governmental Committee. *London Times*, July 16, 1938, p. 12. Summary: *N. Y. Times*, July 15, 1938, p. 7. Text: *Press Releases*, July 16, 1938, pp. 35-36; *T. I. B.*, July, 1938, pp. 245-247. The Committee of 27 nations, meeting Aug. 3 in London, selected as permanent director, George Rublee of Washington, D. C. *C. S. Monitor*, Aug. 3, 1938, p. 1; *London Times*, Aug. 4, 1938, p. 10. At a meeting on Aug. 4 the Committee was told it has the task of resettling 650,000 political refugees in five years. *N. Y. Times*, Aug. 5, 1938, p. 9. Mr. Rublee arrived in London Aug. 15. *N. Y. Times*, Aug. 16, 1938, p. 10.

- 11 TURKEY—YUGOSLAVIA. Agreement initialed at Istanbul, providing for the emigration of 150,000 Moslem Turks living in Yugoslav Macedonia. *B. I. N.*, July 30, 1938, p. 670.
- 12 LEAGUE OF NATIONS—VENEZUELA. League of Nations Secretariat announced withdrawal of Venezuela from the League. *N. Y. Times*, July 13, 1938, p. 13; *B. I. N.*, July 30, 1938, p. 673.
- 14 AMERICAN FOREIGN SERVICE. President Roosevelt signed Executive Order No. 7927, establishing the "Foreign Service Regulations of the United States" for the consolidation of the diplomatic and consular services. *Press Releases*, July 23, 1938, pp. 60-61.
- 15—August 15 JAPAN—RUSSIA. Japan sent protest July 15 regarding alleged crossing of the Manchukuo frontier. *B. I. N.*, July 30, 1938, p. 664. Soldiers of the two countries clashed July 22 on an island in the Ussuri River, 100 miles from Changkufeng. *C. S. Monitor*, July 23, 1938, p. 3. Soviet troops launched an attack at Changkufeng on Aug. 2. *London Times*, Aug. 3, 1938, p. 10. On Aug. 4 the Japanese Foreign Office announced a proposal for a border truce in the Siberian-Manchukuoan dispute. *C. S. Monitor*, Aug. 4, 1938, p. 1; *N. Y. Times*, Aug. 5, 1938, pp. 1, 8; *London Times*, Aug. 5, 1938, p. 12. Russia presented proposals Aug. 7 for a truce and demarcation of the frontiers of Russian Siberia and Japanese-protected Manchukuo, near the Korean border. *London Times*, Aug. 8, 1938, p. 10. Japanese and Russian views: *N. Y. Times*, Aug. 9, 1938, p. 8. An armistice was declared Aug. 10 along the Manchukuoan-Siberian border. *London Times*, Aug. 12, 1938, p. 12; *C. S. Monitor*, Aug. 11, 1938, p. 1; *N. Y. Times*, Aug. 11, 1938, pp. 1, 6. Abridged text of 3 truce conferences: *C. S. Monitor*, Aug. 12, 1938, p. 1. Both governments claimed on Aug. 15 violations of the truce. *C. S. Monitor*, Aug. 15, 1938, p. 1.
- 18 FRANCE—GREAT BRITAIN. Commercial treaty signed in Paris, terminating the capitulations in Morocco as far as they concern British nationals. It will be in force for seven years and supersedes the treaty with Morocco, signed in December, 1856. *B. I. N.*, July 30, 1938, p. 654.
- 21 PAN AMERICAN UNION. The Governing Board at a special meeting adopted a resolution proclaiming that public opinion in the Americas demands an end of war. *N. Y. Times*, July 22, 1938, p. 6; *C. S. Monitor*, July 21, 1938, pp. 1, 4. Text of resolution; *T. I. B.*, July, 1938, pp. 236-238.
- 27 CZECHOSLOVAKIA—POLAND. Poland sent note protesting continued terrorist activities of Czech communists in Poland, and stated that its note of March 22 had not yet been given consideration. *London Times*, July 28, 1938, p. 13; *B. I. N.*, Aug. 13, 1938, p. 706.
- 28 CANADA—UNITED STATES. Three aeronautical agreements reached by exchange of notes at Washington: (1) air navigation; (2) reciprocal issuance of airman certificates; (3) reciprocal recognition of certificates of airworthiness concerning airplanes for export. *C. S. Monitor*, July 29, 1938, p. 1; *N. Y. Times*, July 29, 1938, p. 8. Summary: *Press Releases*, July 30, 1938, pp. 67-68. Text of arrangement regarding certificates of airworthiness for export: *Ex. Agr. Ser.*, No. 131.
- 31 BALKAN ENTENTE—BULGARIA. The Premiers of Bulgaria, Greece, Rumania, Turkey and Yugoslavia, meeting at Salonica, signed an agreement renouncing the military penalties imposed on Bulgaria by the Treaty of Neuilly, signed Nov. 27, 1919, and the Lausanne treaty of July, 1923. Bulgaria also signed non-aggression pacts with all countries of the Entente. *C. S. Monitor*, Aug. 1, 1938, pp. 1, 6.

Text of agreement: *London Times*, Aug. 1, 1938, p. 10. Text of communiqué: *N. Y. Times*, Aug. 1, 1938, p. 7.

August, 1938

- 6 ECUADOR—UNITED STATES. Trade agreement signed at Quito. *Press Releases*, Aug. 13, 1938, p. 99.
- 6 RUSSIA—UNITED STATES. Trade agreement renewed for one year by an exchange of notes, accompanied by a promise by Russia to purchase \$40,000,000 of American goods. *N. Y. Times*, Aug. 7, 1938, p. 29. Texts of notes: *Press Releases*, Aug. 13, 1938, pp. 110-113.
- 8 LIBERIA—UNITED STATES. Treaty of friendship, commerce and navigation signed at Monrovia terminating the previous treaty in effect since Feb. 17, 1863. *Press Releases*, Aug. 13, 1938, p. 114.
- 11 INTERNATIONAL DANUBE COMMISSION. It was decided at a meeting in Sinaia, Rumania, to move its offices from Vienna to Belgrade. *N. Y. Times*, Aug. 12, 1938, p. 9.
- 11 PACIFIC ISLANDS. The Department of State announced that Great Britain and the United States have agreed to set up a régime for their use in common of Canton and Enderbury Islands for purposes connected with international aviation and communications. *London Times*, Aug. 11, 1938, p. 10; *Press Releases*, Aug. 13, 1938, p. 114; *N. Y. Times*, Aug. 11, 1938, p. 10.
- 11 POLAND—UNITED STATES. Agreement concluded for the reduction of passport visa fees, effective Sept. 1. *Press Releases*, Aug. 11, 1938, p. 115.

INTERNATIONAL CONVENTIONS

AERIAL NAVIGATION. Paris, Oct. 13, 1919. Protocol of Amendments. Brussels, June 1, 1935.

Adhesion: Italy. May 19, 1938.

Ratification: Iraq. March 13, 1938. *T. I. B.*, June, 1938, p. 171.

AFRICAN POSTAL UNION. Pretoria, Oct. 30, 1935.

Signatures: South Africa, Portuguese Colonies, Belgian Congo, Kenya, Uganda and Tanganyika Territory, Nyasaland, Northern and Southern Rhodesia, and Swaziland. *L. N. M. S.*, June, 1938, p. 156.

AFRICAN TELECOMMUNICATION AGREEMENT. Pretoria, Oct. 30, 1935.

Signatures: South Africa, Portuguese Colonies, Belgian Congo, Kenya, Uganda and Tanganyika Territory, Nyasaland, Northern and Southern Rhodesia and Swaziland. *L. N. M. S.*, June, 1938, p. 156.

AGRICULTURE, INTERNATIONAL INSTITUTE OF. Protocols. Rome, June 7, 1905, and April 21, 1926.

Withdrawal: Russia. *T. I. B.*, April, 1938, p. 93.

AIR MAIL. Panama, Dec. 22, 1936.

Ratification: Spain. April 4, 1938. *T. I. B.*, May, 1938, p. 144.

AIR TRAFFIC. Warsaw, Oct. 12, 1929.

Adhesions: Aden and Burma. *T. I. B.*, May, 1938, p. 128.

ARBITRATION CLAUSES. Protocol. Geneva, Sept. 24, 1923.

Ratification deposited: Free City of Danzig (by Poland). April 26, 1938. *T. I. B.*, May, 1938, p. 133; *L. N. O. J.*, July, 1938, p. 609.

Reservation withdrawn: The Netherlands. *T. I. B.*, April, 1938, p. 96.

ARGENTINE ANTI-WAR TREATY. Rio de Janeiro, Oct. 10, 1933.

Adhesion deposited: Finland. Feb. 17, 1938. *T. I. B.*, April, 1938, p. 86.

ARTISTIC EXHIBITIONS. Buenos Aires, Dec. 23, 1936.*Ratifications deposited:*Brazil. March 22, 1938. *T. I. B.*, June, 1938, p. 195.Haiti. June 23, 1938. *T. I. B.*, July, 1938, p. 255.El Salvador. April 1, 1938. *T. I. B.*, April, 1938, p. 103.**BROADCASTING.** Convention and Final Act. Geneva, Sept. 23, 1936.*Adhesions:*Ireland. *T. I. B.*, July, 1938, p. 235.El Salvador. March 23, 1938. *T. I. B.*, May, 1938, p. 117.*Adhesion deposited:* Sweden. June 22, 1938. *T. I. B.*, July, 1938, p. 235.*Ratifications deposited:*France. March 8, 1938. *T. I. B.*, April, 1938, p. 86.Norway. May 5, 1938. *T. I. B.*, July, 1938, p. 235.**CAPITULATIONS IN EGYPT.** Montreux, May 8, 1937.*Ratifications:*France. June 16, 1938. *B. I. N.*, July 2, 1938, p. 571.India and South Africa. May 19, 1938. *T. I. B.*, July, 1938, p. 238.New Zealand (by Great Britain). March 23, 1938. *T. I. B.*, April, 1938, p. 88.

Spain. June 2, 1938.

United States. June 13, 1938. *T. I. B.*, July, 1938, p. 238.*Ratifications deposited:*Australia (by Great Britain). April 27, 1938. *T. I. B.*, June, 1938, p. 162.Norway. April 13, 1938. *T. I. B.*, May, 1938, p. 123.**CATTLE HERDBOOKS.** Rome, Oct. 14, 1936.*Ratifications deposited:*France. March 24, 1938. *T. I. B.*, April, 1938, p. 93.Germany. May 24, 1938. *T. I. B.*, June, 1938, p. 168.**COPYRIGHT.** Revision. Rome, June 2, 1928.*Adhesion:* Portugal (in force July 29, 1937). *Droit d'Auteur*, July, 1938, p. 77.**COPYRIGHT CONVENTION.** Havana, Feb. 20, 1928.*Adhesion:* Colombia. April 22, 1938. *T. I. B.*, May, 1938, p. 133.**COUNTERFEITING CURRENCY AND PROTOCOL.** Geneva, April 20, 1929.*Adhesion:* Brazil. May 11, 1938. *T. I. B.*, July, 1938, p. 249.**ECONOMIC STATISTICS.** Convention and Protocol. Geneva, Dec. 14, 1928.*Adhesion deposited:* Lithuania. April 2, 1938. *T. I. B.*, May, 1938, p. 144; *L. N. O. J.*, July, 1938, p. 610.**EDUCATIONAL FILMS.** Geneva, Oct. 11, 1933.*Text:* *T. I. B.*, April, 1938, pp. 104-114.**EDUCATIONAL AND PUBLICITY FILMS.** Buenos Aires, Dec. 23, 1936.*Ratifications deposited:*Brazil. May 5, 1938. *T. I. B.*, May, 1938, p. 125.Haiti. June 23, 1938. *T. I. B.*, July, 1938, p. 239.El Salvador. April 1, 1938. *T. I. B.*, April, 1938, p. 89.**EMPLOYMENT OF CHILDREN AT SEA.** Genoa, July 9, 1920.*Denunciation:* Brazil. *T. I. B.*, July, 1938, p. 252.**FISHING NETS AND SIZE OF FISH.** London, March 23, 1937.*Signatures:* Belgium, Denmark, Germany, Great Britain and Northern Ireland, Iceland, Irish Free State, The Netherlands, Norway, Poland and Sweden.*Text:* *G. B. Misc. Ser.*, No. 5 (1937).

FLORA AND FAUNA PRESERVATION. London, Nov. 8, 1933.

Ratification: France. June 3, 1938. *T. I. B.*, July, 1938, p. 255. (With Portugal's ratification a few days ago, the convention has now been ratified by all the 10 Powers which first elaborated it.) London *Times*, May 28, 1938, p. 13.

FOREIGN ARBITRAL AWARDS. Geneva, Sept. 26, 1927.

Ratification deposited: Free City of Danzig (by Poland). April 26, 1938. *T. I. B.*, May, 1938, p. 133; *L. N. O. J.*, July, 1938, p. 610.

GOOD OFFICES AND MEDIATION. Buenos Aires, Dec. 23, 1936.

Ratifications deposited:

Brazil. April 11, 1938.

Colombia. Jan. 28, 1938.

Nicaragua. April 29, 1938. *T. I. B.* May, 1938, p. 116.

El Salvador. April 1, 1938. *T. I. B.*, April, 1938, p. 85.

HISTORY TEACHING. Geneva, Oct. 2, 1937.

Signatures:

Colombia. June 2, 1938. *T. I. B.*, July, 1938, p. 240.

Greece. April 6, 1938.

Iran. April 27, 1938. *T. I. B.*, May, 1938, p. 124.

HOURS OF WORK IN SHEET-GLASS WORKS. Geneva, June 21, 1934.

Ratification: Mexico. *T. I. B.*, April, 1938, p. 97.

INDUSTRIAL PROPERTY. London, June 2, 1934.

Came into force for the following countries: Denmark, Germany, Great Britain, Japan, Norway, United States. Aug. 1, 1938. *T. I. B.*, July, 1938, p. 251.

INTER-AMERICAN ARBITRATION. Washington, Jan. 5, 1929.

Ratification deposited: Colombia (with reservation). July 12, 1938. *T. I. B.*, July, 1938, p. 229.

In force: Brazil, Chile, Colombia, Cuba, Dominican Republic, Ecuador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Peru, El Salvador, United States, Venezuela.

INTER-AMERICAN CONCILIATION CONVENTION. Washington, Jan. 5, 1929. Additional Protocol. Montevideo, Dec. 26, 1933.

Adhesion: Guatemala. May 26, 1938. *T. I. B.*, July, 1938, p. 230.

INTER-AMERICAN CULTURAL RELATIONS. Buenos Aires, Dec. 23, 1936.

Ratifications deposited:

Brazil. May 24, 1938. *T. I. B.*, June, 1938, p. 164.

Haiti. June 23, 1938. *T. I. B.*, July, 1938, p. 239.

INTER-AMERICAN RADIO COMMUNICATIONS. Havana, Dec. 13, 1937.

Ratifications deposited:

Haiti. June 27, 1938. *T. I. B.*, June, 1938, p. 192.

United States. July 21, 1938. *T. I. B.*, July, 1938, p. 253.

INTERCHANGE OF PUBLICATIONS. Buenos Aires, Dec. 23, 1936.

Ratifications deposited:

Brazil. May 24, 1938. *T. I. B.*, June, 1938, p. 190.

Haiti. June 23, 1938. *T. I. B.*, July, 1938, p. 253.

El Salvador. April 1, 1938. *T. I. B.*, April, 1938, p. 100.

INTERNATIONAL CRIMINAL COURT. Geneva, Nov. 16, 1937.

Signatures:

Cuba. May 28, 1938.

Russia. May 14, 1938. *L. N. O. J.*, July, 1938, p. 612.

INTERNATIONAL LABOR OFFICE CONVENTIONS.

Ratification: New Zealand (22 conventions). March 29, 1938. *T. I. B.*, May, 1938, pp. 140-141; *L. N. O. J.*, pp. 612-615.

LETTERS, ETC., OF DECLARED VALUE. Cairo, March 20, 1934.

Adhesion: Brazil. April 2, 1938. *T. I. B.*, July, 1938, p. 253.

LOAD LINE CONVENTION. London, July 5, 1930.

Application to: Burma (as an overseas territory). *T. I. B.*, April, 1938, p. 97.

MAINTENANCE, etc., OF PEACE. Buenos Aires, Dec. 23, 1936.

Ratifications deposited:

Colombia. March 10, 1938. *T. I. B.*, April, 1938, pp. 83-84.

Cuba. March 25, 1938. *T. I. B.*, May, 1938, p. 115.

Dominican Republic. July 1, 1937. *T. I. B.*, April, 1938, pp. 83-84.

El Salvador. April 12, 1938. *T. I. B.*, July, 1938, p. 233.

MARITIME BUOYAGE. Geneva, May 13, 1936.

Adhesion deposited: Egypt. April 7, 1938. *T. I. B.*, May, 1938, p. 143; *L. N. O. J.*, July, 1938, p. 611.

MINIMUM AGE (SEA) CONVENTION. Revised. Geneva, Oct. 22, 1936.

Adhesion: Brazil. *T. I. B.*, July, 1938, p. 252.

MONEY ORDER. Panama, Dec. 22, 1936.

Ratification: Spain. April 4, 1938. *T. I. B.*, May, 1938, p. 144.

MOTOR VEHICLES TAXATION. Geneva, March 30, 1931.

Accessions: Kenya, Uganda, Nyasaland, Tanganyika Territory, Zanzibar, Northern Rhodesia. May 3, 1938. *L. N. O. J.*, July, 1938, p. 610.

NARCOTIC DRUG TRAFFIC. Procès-Verbal. Geneva, June 26, 1936.

Adhesion: Guatemala. June 2, 1938. *T. I. B.*, June, 1938, p. 166.

Ratification deposited: Rumania. June 28, 1938. *T. I. B.*, July, 1938, p. 244.

Signatures:

El Salvador. June 8, 1938.

South Africa. May 25, 1938. *L. N. O. J.*, July, 1938, p. 611.

NATIONALITY. Montevideo, Dec. 26, 1933.

Adhesion: Brazil (with reservation). Jan. 10, 1938. *T. I. B.*, June, 1938, p. 165.

NAVAL ARMAMENT TREATY. Protocol. London, June 30, 1938.

Text and signatures: Press Releases, July 2, 1938, pp. 10-11; *G. B. T. S.*, No. 43 (1938), Cmd. 5781; *T. I. B.*, June, 1938, pp. 158-159.

NIGHT WORK OF WOMEN. Washington, Nov. 28, 1919. Revised. 1934.

Ratification: Iraq. *T. I. B.*, May, 1938, p. 140.

NON-INTERVENTION. Buenos Aires, Dec. 23, 1936.

Ratifications deposited:

Colombia. March 10, 1938. *T. I. B.*, April, 1938, p. 85.

Cuba. March 25, 1938. *T. I. B.*, May, 1938, p. 117.

Dominican Republic. July 1, 1937. *T. I. B.*, April, 1938, p. 86.

El Salvador. April 12, 1938. *T. I. B.*, July, 1938, p. 234.

NORTH AMERICAN REGIONAL BROADCASTING. Havana, Dec. 13, 1937.

Ratifications deposited:

Haiti. June 27, 1938. *T. I. B.*, June, 1938, p. 192.

United States. July 21, 1938. *T. I. B.*, July, 1938, p. 254.

PAN AMERICAN HIGHWAY. Buenos Aires, Dec. 23, 1936.

Ratifications deposited:

Guatemala. Aug. 17, 1938. *N. Y. Times*, Aug. 18, 1938, p. 8

El Salvador. *T. I. B.*, April, 1938, p. 100.

PARCEL POST. Cairo, March 20, 1934.

Adhesion: Brazil. April 2, 1938. *T. I. B.*, July, 1938, p. 253.

PARCEL POST. Panama, Dec. 22, 1936.

Ratification: Spain. April 4, 1938. *T. I. B.*, May, 1938, p. 144.

PEACE ON THE AMERICAN CONTINENT. Buenos Aires, Dec. 23, 1936.

Ratifications deposited:

Colombia. March 10, 1938. *T. I. B.*, April, 1938, p. 84.

Cuba. March 25, 1938. *T. I. B.*, May, 1938, p. 116.

Dominican Republic. July 1, 1937. *T. I. B.*, April, 1938, p. 84.

El Salvador. April 12, 1938. *T. I. B.*, July, 1938, p. 233.

PERMANENT COURT OF INTERNATIONAL JUSTICE. Optional Clause. Geneva, Dec. 16, 1920.

Renewal: Estonia (for 10 years). May 2, 1938. *L. N. O. J.*, July, 1938, p. 609.

Withdrawal of declaration: Paraguay. April 26, 1938. *T. I. B.*, July, 1938, p. 231.

POSTAL CONVENTION. Cairo, March 20, 1934.

Adhesion: Brazil. April 2, 1938. *T. I. B.*, July, 1938, pp. 252-253.

POSTAL UNION OF THE AMERICAS AND SPAIN. Panama, Dec. 22, 1936.

Ratification: Spain. April 4, 1938. *T. I. B.*, May, 1938, p. 144.

Ratification deposited: Canada. May 27, 1937.

Text: *Canada Treaty Ser.*, 1937, No. 16.

PREVENTION OF CONTROVERSIES. Buenos Aires, Dec. 23, 1936.

Ratifications deposited:

Guatemala. Aug. 17, 1938. *N. Y. Times*, Aug. 18, 1938, p. 8.

El Salvador. April 1, 1938. *T. I. B.*, April, 1938, p. 85.

PUBLIC INSTRUCTION. Buenos Aires, Dec. 23, 1936.

Ratification: Haiti. April 25, 1938.

Ratifications deposited:

Brazil. May 24, 1938. *T. I. B.*, June, 1938, p. 164.

Nicaragua. April 29, 1938. *T. I. B.*, May, 1938, p. 125.

El Salvador. April 1, 1938. *T. I. B.*, April, 1938, p. 89.

RADIO COMMUNICATIONS REGULATIONS AND PROTOCOL. Madrid, Dec. 9, 1932.

Application to: Tunisia. March 21, 1938.

Ratifications deposited:

Cuba. April 13, 1938.

France. May 5, 1938. *T. I. B.*, May, 1938, pp. 144-145.

REFUGEES FROM GERMANY. Geneva, Feb. 10, 1938.

Text and Signatures: Belgium, Great Britain, Cuba, Denmark, Spain, France, Norway, The Netherlands, Portugal, Sweden, Switzerland, Czechoslovakia. *G. B. Misc. Ser.*, No. 5 (1938), *Cmd.* 5780.

SAFETY AT SEA. London, May 31, 1929.

Application to: Burma (as an overseas territory). April 1, 1937. *T. I. B.*, April, 1938, pp. 91-92.

SEAMEN'S ARTICLES OF AGREEMENT. Geneva, June 24, 1926.

Ratification: Canada. *T. I. B.*, July, 1938, p. 252.

SLAVERY. Geneva, Sept. 25, 1926.

Reservation withdrawn: India. *T. I. B.*, April, 1938, p. 92; *L. N. O. J.*, July, 1938, p. 609.

STATISTICS OF CAUSES OF DEATH. London, June 19, 1934.

Promulgation: Mexico. March 23, 1938. *T. I. B.*, April, 1938, p. 91.

SUBMARINES IN WAR. Procès-Verbal. London, Nov. 6, 1936.

Adhesion: Siam. Jan. 12, 1938. *T. I. B.*, April, 1938, p. 87.

SUGAR PRODUCTION AND MARKETING. London, May 6, 1937.

Ratifications deposited:

Belgium. April 7, 1938.

Brazil. March 31, 1938.

Haiti. March 22, 1938. *T. I. B.*, April, 1938, pp. 93-94.

Hungary. June 14, 1938. *T. I. B.*, July, 1938, p. 248.

The Netherlands. March 14, 1938.

Poland. March 14, 1938.

United States. April 4, 1938. *T. I. B.*, April, 1938, pp. 93-94.

Effective provisionally: France. April 22, 1938. *T. I. B.*, May, 1938, p. 128.

TELECOMMUNICATIONS. Madrid, Dec. 9, 1932.

Adhesion: Norway. March 2, 1938. *T. I. B.*, June, 1938, p. 192.

Application to:

French colonies. March 26, 1938. *T. I. B.*, April, 1938, p. 100.

Tunisia. March 21, 1938.

Ratifications deposited:

Cuba. April 13, 1938.

France. May 5, 1938. *T. I. B.*, May, 1938, pp. 144-145.

TELEGRAPH REGULATIONS AND PROTOCOL. Madrid, Dec. 9, 1932.

Application to: Tunisia. March 21, 1938.

Ratification deposited: France. May 5, 1938. *T. I. B.*, May, 1938, pp. 144-145.

TERRORISM. Geneva, Nov. 16, 1937.

Signatures:

Cuba. May 28, 1938.

Haiti. May 3, 1938.

Russia. May 13, 1938. *L. N. O. J.*, July, 1938, p. 612.

TORPEDO SALVAGE. Additional Protocol. Paris, Jan. 12, 1938.

Text and signatures: Belgium, France, Great Britain, Ireland, Italy, The Netherlands, Portugal, Spain. *G. B. T. S.*, No. 40 (1938), *Cmd.* 5774.

UNDERGROUND WORK (WOMEN). Geneva, June 4, 1935.

Adhesion: Brazil. *T. I. B.*, July, 1938, p. 251.

Ratification: India and Turkey. *T. I. B.*, May, 1938, p. 140.

UNEMPLOYMENT. Washington, Nov. 28, 1919.

Denunciation: India. *T. I. B.*, May, 1938, p. 140.

Ratification: New Zealand. March 29, 1938. *L. N. O. J.*, July, 1938, p. 612.

WEIGHT OF PACKAGES ON VESSELS. Geneva, June 21, 1929.

Ratification: Canada. *T. I. B.*, July, 1938, p. 252.

WHALING. Geneva, Sept. 24, 1931.

Adhesion deposited: Ireland. April 9, 1938. *L. N. O. J.*, July, 1938, p. 610; *T. I. B.*, May, 1938, p. 134.

Text: *Irish Treaty Ser.*, 1938, No. 2.

WHALING. Final Act. London, June 8, 1937.

Adhesion in force:

Canada. June 14, 1938. *T. I. B.*, July, 1938, p. 250.

Mexico. May 7, 1938.

Came into force: May 7, 1938. *T. I. B.*, May, 1938, p. 139.

Ratifications deposited:

Ireland. May 7, 1938.

New Zealand. June 24, 1938. *T. I. B.*, July, 1938, p. 250.

Text: Irish Treaty Ser., 1938, No. 3.

WHITE SLAVE TRADE (WOMEN OF FULL AGE). Geneva, Oct. 11, 1933.

Adhesions:

Brazil. June 24, 1938.

Ireland. May 25, 1938. *T. I. B.*, July, 1938, p. 247.

Adhesion deposited: Mexico. March 9, 1938. *T. I. B.*, June, 1938, p. 167.

DOROTHY R. DART

HOUSE OF LORDS

(LORD ATKIN, LORD THANKERTON, LORD MACMILLAN, LORD WRIGHT, AND
LORD MAUGHAM)

THE CRISTINA *

March 3, 1938

By a decree dated June 28, 1937, the respondents, the Spanish Republican Government, requisitioned all ships registered at Bilbao. A steamship which was registered at that port, and which was not in Spanish territorial waters at the date of the decree, arrived at Cardiff on July 8, 1937. By virtue of the decree the agent of the Spanish Republican Government took possession of the ship, whereupon the appellants, the owners of the ship, issued a writ against the vessel and all persons claiming an interest therein whereby the owners sought to obtain possession. The respondents claimed immunity from the proceedings and moved to set aside the writ.

Held, that as the Spanish Republican Government were the only persons claiming an interest in the ship adverse to the plaintiffs, they were and were intended to be impleaded by the plaintiffs; that by reason of the requisition the ship was in actual possession of the Republican Government for public purposes; and that the proceedings, which were directed to taking a Spanish ship out of the possession of the recognized Government of Spain, could not be maintained since to admit such proceedings would be in breach of the established principles of international law that the courts would not implead a foreign sovereign without his consent or seize or detain property which was his or of which he was in possession or control.

Judgment of the Court of Appeal affirmed.

This was an appeal by the plaintiffs, the owners of the *Cristina*, from a decision of the Court of Appeal which raised questions with regard to the jurisdiction of English courts to make orders affecting foreign states.

Last July the Spanish Republican Government requisitioned the vessels *Cristina*, *Arraiz*, *Marte*, and *Marqués de Urquijo*, registered at Bilbao but then lying at Cardiff, and the shipowners issued writs in the British Admiralty Court claiming the possession of their vessels. The Spanish Government then moved to set aside the writs and all subsequent proceedings, on the ground that at the time the writs were issued the vessels were "the property of the Government of Spain, a recognized foreign independent state, and that the said state declines to sanction the institution of these proceedings in this court."

The Spanish Government alleged that at the time of the issue of the writs the vessels "were in the possession of the Spanish Government by its duly authorized agents; that at the time of the issue of the writs the Spanish Republican Government had a right to the possession" of the vessels; and "that the actions implead a foreign sovereign—namely, the Government of Spain."

On July 30 Mr. Justice Bucknill found that the Spanish Government's requisition was based on a decree promulgated in the Spanish *Gazette* at Valencia, and the motions were adjourned for further evidence.

* The Times Law Reports, March 11, 1938, Vol. 54, p. 512. Reported by Charles Clayton, Esq., Barrister-at-Law.

The matter came on again before Mr. Justice Bucknill on October 15. The case of the *Cristina* was taken, as the affidavits were filed in that particular action.

The plaintiffs were the Compañia Naviera Vascongada, who claimed, as sole owners of the steamship *Cristina*, of the port of Bilbao, to have possession adjudged to them of the vessel, at present under arrest of the court.

The defendants were "the steamship or vessel *Cristina* and all persons claiming an interest."

Mr. Justice Bucknill said that he was satisfied that the Spanish Government did intend the decree to apply to the *Cristina*, although at the time of the decree she was not in Spanish territorial waters and had never been within them since, and although at the time of her requisition she was within British territorial waters, and that in pursuance of that intention it took possession of the vessel. It might be that that action was not in accordance with English ideas of international comity, but if it was contrary to the comity of nations it was a matter for diplomatic representation and not a matter for that court. It was impossible for the court to exercise jurisdiction, and the writ and warrant of arrest must be set aside.

The judgment applied equally to the *Cristina*, the *Arraiz*, and the *Marqués de Urquijo*. The case of the *Marte* would stand over *sine die*.

The plaintiffs, the owners of the *Cristina*, appealed to the Court of Appeal, who in November held that the case was covered by *The Jupiter* (40 The Times L.R. 815; [1924] P. 236) and dismissed the appeal.

LORD ATKIN. My Lords, the circumstances in which the writ in this action was issued and the *Cristina* was arrested have been set out in the opinion of my noble and learned friend Lord Wright which I have had the advantage of reading, and I need not repeat them.

The foundation for the application to set aside the writ and arrest of the ship is to be found in two propositions of international law engrafted into our domestic law which seem to me to be well established and to be beyond dispute. The first is that the courts of a country will not implead a foreign sovereign, that is, they will not by their process make him against his will a party to legal proceedings whether the proceedings involve process against his person or seek to recover from him specific property or damages.

The second is that they will not by their process, whether the sovereign is a party to the proceedings or not, seize or detain property which is his or of which he is in possession or control. There has been some difference in the practice of nations as to possible limitations of this second principle—whether it extends to property only used for the commercial purposes of the sovereign or to personal private property. In this country it is in my opinion well settled that it applies to both.

I draw attention to the fact that there are two distinct immunities appertaining to foreign sovereigns, for at times they tend to become confused

and it is not always clear from the decisions whether the judges are dealing with one or the other or both. It seems to me clear that in a simple case of a writ *in rem* issued by our Admiralty Court in a claim for collision damage against the owners of a public ship of a sovereign state in which the ship is arrested both principles are broken. The sovereign is impleaded and his property is seized.

In my opinion the facts of this case establish the same breach of the two principles as in the illustration just given. I entertain no doubt that the effect, and the intended effect, of the action of the Spanish consul at Cardiff in July, 1937, was to "purge" the officers and crew of the ship of those who were disaffected to the present Spanish Government, and to secure that the new master, officers, and crew should hold the ship for the Government; and that from and after July 14, the master, officers, and crew held the ship not for the owners but for the Government; and that by the master, officers, and crew the Government were in fact in possession of the ship. I cannot pay serious attention to the suggestion that all that the consul intended to do was to supply a well affected new master on behalf of the owners.

These being the facts, I come to the conclusion that when the plaintiffs issued a writ in which they constituted as defendants the steamship or vessel *Cristina* and all persons claiming an interest therein in the body of which the same ship and all persons claiming an interest therein were commanded within eight days to cause an appearance to be entered for them in the Probate, Divorce, and Admiralty Division and on which they endorsed the claim to have possession adjudged to them of the said steamship or vessel *Cristina*, they were directly impleading the Spanish Government, whom they knew to be the only persons interested in the *Cristina* other than themselves, and from whom they desired that possession should be taken after it was adjudged to them.

We have had an interesting exposition of the history of Admiralty practice and the evolution of the writ *in rem*. It is plain that it began with the arrest of a named defendant. In his absence any of his property in the jurisdiction, including his ship or ships, could be arrested. Eventually, the ship, over which some maritime claim was asserted, could alone be arrested. But in all cases, as in the present practice when a defendant has appeared, the claim is against him personally, and though it is enforced in the first instance by sale of the ship or enforcement of the bail a damage claim is not in our jurisprudence limited to the value of the ship. In these days it is unusual to name defendants. When the defendants are described as "the owners of a vessel" they can be at once identified. When persons are not entitled the defendants, but in the body of the writ are cited to appear as persons claiming an interest, there is said to be some uncertainty whether they appear under leave to intervene or without such leave. In any case when they do appear they appear as defendants, and as such I conceive that they are impleaded. And when they cannot be heard to protect their

interest unless they appear as defendants I incline to hold that if they are persons claiming an interest they are by the very terms of the writ impleaded. But in the present case, where persons claiming an interest are the only persons entitled defendants, and the Spanish Government are the only persons claiming an interest adverse to the plaintiffs, I have no doubt not only that the Government were in fact impleaded but were intended by the plaintiffs to be impleaded.

The second point seems to me, if possible, to be clearer. It is well established that the court will not arrest a ship which is under the control of a sovereign by reason of requisition. *The Broadmayne* (32 The Times L.R. 304; [1916] P. 64), *The Messicano* (32 The Times L.R. 519), *The Crimdon* (35 The Times L.R. 81).

But the present case is not one of control for public purposes but of actual possession for public purposes. It is indistinguishable from *The Gagara* (35 The Times L.R. 243; [1919] P. 95), which, in the Court of Appeal, was decided solely on the ground that the ship was in the actual possession of a foreign sovereign—namely, the State of Estonia. The courts of our country will not allow their process to be used against such a ship and the arrest cannot be maintained. In the present case I find it unnecessary to decide many of the interesting points raised in the argument for the appellants—whether the ship was rightly in the possession of the Government; what was the extritorial effect of the Spanish decree; what implied restrictions in different circumstances might be attached to sovereign immunity; when, if ever, the assertion of the sovereign as to his property or possession is conclusive. In matters of such grave importance as those involving questions of international law, it seems to me very expedient that courts should refrain from expressing opinions which are beside the question actually to be decided.

In the present case, in my opinion the decisions of the trial judge and the Court of Appeal were right and should be affirmed, and this appeal should be dismissed, with costs.

LORD THANKERTON. My Lords, in my opinion, on the facts in this case, the decisions of the trial judge and of the Court of Appeal were right, and should be affirmed.

It is admitted that the Government of the Republic of Spain is the Government of a foreign sovereign state, fully recognized as such by his Majesty's Government. In my opinion it is sufficiently established that the Spanish Government, without a breach of the peace, obtained by their agents *de facto* possession of the ship on July 14, 1937, and have since remained in *de facto* possession. I am further of opinion that it is sufficiently established that such possession is for public uses, for the purposes of prosecution of the civil war in Spain. The Spanish Government decline to submit to the jurisdiction, and it has not been maintained by the appellants that there are any facts from which such submission can be implied.

I agree with my noble and learned friend on the Woolsack that in the present case not only were the Spanish Government in fact impleaded, but they were intended to be so impleaded. Further, the order sought in the present case would necessarily displace the *de facto* possession of the Spanish Government, and I agree with my noble and learned friend that the doctrine of immunity of the property of a foreign sovereign state dedicated to public uses includes the case of actual possession for public uses. In this view the case clearly comes within the principles laid down by Lord Justice Brett in *The Parlement Belge* (5 P.D. 197).

But, my Lords, I have some doubt whether the proposition that the foreign sovereign state cannot be impleaded is an absolute one, the real criterion being the nature of the remedy sought. To indicate this, let me quote the principles laid down in *The Parlement Belge*. Lord Justice Brett stated (5 P.D. at p. 205):

The first question really raises this, whether every part of the public property of every sovereign authority in use for national purposes is not as much exempt from the jurisdiction of every court as is the person of every sovereign. Whether it is so or not depends upon whether all nations have agreed that it shall be, or in other words, whether it is so by the law of nations. The exemption of the person of every sovereign from adverse suit is admitted to be part of the law of nations. An equal exemption from interference by any process of any court of some property of every sovereign is admitted to be a part of the law of nations.

This passage suggests that the absolute exemption is of the person of the sovereign from adverse suit, but that in the case where property of a sovereign is not admitted by the agreement of nations to be exempt, action *in rem* against such property which is within the territorial jurisdiction is available, even if the sovereign be invited to contest the suit, if he so choose.

It happens that *The Parlement Belge* (*supra*) affords an interesting illustration, for Sir Robert Phillimore, in the same case in the court below (4 P.D. 129) had rejected the claim to exemption, and his grounds are stated in the following passage (at p. 148):

Looking to the character of the suit and to other passages in the judgment [Mr. Justice Story's judgment in *The Santissima Trinidad* (7 Wheat. 283)], it seems to me clear that by the expression "public ship of the Government" was meant a ship of war, and not any vessel employed by the Government. But even if the term could be treated as more comprehensive and as including public ships such as I have referred to sent by the Government on exploring expeditions, it would not include a vessel engaged in commerce, whose owner is (to use the expression of Bynkershoek, *De leg. Mercatore*) "*strenuè mercatorem agens*." (Corn. van Bynkershoek, *De Foro Legatorum*, ch. XIV. (*De Legato Mercatore*) p. 165 (ed. 1767)). Upon the whole, I am of opinion that neither upon principle, precedent, nor analogy of general inter-

national law, should I be warranted in considering the *Parlement Belge* as belonging to that category of public vessels which are exempt from process of law and all private claims.

In the Court of Appeal, in delivering the judgment of the court, Lord Justice Brett held that the exemption was not confined to ships of war, but applied to ships and other property of the sovereign destined to public uses. He then went on to consider whether *The Parlement Belge* (*supra*) was so dedicated, and came to the conclusion that it was so dedicated, because its use for purposes of trade was only subservient to the main purpose of carrying the mails. Then comes a striking passage in the judgment (5 P.D. at p. 220):

The ship is not in fact brought within the first proposition. As to the second, it has been frequently stated that an independent sovereign cannot be personally sued, although he has carried on a private trading adventure. It has been held that an ambassador cannot be personally sued, although he has traded; and in both cases because such a suit would be inconsistent with the independence and equality of the state which he represents. If the remedy sought by an action *in rem* against public property is, as we think it is, an indirect mode of exercising the authority of the court against the owner of the property, then the attempt to exercise such an authority is an attempt inconsistent with the independence and equality of the state which is represented by such owner.

It may be argued, as a logical inference from this passage, that an action *in rem* against property of the sovereign which is engaged in the private trading, and which is not dedicated to public uses, is not to be regarded as inconsistent with the independence and equality of the state represented by such owner, and that any other view would lead to absolute exemption of all property owned by the sovereign, and not the exemption of some property only.

If that were the correct inference, it would not justify the view of the Court of Appeal—in *The Porto Alexandre* (36 The Times L.R. 66; [1920] P. 30), where the ship was being used in ordinary commerce, the earning of freight being the sole interest of the Portuguese Government, who owned it—that they were bound to hold it exempt by reason of the decision in *The Parlement Belge* (*supra*). They made no inquiry whether such an exemption was generally agreed to by the nations, and it seems to be common knowledge that they have not so agreed. This question, which has come to be of increasing importance of recent years, has not been considered by this House, and, as I hold that the *Cristina* was dedicated to public uses, I find it unnecessary to decide it in this appeal. Accordingly, I express no opinion on the matter, but I desire to make clear that I hold myself free to reconsider the decision in *The Porto Alexandre* (*supra*). In the later case of *The Jupiter* (40 The Times L.R. 815; [1924] P. 236) counsel for the appellants conceded

that he was precluded by the decision in *The Porto Alexandre (supra)* from raising this question in the Court of Appeal.

I concur in the motion proposed by the noble and learned Lord.

LORD MACMILLAN. My Lords, various topics of the first importance were mooted in the course of the argument on this appeal, which it is unnecessary and inexpedient to discuss, but it may not be out of place to indicate the general principles which provide the setting for the particular problem which your Lordships have to solve.

It is an essential attribute of the sovereignty of this realm, as of all sovereign independent states, that it should possess jurisdiction over all persons and things within its territorial limits, and in all causes, civil and criminal, arising within these limits. This jurisdiction is exercised through the instrumentality of the duly constituted tribunals of the land. But, just as individuals living in a community find it expedient to submit to some diminution of their freedom of action in favour of their fellow-citizens, so also the sovereign states which constitute the community of nations have been led by courtesy, as well as by self-interest, to waive in favour of each other certain of their sovereign rights. The extent of these mutual concessions, and their recognition, is primarily a matter of international, not of domestic, law, and as must necessarily be the case with all international law, which has neither tribunals nor legislatures to define its principles with binding authority, there may be considerable divergence of view and of practice among the nations. Hence, when questions involving international law arise in the domestic courts of a state, problems of great difficulty and gravity may emerge.

"It is a trite observation that there is no such thing as a standard of international law extraneous to the domestic law of a kingdom, to which appeal may be made. International law, so far as this court is concerned, is the body of doctrine regarding the international rights and duties of states which has been adopted and made part of the law of Scotland." These are the well-chosen words of Lord Dunedin, when Lord Justice-General, in a case which raised important issues of international law (*Mortensen v. Peters* (1906) 8 F. (J.C.) 93, at p. 101).

It is a recognized prerequisite of the adoption in our municipal law of a doctrine of public international law that it shall have attained the position of general acceptance by civilized nations as a rule of international conduct, evidenced by international treaties and conventions, authoritative textbooks, practice and judicial decisions. It is manifestly of the highest importance that the courts of this country, before they give the force of law within this realm to any doctrine of international law, should be satisfied that it has the hall marks of general assent and reciprocity.

I confess that I should hesitate to lay down that it is part of the law of England that an ordinary foreign trading vessel is immune from civil process

within this realm by reason merely of the fact that it is owned by a foreign state, for such a principle must be an importation from international law, and there is no proved consensus of international opinion or practice to this effect. On the contrary, the subject is one on which divergent views exist, and have been expressed among the nations. When the doctrine of the immunity of the person and property of foreign sovereigns from the jurisdiction of the courts of this country was first formulated and accepted, it was a concession to the dignity, equality and independence of foreign sovereigns which the comity of nations enjoined. It is only in modern times that sovereign states have so far condescended to lay aside their dignity as to enter the competitive markets of commerce, and it is easy to see that different views may be taken whether an immunity conceded in one set of circumstances should to the same extent be enjoyed in totally different circumstances.

I recognize that the courts of this country have already, in cases which have been cited at the bar, gone a long way in extending the doctrine of immunity, but the cases which have gone furthest have not been hitherto considered in this House, and, like my noble and learned friend Lord Thankerton, I desire to reserve my opinion on the question raised in *The Porto Alexandre* (36 The Times L.R. 66; [1920] P. 30).

With these observations I am content to express my agreement with what I understand to be the opinion of all your Lordships, that this action, which is directed to take—ultimately, if necessary, by force—a Spanish ship requisitioned for public purposes by the duly recognized Government of Spain, and lying in a British port, out of the possession of that Government, cannot be allowed to proceed in the courts of this country.

LORD WRIGHT. My Lords, the appellants, who are a Spanish company carrying on the business of shipowners at Bilbao, in Spain, initiated this action by a writ *in rem* in the Admiralty Division claiming as sole owners of the steamship *Cristina* to have possession adjudged to them of the steamship. The writ was against the steamship or vessel *Cristina* and all persons claiming an interest therein. *The Cristina*, which is a Spanish steamship registered at the port of Bilbao, was on July 22, 1937, the date of the writ, lying in Queens Dock, Cardiff, where she had arrived on July 8, 1937. At that latter date she was in charge of a captain named Faustino Frias, appointed by and acting for the appellants, who were operating her. On July 9, 1937, he attended at the office of the Spanish consul at Cardiff, as Spanish shipmasters are bound to do by Spanish law on arriving at a foreign port, when he was handed a letter from the consul requiring him to produce at the consulate the *Patente de Navegación*, so that it could be noted in accordance with a decree of the Spanish Government, dated June 28, 1937, requisitioning the ship. The captain failed to do so, and on July 13, 1937, the consul, by registered letter, dismissed the captain and also all other officers and members

of the crew not in sympathy with his Government. On the following day the consul went on board with one Santiago Asolo, a new master, whom he had appointed in the name of the Government of the Republic of Spain, and broke open the captain's cabin, which was locked, but found that the late captain, who had left the ship, had taken away the *Patente de Navegación*. The new captain was placed in charge of the vessel on behalf of the Spanish Government, and has remained so, save for a period when he was absent for family reasons, when he left the ship in charge of a mate, also appointed by the consul for the Spanish Government. The master and mate have sworn that at all material times they and the crew have had continuous possession of the ship on behalf of the Spanish Government, and have held themselves and the ship at that Government's disposal, subject to the arrest by the court, which was effected by a warrant issued on the appellant's application, supported by affidavits. It is also sworn that the ship's expenses have been disbursed by the Spanish Government since the new captain took charge.

The Spanish consul at Cardiff, who acted with the authority of the Spanish consul-general and the Spanish Ambassador in London, claimed to requisition the *Cristina* in virtue of a decree dated at Valencia June 28, 1937, and published in the *Gaceta de la Republica* on June 29, 1937, which provided that all the vessels registered at the port of Bilbao should be requisitioned and be at the disposal of "the legitimate Government of the Republic," and that any Spanish shipowner, or owner of a vessel so registered, should be bound to hand over its administration to the bodies designated by the Government for the purposes of receiving orders and instructions in relation to the service to be rendered by the vessel. The decree recited, *inter alia*, that in order the better to be able to meet the requirements of the war the Government considered it desirable to exercise immediate and direct control over services of marine transport in order to carry into effect the plans of supplies, evacuation or anything which the Government might wish to carry out. The decree was stated to be directed to control and administer the means of marine transport. It also contained various ancillary provisions and, in particular, required entries to be made in the appropriate registers and ships' papers of any requisition under the decree.

On July 27, 1937, the respondents entered a conditional appearance "as owners or persons interested in this action, without prejudice to an application to set aside the writ or service thereof." On the same day they lodged a notice of motion claiming that the writ, the arrest, and all subsequent proceedings should be set aside on the grounds that the *Cristina* was the property of the Government of Spain, a foreign independent state, which declined to sanction the proceedings; that the *Cristina* was in the possession of the Government by its duly authorized agent; that the Government had a right to the possession of the *Cristina*; and that the action impleaded a foreign sovereign state—namely, the Government of Spain. Among the affidavits in support of the application was one from the Coun-

sellor of the Spanish Embassy in London, affirming on oath that by virtue of the decree the Government of Spain "claims and is entitled to possession of the said ship under the said requisition." He further deposed that the Government of Spain was unwilling to submit to the jurisdiction of the court, and that the proceedings impleaded that Government. He also deposed that the requisition had been effected at Cardiff by notices from the consul at Cardiff to the captain, agents, and cargo owners of the ship, and to the port and immigration authorities there.

At the trial Mr. Justice Bucknill granted the application and set aside the writ, arrest and proceedings. His decision was affirmed by the Court of Appeal from whose order this appeal is now brought to this House. At the trial it was admitted on behalf of the appellants that the respondents, the Republican Government of Spain, is an independent sovereign state, recognized by his Majesty's Government. It was not contested that this admission involved that the Republican Government was the sole Government recognized by his Majesty's Government in and for Spain. The case has accordingly proceeded throughout on that footing. This House and the courts below have thus no judicial knowledge, save as appears from the recitals in the decree, of the conflict which it is general knowledge is going on in Spain, or the division of territory between the contesting forces.

It has also been admitted that the *Cristina* was not in Spanish territorial waters from the date of the decree until the date of the facts alleged to constitute the requisition, when she was in British territorial waters.

The respondents do not contend that they are the owners of the *Cristina*, but say that they are and were at all material times in *de facto* possession of the *Cristina* and were therefore without their consent impleaded by the writ *in rem* claiming possession adversely to their actual possession. Such a proceeding, they contend, is inconsistent with their position as an independent sovereign state recognized by his Majesty's Government. They further contend that the action involved a claim to interfere with their right of direction and control coupled with actual possession, acquired by reason of the requisition. This though not ownership is, it is said, a right in the ship in the nature of property, and was, as being the property of an independent sovereign state, immune from the interference of the court, either by the arrest or by an order annulling the requisition and giving possession to the appellants and ousting the respondents from possession. The word requisition, while not a term of art, is familiar, and has been constantly used to describe the compulsory taking by government invariably, or at least generally, for public purposes of the user, direction and control of the ship, with or without possession.

In my judgment, both contentions are well founded, and the order of the courts below may be sustained on either ground. But the grounds are separate, and call for separate analysis, though both alike are based on the general principles of international law according to which a sovereign state

is held to be immune from the jurisdiction of another sovereign state. This is sometimes said to flow from international comity or courtesy, but may now more properly be regarded as a rule of international law accepted among the community of nations. It is binding on the municipal courts of this country in the sense and to the extent that it has been received and enforced by these courts. It is true that it involves a subtraction from the sovereignty of the state, which renounces *pro tanto* the competence of its courts to exercise their jurisdiction even over matters occurring within its territorial limits, though to do so is, *prima facie*, an integral part of the sovereignty. The rule may be said to be based on the principle "*par in parem non habet imperium*"—no state can claim jurisdiction over another sovereign state. Or it may be rested on the circumstance that, in general, the judgment of a municipal court could not be enforced against a foreign sovereign state, or that the attempt to enforce might be regarded as an unfriendly act. Or it may be taken to flow from reciprocity, each sovereign state within the community of nations accepting some subtraction from its full sovereignty in return for similar concessions on the side of the others. I need not discuss other possible explanations. The rule is naturally subject to waiver by the consent of the sovereign, who may desire a legal adjudication as to his rights. There may, indeed, be particular and special exceptions not necessary here to discuss. The principle has been received and applied by the courts of this country in many decided cases, and in particular in many cases dealing with states of facts similar to the facts here in question. But the rule only applies as between sovereign states recognized as such by his Majesty's Government. For the purposes of the present case, so far as concerns Spain, the respondents are such a sovereign state.

The first of the two rules here relevant—namely, that the independent sovereign may not be directly or indirectly impleaded in the courts of this country without its consent has been recognized as a general proposition in many cases, as for instance *Mighell v. Sultan of Johore* (10 The Times L.R. 115; [1894] 1 Q. B. 149), an action *in personam*. Similarly, in *Duff Development Company v. Kelantan Government* (40 The Times L.R. 566; [1924] A.C. 797), Lord Cave (at pp. 567 and 805 of the respective reports) referred to the right of an independent sovereign state by international law to the immunity against legal process, which was defined in *The Parlement Belge* (5 P.D. 197), and Lord Sumner said (at pp. 572 and 822 of the respective reports): "The principle is well settled, that a foreign sovereign is not liable to be impleaded in the municipal courts of this country, but is subject to their jurisdiction only when he submits to it, whether by invoking it as a plaintiff or by appearing as a defendant without objection." The principle is stated without any special reference to reciprocity.

But *The Parlement Belge* (*supra*) shows clearly that a sovereign may be impleaded as much by an action *in rem* as by an action *in personam*. As was said by the Privy Council in *Young v. s.s. Scotia* ([1903] A.C. 501, at

p. 504): "Where you are dealing with an action *in rem* for salvage, the particular form of procedure which is adopted in the seizure of the vessel is only one mode of impleading the owner." In *The Parlement Belge* (*supra*) (a case to which I shall later refer in connexion with the immunity of the sovereign's property) the action *in rem* was brought under a claim for collision damage done by a Belgian state mail packet. It was contended that the sovereign was not impleaded (*sc.* personally) but only the *res*. Lord Justice Brett, in delivering the judgment of the Court of Appeal, said (5 P.D. at p. 219):

[*The Bold Buccleugh* (7 Moo. P.C. 267)] decides that an action *in rem* is a different action from one *in personam* and has a different result. But it does not decide that a court which seizes and sells a man's property does not assume to make that man subject to its jurisdiction. To implead an independent sovereign in such a way is to call upon him to sacrifice either his property or his independence. To place him in that position is a breach of the principle upon which his immunity from jurisdiction rests. We think that he cannot be so indirectly impleaded, any more than he could be directly impleaded. The case is, upon this consideration of it, brought within the general rule that a sovereign authority cannot be personally impleaded in any court.

I think that the substantial soundness of this ruling is corroborated by considering the nature of the modern writ *in rem*. The history and effect of that writ have been fully explored by Mr. Justice Jeune in *The Dictator* ([1892] P. 304), approved and followed by the Court of Appeal in *The Gemma* (15 The Times L.R. 529; [1899] P. 285). It seems that originally the warrant was issued for the purpose of compelling the defendant to appear and submit to the court, and was directed not merely against the property said to be the instrument of injury, but any property of the defendant, or even himself personally. But the modern writ *in rem* has become a machinery directed against the ship charged to have been the instrument of the wrongdoing in cases where it is sought to enforce a maritime or statutory lien, or in a possessory action against the ship whose possession is claimed.

To take the present case, the writ names as defendants the *Cristina* and all persons claiming an interest therein, and claims possession. The writ commands an appearance to be entered by the defendants (presumably other than the vessel), and gives notice that in default of so doing the plaintiffs may proceed and judgment be given by default, adjudging possession to the plaintiffs. A judgment *in rem* is a judgment against all the world, and if given in favour of the plaintiffs would conclusively oust the defendants from the possession which, on the facts I have stated, they beyond question *de facto* enjoy. The writ by its express terms commands the defendants to appear or let judgment go by default. They are given the clear alternative of either submitting to the jurisdiction or losing possession. In the words of Lord Justice Brett the independent sovereign is thus called on to sacrifice

either its property or its independence. It is, I think, clear that no such writ can be upheld against the sovereign state unless it consents. It is therefore given the right, if it desires neither to appear nor to submit to judgment, to appear under protest and apply to set aside the writ, or take other appropriate procedure with the same object. It may be said that it is indirectly impleaded, but I incline to think that it is more correct to say that it is directly impleaded. The defendants cited are "all persons claiming an interest in the *Cristina*," a description which precisely covers on the facts of the case the Spanish Government, and, to judge by the affidavits filed by the appellants in applying to obtain the warrant to arrest, no one else. Under the modern and statutory form of a writ *in rem* a defendant who appears becomes subject to liability *in personam*. Thus, the writ *in rem* becomes in effect also a writ *in personam*. This emphasizes the view that the writ directly impleads the Spanish Government.

The crucial fact in this connexion is simply that *de facto* possession was enjoyed by the Spanish Government. The position would obviously have been quite different if the respondents were seeking to obtain possession by the process of the court instead of resisting an attempt by the process of the court to oust them from actual possession.

In the present case the fact of possession was proved. It is unnecessary here to consider whether the court would act conclusively on a bare assertion by the Government that the vessel is in its possession. I should hesitate as at present advised so to hold, but the respondents here have established the necessary facts by evidence.

It is unnecessary to consider by what mode the respondents obtained possession. It is enough to ascertain that they had possession at the time when the claim to immunity was made. Nor is it necessary to consider here whether any particular person not entitled to diplomatic immunity has made himself liable to English law.

The appellants have contended that the rule that the sovereign cannot be impleaded is not absolute or universal, and have instanced as possible exceptions cases of title to real property in the jurisdiction, or suits to administer a fund in court in which the foreign sovereign is interested, or representative actions such as debenture holders' actions where the sovereign holds debentures. Whatever may be the position in such cases, they are essentially different from, and afford no guidance for, the present case, and I do not need here to discuss them.

This ground would by itself, subject to some questions to be considered below, be enough to entitle the respondents to succeed, but there is a second ground on which the writ should, in my judgment, be set aside, which is that it claims to interfere with the property of the foreign sovereign. That the court has in general no jurisdiction to do this is illustrated by *The Parlement Belge* (*supra*). One ground of the decision that the writ should be set aside was that it was *in rem* against the Belgian packet. Lord Justice Brett en-

forced the principle by a copious citation of English and United States authorities, and rightly concluded (5 P.D. at p. 214):

The principle to be deduced from all these cases is that, as a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign state to respect the independence and dignity of every other sovereign state, each and every one declines to exercise by means of its courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or over the public property of any state which is destined to public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory, and, therefore, but for the common agreement, subject to its jurisdiction.

The appellants, while not contesting the general principle, have denied that it applies to the facts of the present case, for various reasons. In the first place they have relied on the fact that the Spanish Government had no property (in the sense of ownership) in the *Cristina*, whereas in *The Parlement Belge* (*supra*) the Belgian Government was the owner of the mail packet. But the rule is not limited to ownership. It applies to cases where what the Government has is a lesser interest, which may be not merely not proprietary but not even possessory. Thus it has been applied to vessels requisitioned by a government where, in consequence of the requisition, the vessel, whether or not it is in the possession of the foreign state, is subject to its direction and employed under its orders. That was a separate ground in *The Porto Alexandre* (36 The Times L.R. 66; [1920] P. 30), apart from the question whether, or fact that, the vessel had actually become the property of the Portuguese Government which was possessing and employing her. A similar immunity from arrest was upheld in favour of the British Crown in *The Broadmayne* (32 The Times L.R. 304; [1916] P. 64), a vessel requisitioned by the British Government under what was in fact a compulsory charter-party and hiring. The Government, it was held, could not be deprived by the order of the court of her services, nor could the court interfere with her so long as she was in the Crown's employment, though any rights against the owners not affecting the user by the Crown were preserved. This latter point does not arise in actions for possession, as contrasted with actions claiming a lien. Similarly, in *The Jupiter* (40 The Times L.R. 673, 815; [1924] P. 236) no question of ownership of the vessel was involved. All that clearly appears from the report is that the vessel, being a Russian vessel, was in the possession and subject to the control of the Russian Soviet Government, which claimed the right to possession under a master holding for it. A writ *in rem* for possession was set aside. The Court of Appeal obviously treated the facts as sufficient to bring the case within the rule which Lord Justice Scrutton ([1924] P. at p. 243) quoted from Dicey's *Conflict of Laws* (3rd ed. at p. 215): "The court has no jurisdiction to entertain an action against any foreign sovereign. Any action against the property of a foreign sovereign is an action or proceeding against such

person." In my judgment on the facts of the present case the requisitioning of the *Cristina* under the decree of June 28, 1937, gave the Spanish Government a right of interest in the *Cristina*, whether called property or not, which was immune from interference by the courts of this country.

The Court of Appeal rightly, as I think, treated the case as concluded in substance by *The Jupiter* (*supra*). It has, however, been strenuously contended that the decision in *The Jupiter* (*supra*) does not govern this case because the requisition was there effected within the jurisdiction of the requisitioning state, whereas in the present case the Spanish Government seized the *Cristina* in British territorial waters. It was said that such seizure constituted a wrongful act which was a breach of international comity and excluded a right to claim the reciprocal comity of immunity. The famous judgment of Chief Justice Marshall in *Schooner Exchange v. M'Faddon and Others* ((1812) 7 Cranch 116) was also relied on as resting the immunity on a licence in favour of the sovereign state which brings its own property within the alien jurisdiction on the footing of the licence, whereas no such licence can be implied when the vessel has entered the jurisdiction in the owner's possession and has then been wrongly seized. It was also said that the judgment of the courts below, if upheld, would enable a foreign sovereign state to effect unlawful seizures in this realm of chattels or property without either the state itself or its agents being under any liability, civil or criminal. But, in my judgment, these objections are ill-conceived. I do not think that Chief Justice Marshall had any such idea in mind when he referred to an implied licence under which the foreign vessel entered the jurisdiction. His expressions were apt with regard to the facts before him, but were not intended to limit or define the immunity which follows not so much from the fiction of a licence, as from the independent status in international law of the foreign sovereign. This gives the sovereign, so far as concerns courts of law, an immunity even in respect of conduct in breach of the municipal law. The remedy, if any, is *prima facie* by diplomatic representation or other action between the sovereign states, not by litigation in municipal courts. Whatever the consequences which in any particular case may follow from this immunity, it is too well established in the law of this country to admit of being infringed. It must also be noted in the present case that the *Cristina*, even when in Cardiff docks, may have, as being a foreign merchant ship, a different status from an ordinary chattel on land. But as the relevant fact here is that the Spanish Government had in fact requisitioned her, there is no need to consider whether in any sense, or to any extent, she was subject while in English territorial waters to the law of her flag, or to the operation of the Spanish decree. Nor is it necessary, even if it be competent, for the court to debate whether the decree was validly made under Spanish law. I do not think that *The Jupiter* (*supra*) admits of any solid distinction because of the fact that the *Jupiter* was requisitioned within the territorial jurisdiction of the Soviet State.

A further point raised by the appellants was that the *Cristina* was a private merchant vessel employed in trading, whereas in *The Parlement Belge* (*supra*) the Court of Appeal was careful to point out that the vessel was mainly used for carrying the mails, and that the carrying of passengers and merchandise was subsidiary. And it is said that the Court of Appeal in *The Parlement Belge* (*supra*) would have refused to recognize the respondent's immunity in the facts of this case. The contention seems to be that the *Cristina* was a tramp steamer which its owners had employed in ordinary trading, and in the carriage of commercial cargoes, and that with regard to such a vessel the foreign sovereign state could not claim immunity on the ground of property or possession, nor could it claim immunity from being impleaded by an action *in rem* against the ship. It might be enough to say in answer to these arguments that the circumstances under which the respondents took possession of the *Cristina*, particularly in view of the recitals to the decree, sufficiently bring the *Cristina* within the description of public property of the state destined to public use. This is the general criterion postulated by the Court of Appeal in *The Parlement Belge* (*supra*), but that court never intended to lay down that a trading vessel must be deemed to be as a matter of law outside the sphere of immunity.

The main contention of the plaintiffs in that case was that the immunity was limited to ships of war, and a few other types of vessels, such as royal yachts, transports, and a few others. It was no doubt with regard to armed ships of war that the immunity of ships was first recognized, as in *The Exchange* (*supra*). But as Sir H. S. Giffard, S.G., pungently pointed out in argument in *The Parlement Belge* (5 P.D., at p. 202): "The privilege depends on the immunity of the sovereign, not on anything peculiar to a ship of war, though it seldom arises as to anything else, because hardly anything belonging to a sovereign in his public capacity, except a ship of war, ever goes wandering into the jurisdiction of foreign courts." Times, however, have changed, and the general principle must override the particular instance, and be adapted to the new conditions. Indeed *The Parlement Belge* (*supra*) might be fairly described as a commercial vessel, since mails are more often than not carried by private ships. In *Young v. s.s. Scotia* (*supra*) the vessel held to be immune as a public vessel was a train ferry owned by the Crown and employed to carry trains between two points on a railway owned by the Government of Canada. In *The Jassy* ([1906] P. 270) Sir Gorrell Barnes, P., upheld the immunity in the case of a vessel which was the property of the State of Rumania and employed for the public purposes of the state in connexion with the national railways of Rumania.

But the most signal development of the principle has been during the Great War, during which the importance to the state of trading vessels became fully realized. This development was most uncompromisingly expressed in a judgment of the Supreme Court of the United States in *Berizzi Bros. Company v. s.s. Pesaro* (271 U.S. 562). That was an action *in rem*

brought against an Italian ship for damages for failure to carry a parcel of silk shipped for carriage from Italy to New York. The ship belonged to the Italian Government, and was a general ship engaged in the common carriage of merchandise for hire. The court said (271 U.S., at p. 574):

We think the principles [of immunity] are applicable alike to all ships held and used by the government for a public purpose, and that when, for the purpose of advancing the trade of its people or providing revenue for its treasury, a government acquires, mans and operates ships in the carrying trade, they are public ships in the same sense that war ships are. We know of no international usage which regards the maintenance and advancement of the economic welfare of a people in time of peace as any less a public purpose than the maintenance and training of a naval force.

This was in 1925. The court cited as recent authorities *Young v. s.s. Scotia* (*supra*), *The Jassy* (*supra*), *The Gagara* (35 The Times L.R. 243; [1919] P. 95), *The Porto Alexandre* (*supra*), and *The Jupiter* (*supra*). This judgment seems to represent the impact of modern ideas on the doctrines of *The Parlement Belge* (*supra*), but I cannot regard it as other than representing logical evolution. The decision of the United States court agrees with that of the Court of Appeal in *The Porto Alexandre* (*supra*), where the ship was one which had been requisitioned by the Portuguese Government and was being employed by them in the carriage for reward of ordinary commercial cargoes. The Court of Appeal held that the case came within the principle of *The Parlement Belge* (*supra*). Lord Justice Warrington referred to *Briggs v. Light-Boats* (93 Mass. 157), where immunity was granted in respect of a government lightship, and quoted the words of Lord Justice Brett in *The Parlement Belge* with reference to that case ([1920] P., at p. 35): "The ground of that judgment is that the public property of a government in use for public purposes is beyond the jurisdiction of the courts of either its own or of any other state, and that ships of war are beyond such jurisdiction, not because they are ships of war, but because they are public property," the reason being "that the exercise of such jurisdiction is inconsistent with the independence of the sovereign authority of the state." In view of what I regard as the nature and purpose of the possession held by the respondents of the *Cristina*, it is not necessary to express a final opinion on the question, but, as at present advised, I am of opinion that these decisions of the United States Supreme Court and of the Court of Appeal correctly state the English law on this point.

This modern development of the immunity of public ships has not escaped severe, and in my opinion, justifiable, criticism on practical grounds of policy, at least as applied in times of peace. The result that follows is that governments may use vessels for trading purposes, in competition with private ship-owners, and escape liability for damage, and similar salvage claims. Various international conventions have discussed this problem; and have culminated in the International Convention for the Unification of Certain Rules con-

cerning the Immunity of State-Owned Ships, of April 10, 1926. The general purport of the convention was to provide that ships owned or operated by states were to be subject to the same rules of liability as privately owned vessels. Ships of war, state-owned yachts, and various other vessels owned or operated by a state on government and non-commercial service were excepted. There was power for a state to suspend the operation of the convention in time of war. Great Britain, along with the majority of modern states, signed the convention, but has not yet ratified it or enacted any legislation to bring it into effect in this country. But even if the provisions of the convention were made law here, it is not clear that it would affect the position in the present case, because its effect is apparently limited to claims in respect of the operation of such ships, or in respect of the carriage of cargoes in them. Thus it would affect claims *in rem* for collision damage, such as the claim in *The Parlement Belge* (*supra*), or for salvage as in *The Broadmayne* (*supra*) and *Porto Alexandre* (*supra*), or for cargo damage, as in *The Pesaro* (*supra*), but, it may be, not claims for possession, such as that in the present case, or *The Gagara* (*supra*) or *The Jupiter* (*supra*).

I may add that in the present case it is in my opinion sufficiently shown by the evidence before the court that the Spanish Government had actually requisitioned, and taken possession and control of, the *Cristina*. That is all that is needed to justify the claim to immunity on the ground of "property." The question how far a mere claim or assertion by that Government would be conclusive on the court, does not arise here.

For the reasons which I have stated, the decision of Mr. Justice Bucknill and of the Court of Appeal was, in my judgment, on the materials of fact, on which the court must act, a decision which flowed inevitably from the application of the principles of international law as recognized by the courts of this country. In my judgment the appeal must fail.

LORD MAUGHAM. My Lords, the claim of the respondents, who are the Government of the Spanish Republic, and who entered a conditional appearance to the writ *in rem*, is based on their immunity as an independent sovereign state. The facts are fully stated in the opinion of my noble and learned friend Lord Wright, and it is unnecessary to repeat them at length. The appellants, the plaintiffs in the action, were at all material times, and still are, the sole owners of the *Cristina*. While it remained in their hands it was a private vessel, registered at the port of Bilbao. A decree was made in Spain on June 28, 1937, requisitioning all vessels registered in the port of Bilbao. The *Cristina* at that date was not within the territorial jurisdiction of Spain. She arrived at the port of Cardiff on July 8. On July 14, the respondents, by their agents, and, it should be mentioned, without a breach of the peace, took possession of the vessel. For the reasons given by your Lordships I accept the view that since July 14 the respondents, by their agent, have been in *de facto* possession of the ship. The writ was dated July 22. According to a not unusual form the defendants were "the steamship or

vessel *Cristina* and all persons claiming an interest therein." The endorsement on the writ was a claim by the plaintiffs as sole owners of the ship "to have possession adjudged to them" of the same. There was an arrest of the vessel in due course. The respondents entered a conditional appearance on July 27, and moved to set aside the writ and arrest for the following reasons:

That the steamship *Cristina* was at the time the writ in this action was issued the property of the Government of Spain, a recognized foreign independent state; and that the said state declines to sanction the institution of these proceedings in this court.

That at the time of the issue of the writ in this action the steamship *Cristina* was in the possession of the Spanish Government by its duly authorized agent.

That at the time of the issue of the writ in this action the Spanish Republican Government had a right to the possession of the steamship *Cristina*.

That this action impleads a foreign sovereign state—namely, the Government of Spain.

The first reason has been abandoned. The respondents relied on the circumstance that by a decree of June 28, 1937, they had purported to requisition all vessels registered in the Port of Bilbao (including the *Cristina*), and by reason thereof they claimed that they were entitled to possession of the *Cristina*, and that they were therefore impleaded by the proceedings. It was alleged that the Spanish consul at Cardiff had requisitioned the *Cristina* in pursuance of this decree, and that the Spanish Government were in fact in possession of her through a new master appointed by the said Spanish consul.

Mr. Justice Bucknill and the Court of Appeal held themselves bound by authority to decide that the court must decline jurisdiction on the ground that a foreign sovereign state—namely, the Republic of Spain, was asserting a possessory interest in the *Cristina* and objected to the jurisdiction of the court. Hence the present appeal. If it were successful the result would be that our courts would have to determine the legal effect in this country of the decree of June 28, 1937, as regards a ship under the Spanish flag which was not at that date within Spanish territorial jurisdiction. This question has not been argued, and I shall abstain from expressing any opinion on it. But it seems to me that the claim by the Spanish Government for immunity from any form of process in this country may extend to cases where possession of ships or other chattels had been seized in this country without any shadow of right, and also to cases where maritime liens were sought to be enforced by actions *in rem* against vessels belonging to a foreign government and employed in the ordinary operations of commerce. For my part, I think such a claim ought to be scrutinized with the greatest care. In these days, and in the present state of the world, diplomatic representations made to a good many states afford a very uncertain remedy to the unfortunate persons

who may have been injured by the foreign government. Moreover, the persons entrusted with the making of diplomatic representations cannot try an action. If a foreign government ship has been involved in a collision at sea due, as alleged, to the negligence of her captain and crew the foreign government has only to dispute liability to render further diplomatic correspondence a waste of time.

It is not in doubt that an action *in personam* against a foreign government will not be entertained in our courts unless that government submits to the jurisdiction. The rule was founded on the independence and dignity of the foreign government or sovereign, or, to use the language of the Master of the Rolls, in delivering judgment in the great case of *The Parlement Belge* (5 P.D. 197, at p. 207): "The real principle on which the exemption of every sovereign from the jurisdiction of every court has been deduced is that the exercise of such jurisdiction would be incompatible with his regal dignity—that is to say, with his absolute independence of every superior authority." This immunity, be it noted, has been admitted in all civilized countries on similar principles, and with nearly the same limits. It had been by implication admitted in this country by the statute 7 Anne, c. 12, passed in consequence of the taking of the Russian Ambassador from his coach, and his imprisonment under the old law by a private suitor. The statute has always been regarded as merely declaratory of the common law. The settled practice of the court to take judicial notice of the status of any foreign government (and, it may be added, of its ambassador) was finally established in this House in *Duff Development Company v. Kelantan Government* (40 The Times L.R. 566; [1924] A.C. 797). The present Government of the Republic of Spain has been recognized as being an independent sovereign state.

The immunity of a foreign government and its ambassador as regards property does not stand on the same footing. The Statute of Anne protects the goods and chattels of "the ambassador or other public minister . . . received as such . . . or the domestic or domestic servant of any such ambassador or other public minister." It is clear, I think, that the property in the goods and chattels would have to be established, if necessary, in our courts before the immunity could be claimed. The ambassador could not be sued in trover or detinue; but if the property were not in his possession, and he had to bring an action to recover it, I am of opinion that he would have to prove in the usual way that the goods were his property. Speaking for myself, I think the position of a foreign government is the same. There is, I think, neither principle nor any authority binding this House to support the view that the mere claim by a government or an ambassador, or by one of his servants, would be sufficient to bar the jurisdiction of the court, except in such cases as ships of war or other notoriously public vessels, or other public property belonging to the state. Professor Dicey has been relied on in favour of another view, but his proposition, founded on existing authorities, was that "an action or other proceeding against the property"

of a foreign sovereign or an ambassador or his suite was for the purpose of the general rule "an action or proceeding against such person" (Dicey, ch. IV, rule 52). He did not (as he showed in the notes to the rule) mean by this that an action against property *claimed* by such person is beyond the jurisdiction of our courts. An independent sovereign sued for breach of promise of marriage in our courts can indeed claim to be outside of our jurisdiction. But there is no authority for the view that if he wrongfully obtained possession of valuable jewelry in this country, and it was in the hands of a third person, he could claim to stay proceedings by the rightful owner against that person to recover possession of the jewelry merely by stating that he claimed it. To come within Professor Dicey's rule he would, in my opinion, be bound to prove his title.

The result so far, in my opinion, is that while in this country no action can be brought against a foreign government or its accredited representative or persons who may be described as belonging to his suite, still, if the foreign government (I need not further mention the other persons with a right to immunity) wishes to recover property in the hands of some third party, an action must be brought in the usual way, and there must therefore be a submission to the jurisdiction up to the judgment. Whether the government has by that submission submitted to execution for costs under the judgment on its property in this country is not yet settled (*Duff Development Company v. Kelantan Government* (*supra*)). If the foreign government wishes to recover property in this country, I am of opinion that it must, subject to certain exceptions, prove its case. If it is, rightly or wrongly, in possession of property in this country, no action can be brought against it by persons claiming title to or any interest in such property.

I now approach one of the main questions involved in this appeal: What is the position as regards an action *in rem* in relation to a ship lying in a British port, or in British waters, which at the date of the writ happens to be in the possession of a foreign government? In the present case two additional facts should be remembered. First, that the *Cristina*, before seizure on behalf of the Spanish Government, was an ordinary steamship employed in commerce; and, secondly, that she was registered at Bilbao and sailed under the Spanish flag.

The leading authority in this country is *The Parlement Belge* (*supra*), decided in 1880 by Lord Justice James, Lord Justice Baggallay and Lord Justice Brett, overruling Sir Robert Phillimore. It related to a Belgian steam-packet plying between Dover and Ostend, belonging to the Belgian Government, manned by commissioned officers, and employed to carry the mails as well as passengers and cargo. The trial judge had decided that the action would lie because the ship was employed in commerce. In the Court of Appeal it was not in dispute that ships of war belonging to a foreign government were exempt from our jurisdiction, and the elaborate judgment delivered by Lord Justice Brett was devoted to a consideration of the prin-

ciples on which immunity could properly be based to determine whether public ships could claim the same immunity. As I read the judgment, which largely followed the reasoning of a remarkable judgment of Chief Justice Marshall in the Supreme Court of U.S.A. in schooner *Exchange v. M'Faddon and Others* (7 Cranch 116), two things have to be established to found the immunity. First, that to permit the action to proceed would be incompatible with the royal dignity of the foreign sovereign or government; and, secondly, that the immunity was one universally recognized in foreign countries. I would myself prefer to say "almost universally" recognized, for a few exceptions would not, I think, affect the matter. But I hold a strong opinion that the Court of Appeal was right in insisting as a condition of immunity on the adherence of other foreign governments to the same rule as to immunity. In relation to such a rule as the one now under consideration the word "comity," whatever may be its defects in regard to other rules of private international law, has a very powerful significance. Neither justice nor convenience requires that a particular state should decline to grant justice to its own nationals who have been injured by ordinary commercial vessels belonging to foreign governments, if those governments are not willing to extend a similar immunity to the similar vessels of the first state. Nor can anything much more absurd be imagined than that, for example, England should decline to give legal redress against a Spanish trading ship belonging to that Government while such an action would be allowed to proceed if the ship were found in port at Genoa, or indeed, for all we know, at Valencia.

Having thus laid down the principles, the judgment proceeded to deal with the question whether *The Parlement Belge* was within them, and the conclusion was in these words (5 P.D. at p. 220): "The property cannot upon the hypothesis be denied to be public property; the case is within the terms of the rule; it is within the spirit of the rule; therefore, we are of opinion that the mere fact of the ship being used subordinately and partially for trading purposes does not take away the general immunity." My Lords, I cannot myself doubt that, if *The Parlement Belge* had been used solely for trading purposes, the decision would have been the other way. Almost every line of the judgment would have been otiose if the view of the court had been that all ships belonging to a foreign government, even if used purely for commerce, were entitled to immunity, and the same is true as regards the judgment of the Supreme Court of the U.S.A. I must admit that some judges have taken another view, and the decision of the Court of Appeal in *The Porto Alexandre* (36 The Times L.R. 66; [1920] P. 30) is a clear decision in a sense opposite to the opinion I have expressed. After much consideration, I can only express my own conclusion. The judgments in *The Porto Alexandre* (*supra*) seem to me to have omitted any consideration of what I deem to be a vital point—namely, the fact that other countries, while they admit the immunity as regards ships of war and other public ships, have not been at

all agreed that the same immunity ought to be granted to ships and cargoes engaged in ordinary trading voyages.

It is objected that an action *in rem* is one in which the foreign government, if in possession of the ship, or if it has an interest in the ship, is impleaded. That, I think, in a sense is true, but I do not think many competent jurists are of opinion that in such a case anything more is sought, or, at any rate, can be obtained, than a remedy against the *res*. When Sir Robert Phillimore, equally distinguished as a judge in maritime and in international law, decided in *The Parlement Belge* (*supra*) (contrary to his first opinion) that the proceeding *in rem* should proceed, he was not deciding that a personal remedy could be enforced against the King of Belgium. For my part, I can see no sufficient reason for not following in the case of a state-owned vessel, being neither a ship of war nor in any true sense a vessel *publicis usibus destinata*, the decision of Sir Robert Phillimore. The effect would be that these state-owned ships would be treated as exceptions to the general rule to this extent, that proceedings against the ships themselves might be brought and prosecuted to a conclusion. Other exceptions are to be found in cases where proceedings are brought and continued for administration of a trust, or an estate, or for the winding-up of a company, even though a foreign government is interested: *Larivière v. Morgan* (L.R. 7 Ch. App. 550, and on appeal in L.R. 7, H.L. Cas. 423); *In re Russian Bank for Foreign Trade* (49 The Times L.R. 253; [1933] 1 Ch. 745). Moreover, no court has yet held that a foreign government can object to an action against a company in which it owns a number of shares.

I hesitate to take the view that a requisitioning decree relating to all vessels registered in an important port, whether large or small, whether built for pleasure or profit, is itself sufficient evidence of an intention to devote the vessels to public uses. On the other hand, there are special circumstances in the present case. The Government of Spain is engaged in civil war, and is entitled to take exceptional and drastic measures to defend itself. The ships mentioned in the requisitioning decree are Spanish ships. There may be public uses for any of such ships, *e.g.*, in carrying stores, munitions, men, orders, and the like for the purposes of defence or attack. On the whole, I think the circumstances of the case justify the inference that the *Cristina* is intended to be used for some of such purposes, and is, therefore, brought within the description *publicis usibus destinata*. She is, as already stated, in the possession of the Spanish Government. On these grounds I think that she is entitled to the immunity claimed, and this is sufficient to dispose of the appeal.

My Lords, I have indicated my unwillingness to follow what I must admit to be the recent current of authority in our courts as regards state-owned trading ships. In what follows I shall merely be indicating the opinion which I have formed—one which I believe is shared by many judges, and by nearly all persons engaged in maritime pursuits—that it is high time steps were

taken to put an end to a state of things which, in addition to being anomalous, is most unjust to our own nationals.

Half a century ago foreign governments very seldom embarked in trade with ordinary ships, though they not infrequently owned vessels destined for public uses, and in particular hospital vessels, supply ships, and surveying or exploring vessels. There were doubtless very strong reasons for extending the privilege long possessed by ships of war to public ships of the nature mentioned, but there has been a very large development of state-owned commercial ships since the Great War and the question whether the immunity should continue to be given to ordinary trading ships has become acute. Is it consistent with sovereign dignity to acquire a tramp steamer and to compete with ordinary shippers and shipowners in the markets of the world? Doing so, is it consistent to set up the immunity of a sovereign if, owing to the want of skill of captain and crew, serious damage is caused to the ship of another country? Is it also consistent to refuse to permit proceedings to enforce a right of salvage in respect of services rendered, perhaps at great risk, by the vessel of another country? Is there justice or equity, or, for that matter, is international comity being followed, in permitting a foreign government, while insisting on its own right to immunity, to bring actions *in rem* or *in personam* against our own nationals?

My Lords, I am far from relying merely on my own opinion as to the absurdity of the position which our courts are in if they must continue to disclaim jurisdiction in relation to commercial ships owned by foreign governments. The matter has been considered over and over again of late years by foreign jurists, by English lawyers, and by business men, and with practical unanimity they are of opinion that, if governments, or corporations formed by them, choose to navigate and trade as shipowners, they ought to submit to the same legal remedies and actions as any other shipowner. This was the effect of the various resolutions of the Conference of London of 1922, of the Conference of Gothenburg of 1923, and of the Genoa Conference of 1925. Three conferences not being deemed sufficient, there was yet another in Brussels in 1926. It was attended by Great Britain, France, Germany, Italy, Spain, Holland, Belgium, Poland, Japan, and a number of other countries. The United States explained their absence by the statement that they had already given effect to the wish for uniformity in the laws relating to state-owned ships by the Public Vessels Act, 1925 (1925, Ch. 428). The Brussels Conference was unanimously in favour of the view that in times of peace there should be no immunity as regards state-owned ships engaged in commerce. And the resolution was ratified by Germany, Italy, Holland, Belgium, Estonia, Poland, Brazil, and other countries, but not, so far, by Great Britain. (Oppenheim, *International Law*, 5th ed., Vol. I, p. 670.)

It must not be supposed that all the countries attending the conferences I have referred to were bound by their municipal laws to grant the immunity

in question. There is no doubt that the practice as to the immunity of state-owned merchant ships has been, and still is, far from uniform (Oppenheim, Vol. I, p. 669). France and Belgium, for example, grant only a limited immunity, and Italy no immunity at all. I have not been able to ascertain the position taken up by Spain. The Soviet Republic has apparently adopted the admirable practice of owning its merchant ships through limited companies, and does not claim—even if it could, which for my part I should doubt—any immunity whatever in relation to such ships.

I should add that it appears that the United States courts still adhere to the practice of granting immunity to foreign state-owned ships engaged in commerce. The statute above referred to (1925, Ch. 428) permits (Section 1) actions to be brought for damages “caused by a public vessel of the United States and for compensation for towage and salvage services including contract salvage rendered to a public vessel of the United States.” This, it will be noted, does not refer in terms to state-owned vessels engaged in trade, but in other respects it extends much further than many countries would be prepared to go, and Section 5 of the statute gives a right of action under the Act to nationals of a foreign government only if it is proved that such government “under similar circumstances allows nationals of the United States to sue in its courts.” It would seem that the Legislature of the United States, like that of all, or nearly all, other civilized countries, is disposed to the view that the immunity of state-owned private vessels ought not to be continued.

A number of other points were ably argued for the appellants, and I have not dealt with them only because I am unable usefully to add anything on those points to what has fallen from my noble and learned friend Lord Wright. I concur in the proposed motion.

SUPREME COURT OF THE UNITED STATES

GUARANTY TRUST COMPANY OF NEW YORK *v.* THE UNITED STATES OF AMERICA *

April 25, 1938

In a suit brought to recover the deposit of a foreign government with a New York bank, such government is subject to the local statute of limitations the same as are private litigants.

The recognition of the Soviet Government by the United States in 1933 left unaffected the legal consequences of the previous recognition of the Provisional Government and its representatives in 1917 which attach to actions taken here prior to the later recognition. Consequently, the assignment of November 16, 1933, by the Soviet Government to the United States of the right of the former to the bank account did not affect the right of the bank to set up against the United States the previous running of the statute of limitations.

The running of the statute of limitations was not affected by the non-recognition by the United States of the Soviet Government during the interval of approximately 16 years between the recognition of the Provisional Government of Russia and the recognition of the Soviet Government as its successor.

Mr. Justice STONE delivered the opinion of the Court.

The principal questions for decision are whether, in a suit at law brought in a federal district court to recover the deposit of a foreign government with a

* 304 U. S. 126.

New York bank, such government is subject to the local statute of limitations as are private litigants; and, if so, whether the assignment of November 16, 1933, by the Russian Soviet Government to the United States of the right of the former to the bank account restricts or overrides the operation of the statute of limitations. A subsidiary question is whether in the circumstances of the case the running of the statute of limitations, if otherwise applicable, was affected by our nonrecognition of the Soviet Government during the interval of approximately sixteen years between recognition of the Provisional Government of Russia and recognition of its successor.

On July 15, 1916, the Imperial Russian Government opened a bank account with petitioner, the Guaranty Trust Company, a New York banking corporation. On March 16, 1917, the Imperial Government was overthrown and was succeeded by the Provisional Government of Russia which was recognized by the United States on March 22, 1917. On July 5, 1917, Mr. Boris Bakhmeteff was officially recognized by the President as the Ambassador of Russia. On July 12, 1917, the account being overdrawn, \$5,000,000 was deposited in the account by Mr. Serge Ughet, Financial Attaché of the Russian Embassy in the United States. On November 7, 1917, the Provisional Government was overthrown and was succeeded by the government of the Union of Soviet Socialist Republics, which will be referred to as the Soviet Government. At that time there remained on deposit in the account the sum of approximately \$5,000,000. On November 28, 1917, the Soviet Government dismissed Bakhmeteff as Ambassador and Ughet as Financial Attaché. But the United States continued to recognize Bakhmeteff as Ambassador until on June 30, 1922, he withdrew from his representation of the Russian Government. Thereafter, until November 16, 1933, it continued to recognize the Financial Attaché, and after the retirement of Bakhmeteff as Ambassador it recognized the former as custodian of Russian property in the United States.

On November 16, 1933, the United States recognized the Soviet Government, and on that date took from it an assignment of all "amounts admitted to be due that may be found to be due it, as the successor of prior Governments of Russia, or otherwise, from American nationals, including corporations . . ." After making demand upon the petitioner for payment of the balance of the account the United States, on September 21, 1934, brought the present suit in the District Court for Southern New York to recover the deposit. Petitioner then moved under the Conformity Act, 28 U. S. C. § 724; New York Civil Practice Act, § 307; and Rules 107 and 120 of the New York Rule of Civil Practice, to dismiss the complaint on the ground that the recovery was barred by the New York six year statute of limitations.

In support of the motion petitioner submitted numerous affidavits, two depositions, and other documentary proof tending to show that on February 25, 1918, it had applied the balance of the account as a credit against indebtedness alleged to be due to it by the Russian Government by reason of the latter's seizure of certain ruble deposit accounts of petitioner in Russian

private banks; that on that date it had repudiated all liability on the deposit account; and that it had then given notice of such repudiation to the Financial Attaché of the Russian Embassy and later both to the Financial Attaché and to Bakhmeteff as Ambassador. The United States submitted affidavits and exhibits in opposition. The District Court found that petitioner had repudiated liability on the account on February 25, 1918; that it had given due notice of repudiation prior to June 30, 1922, to both the Financial Attaché and Ambassador Bakhmeteff; and that recovery was barred by the applicable six year statute of limitations of New York. New York Civil Practice Act, § 48. The Court of Appeals for the Second Circuit reversed the judgment for petitioner, holding that the New York statute of limitations does not run against a foreign sovereign. 91 F. (2d) 898. Moved by the importance of the questions involved, we granted certiorari. 302 U. S. 681.

Respondent argues that the Soviet Government, in a suit brought in the federal courts, is not subject to the local statute of limitations both because a foreign, like a domestic sovereign, is not subject to statutes of limitations, and its immunity as in the case of a domestic sovereign constitutes an implied exception to that statute and to the Conformity Act; and because in any case, since no suit to recover the deposit could have been maintained in New York by the Soviet Government prior to its recognition by the United States and, since according to New York law the statute does not run during the period when suit cannot be brought, the present suit is not barred. It is insisted further that even though the Soviet Government is bound by the local statute of limitations the United States is not so bound, both because the New York statute which bars the remedy but does not extinguish the right is not applicable to the United States, and because the statute is inoperative and ineffective since it conflicts with and impedes the execution of the Executive Agreement between the Soviet Government and the United States by which the assignment was effected. Finally, the Government assails the finding of fact of the district court that petitioner repudiated the liability upon the deposit account, and contends that notice of the repudiation given by petitioner to representatives of the Provisional Government was ineffective to set the statute running against the Soviet Government and in favor of petitioner.

First. The rule *quod nullum tempus occurrit regi*—that the sovereign is exempt from the consequences of its laches, and from the operation of statutes of limitations—appears to be a vestigial survival of the prerogative of the Crown. See *Magdalen College Case*, 11 Co. Rep. 66b, 74b; Hobart, L. C. J. in *Sir Edward Coke's Case*, Gobd. 289, 295; Bracton, *De Legibus*, Lib. ii, c. 5, § 7. But whether or not that alone accounts for its origin, the source of its continuing vitality where the royal privilege no longer exists is to be found in the public policy now underlying the rule even though it may in the beginning have had a different policy basis. Compare Maine, *Ancient Law* (10th ed., 1930) 32 *et seq.* "The true reason . . . is to be found in the great public pol-

icy of preserving the public, rights, revenues, and property from injury and loss by the negligence of public officers. And though this is sometimes called a prerogative right, it is in fact nothing more than a reservation, or exception, introduced for the public benefit, and equally applicable to all governments." Story, J., in *United States v. Hoar*, Fed. Cas. No. 15,373, p. 330. Regardless of the form of government and independently of the royal prerogative once thought sufficient to justify it, the rule is supportable now because its benefit and advantage extend to every citizen including the defendant, whose plea of laches or limitation it precludes; and its uniform survival in the United States has been generally accounted for and justified on grounds of policy rather than upon any inherited notions of the personal privilege of the king. *United States v. Kirkpatrick*, 9 Wheat. 720, 735; *United States v. Knight*, 14 Pet. 301, 315; *United States v. Thompson*, 98 U. S. 486, 489; *Fink v. O'Neil*, 106 U. S. 272, 281; *United States v. Nashville, C. & St. L. R. Co.*, 118 U. S. 120, 125. So complete has been its acceptance that the implied immunity of the domestic "sovereign," state or national, has been universally deemed to be an exception to local statutes of limitations where the government, state or national, is not expressly included; and to the Conformity Act. See *United States v. Thompson*, *supra*.

Whether the benefit of the rule should be extended to a foreign sovereign suing in a state or federal court is a question to which no conclusive answer is to be found in the authorities. Diligent search of counsel has revealed no judicial decision supporting such an application of the rule in this or any other country. The alleged immunity was doubted in *French Republic v. Saratoga Vichy Spring Co.*, 191 U. S. 427, 437, and in *Commissioners of the Sinking Fund of Louisville v. Buckner*, 48 Fed. 533. It was rejected in *Western Lunatic Asylum v. Miller*, 29 W. Va. 326, 329, and was disregarded in *Royal Italian Government v. International Committee of Y. M. C. A.*, 273 N. Y. 468, where neither appellate court delivered an opinion.

The only support found by the court below for a different conclusion is a remark in the opinion of the court in *United States v. Nashville, C. & St. L. R. Co.*, *supra*, where its holding that the United States, suing in a federal court, is not subject to the local statute of limitations, was said to rest upon a great principle of public policy "applicable to all governments alike." The statement is but a paraphrase, which has frequently appeared in judicial opinion,¹ of Mr. Justice Story's statement in *United States v. Hoar*, *supra*, already quoted. His reference to the public policy supporting the rule that limitation does not run against a domestic sovereign as "equally applicable to all governments" was obviously designed to point out that the policy is as applicable to our own as to a monarchical form of government, and is therefore not to be discarded because of its former identity with the royal prerogative. We can find in that pronouncement and in its later versions no intimation that the

¹ *United States v. Knight*, 14 Pet. 301, 315; *Gibson v. Chouteau*, 13 Wall. 92, 99; *United States v. Thompson*, 98 U. S. 486, 490; *Fink v. O'Neil*, 106 U. S. 272, 281.

policy underlying exemption of the domestic sovereign supports its extension to a foreign sovereign suing in our courts.

It is true that upon the principle of comity foreign sovereigns and their public property are held not to be amenable to suit in our courts without their consent. See *The Exchange*, 7 Cranch 116; *Berizzi Bros. v. S. S. Pesaro*, 271 U. S. 562; *The Navemar*, No. 242 this term, decided January 31, 1938. But very different considerations apply where the foreign sovereign avails itself of the privilege, likewise extended by comity, of suing in our courts. See *The Sapphire*, 11 Wall. 164, 167; *Russian S. F. S. Republic v. Cibrario*, 235 N. Y. 255. By voluntarily appearing in the rôle of suitor it abandons its immunity from suit and subjects itself to the procedure and rules of decision governing the forum which it has sought. Even the domestic sovereign by joining in suit accepts whatever liabilities the court may decide to be a reasonable incident of that act. *United States v. The Thekla*, 266 U. S. 328, 340, 341; *United States v. Stinson*, 197 U. S. 200, 205; *The Davis*, 10 Wall. 15; *The Siren*, 7 Wall. 152, 159.² As in the case of the domestic sovereign in like situation, those rules, which must be assumed to be founded on principles of justice applicable to individuals, are to be relaxed only in response to some persuasive demand of public policy generated by the nature of the suitor or of the claim which it asserts. That this is the guiding principle sufficiently appears in the many instances in which courts have narrowly restricted the application of the rule *nullum tempus* in the case of the domestic sovereign.³ It likewise appears from those cases which justify the rule as applied to the United States suing in a state court, on the ground that it is sovereign within the state and that invocation of the rule *nullum tempus* protects the public

² A foreign sovereign as suitor is subject to the local rules of the domestic forum as to costs, *Republic of Honduras v. Soto*, 112 N. Y. 310; *Emperor of Brazil v. Robinson*, 5 Dowl. 522; *Otho, King of Greece v. Wright*, 6 Dowl. 12; *The Beatrice*, 36 L. J. Adm. 10; *Queen of Holland v. Drukker*, (1928) Ch. 877, 884, although the local sovereign does not pay costs. *United States v. Verdier*, 164 U. S. 213, 219. The foreign sovereign suing as a plaintiff must give discovery. *Rothschild v. Queen of Portugal*, 3 Y. & C. Ex. 594, 596; *United States v. Wagner*, L. R. 2 Ch. App. 582, 592, 595; *Prioleau v. United States*, L. R. 2 Eq. 659. A foreign sovereign plaintiff "should so far as the thing can be done be put in the same position as a body corporate." *Republic of Costa Rica v. Erlanger*, L. R. 1 Ch. D. 171, 174; *Republic of Peru v. Weguelin*, L. R. 20 Eq. 140, 141; *cf. King of Spain v. Hullett*, 7 Bligh N. S. 359, 392.

³ The presumption of a grant by lapse of time will be indulged against the domestic sovereign. *United States v. Chaves*, 159 U. S. 452, 464. The rule *nullum tempus* has never been extended to agencies or grantees of the local sovereign such as municipalities, county boards, school districts and the like. *Metropolitan R. Co. v. District of Columbia*, 132 U. S. 1; *Boone County v. Burlington and M. R. R. Co.*, 139 U. S. 634, 693. It has been held not to relieve the sovereign from giving the notice required by local law to charge endorsers of negotiable paper, *United States v. Barker*, 12 Wheat. 559; *cf. Cooke v. United States*, 91 U. S. 389, 398; *Wilber National Bank v. United States*, 294 U. S. 120, 124, and in tax cases has been narrowly construed against the domestic sovereign. *Bowers v. New York & Albany Lighterage Co.*, 273 U. S. 346, 350. Compare *United States v. Knight*, 14 Pet. 301; *Fink v. O'Neil*, 106 U. S. 272.

interest there as well as in every other state. *United States v. Beebe*, 127 U. S. 338; *Swearingen v. United States*, 11 Gill. & J. 273; *McNamee v. United States*, 11 Ark. 148; *cf. United States v. California*, 297 U. S. 175, 186.

We are unable to discern in the case where a foreign sovereign, by suit, seeks justice according to the law of the forum, any of the considerations of public policy which support the application of the rule *nullum tempus* to a domestic sovereign. The statute of limitations is a statute of repose, designed to protect the citizens from stale and vexatious claims, and to make an end to the possibility of litigation after the lapse of a reasonable time. It has long been regarded by this Court and by the courts of New York as a meritorious defense, in itself serving a public interest. *Bell v. Morris*, 1 Pet. 151, 160; *M'Cluny v. Silliman*, 3 Pet. 270, 278; *Campbell v. Haverhill*, 155 U. S. 610, 617; *United States v. Oregon Lumber Co.*, 260 U. S. 290; *Bank v. Barnaby*, 197 N. Y. 210, 227; *Schmidt v. Merchants Despatch Transportation Co.*, 270 N. Y. 287, 302. Denial of its protection against the demand of the domestic sovereign in the interest of the domestic community of which the debtor is a part could hardly be thought to argue for a like surrender of the local interest in favor of a foreign sovereign and the community which it represents. We cannot say that the public interest of the forum goes so far.

We lay aside questions not presented here which might arise if the national government, in the conduct of its foreign affairs, by treaty or other appropriate action, should undertake to restrict the application of local statutes of limitations against foreign governments, or if the states in enacting them should discriminate against suits brought by a foreign government. We decide only that in the absence of such action the limitation statutes of the forum run against a foreign government seeking a remedy afforded by the forum, as they run against private litigants.

Second. Respondent, relying on the New York rules that the statute of limitations does not run against a suit to recover a bank account until liability upon it is repudiated, *Tillman v. Guaranty Trust Co.*, 253 N. Y. 295, and that the statute of limitations does not run against a plaintiff who has no forum in which to assert his rights, *Oswego & Syracuse R. R. v. State*, 226 N. Y. 351, 369, 362; *Cayuga County v. State*, 153 N. Y. 279, 291; *Parmenter v. State*, 135 N. Y. 154, 163, argues that until recognition of the Soviet Government there was no person to whom notice of petitioner's repudiation could be given and no court in which suit could be maintained to recover the deposit.

It is not denied that, in conformity to generally accepted principles, the Soviet Government could not maintain a suit in our courts before its recognition by the political department of the Government. For this reason access to the federal and state courts was denied to the Soviet Government before recognition. *The Penza*, 277 Fed. 91; *The Rogdai*, 278 Fed. 294; *R. S. F. S. R. v. Cibrario*, 235 N. Y. 255; *Preobazhenski v. Cibrario*, 192 N. Y. Supp. 275. But the argument ignores the principle controlling here and recognized by the courts of New York that the rights of a sovereign state are vested in the state

rather than in any particular government which may purport to represent it, *The Sapphire, supra*, 168, and that suit in its behalf may be maintained in our courts only by that government which has been recognized by the political department of our own government as the authorized government of the foreign state. *Jones v. United States*, 137 U. S. 202, 212; *Russian Government v. Lehigh Valley R. Co.*, 293 Fed. 133, 135, *aff'd sub nom. Lehigh Valley R. Co. v. State of Russia*, 21 F. (2d) 396, 409; *Matter of Lehigh Valley R. Co.*, 265 U. S. 573; *R. S. F. S. R. v. Cibrario, supra*; Moore, *International Law Digest*, §§ 75, 78.

What government is to be regarded here as representative of a foreign sovereign state is a political rather than a judicial question, and is to be determined by the political department of the government. Objections to its determination as well as to the underlying policy are to be addressed to it and not to the courts. Its action in recognizing a foreign government and in receiving its diplomatic representatives is conclusive on all domestic courts, which are bound to accept that determination, although they are free to draw for themselves its legal consequences in litigations pending before them. *Jones v. United States, supra*, 212; *Agency of Canadian Car & Foundry Co. v. American Can Co.*, 258 Fed. 363; *Lehigh Valley R. Co. v. State of Russia, supra*.

We accept as conclusive here the determination of our own State Department that the Russian State was represented by the Provisional Government through its duly recognized representatives from March 16, 1917, to November 16, 1933, when the Soviet Government was recognized.⁴ There was at all

⁴ The United States accorded recognition to the Provisional Government March 16, 1917, and continued to recognize it until November 16, 1933, when the Soviet Government was recognized. During that period the United States declined to recognize the Soviet Government or to receive its accredited representative, and so certified in litigations pending in the federal courts. *The Penza, supra*; *The Rogdai, supra*. It recognized Mr. Bakhmeteff as Russian Ambassador from July 5, 1917, until June 30, 1922, when he retired, having designated Mr. Ughet as custodian of Russian property in the United States. Mr. Ughet, after his appointment as Financial Attaché April 7, 1917, continued to be recognized as such by the United States until November 16, 1933. He was recognized by the United States as Chargé d'Affaires *ad interim*, during the absence of the Ambassador from December 3, 1918, to July 31, 1919. Their diplomatic status as stated was certified in the present suit by the Secretary of State, who stated that he considered Mr. Ughet's status unaffected by the termination of the Ambassador's duties.

Their status was certified to by the Department on October 31, 1918, and July 2, 1919, respectively, in *Lehigh Valley Railroad Co. v. State of Russia*, 293 Fed. 133. Mr. Bakhmeteff's status as Ambassador was certified May 18, 1919, in *Agency of Canadian Car & Foundry Co. v. American Can Co.*, 258 Fed. 363, 368; on April 6, 1920 in *The Rogdai*, 278 Fed. 294, 295; on June 24, 1919, in *The Penza*, 277 Fed. 91, 93. Certificate with respect to both Mr. Bakhmeteff and Mr. Ughet was given February 19, 1923, and with respect to Mr. Ughet December 22, 1927. On the faith of the two last mentioned certificates the Court, in the *Lehigh Valley Railroad case, supra*, as stated by the Government's brief in the present case, ordered to be paid to Mr. Ughet approximately \$1,000,000, of which more than \$700,000 was paid to the United States Treasurer "on account of interest due on obligations of the Provisional Government of Russia by the Treasurer."

times during that period a recognized diplomatic representative of the Russian State to whom notice concerning its interests within the United States could be communicated, and to whom our courts were open for the purpose of prosecuting suits in behalf of the Russian State. In fact, during that period suits were brought in its behalf in both the federal and state courts, which consistently ruled that the recognized Ambassador and Financial Attaché were authorized to maintain them.⁵

We do not stop to inquire what the "actual" authority of those diplomatic representatives may have been. When the question is of the running of the statute of limitations, it is enough that our courts have been open to suit on behalf of the Russian State in whom the right to sue upon the petitioner's present claim was vested, and that the political department of the Government has accorded recognition to a government of that state, received its diplomatic representatives, and extended to them the privilege of maintaining suit in our courts in behalf of their state. The right and opportunity to sue upon the claim against petitioner was not suspended; and notice of repudiation of the liability given to the duly recognized diplomatic representatives must, so far as our own courts are concerned, be taken as notice to the state whom they represented.

The Government argues that recognition of the Soviet Government, an action which for many purposes validated here that government's previous acts within its own territory, see *Underhill v. Hernandez*, 168 U. S. 250; *Oetjen v. Central Leather Co.*, 246 U. S. 297; *Ricaud v. American Metal Co.*, 246 U. S. 304; *United States v. Belmont*, 301 U. S. 324; *Dougherty v. Equitable Life Assurance Co.*, 266 N. Y. 71, 84, 85; *Luther v. Sagor & Co.*, 3 K. B. 532, operates to set at naught all the legal consequences of the prior recognition by the United States of the Provisional Government and its representatives, as though such recognition had never been accorded. This is tantamount to saying that the judgments in suits maintained here by the diplomatic representatives of the Provisional Government, valid when rendered, became invalid upon recognition of the Soviet Government. The argument thus ignores the distinction between the effect of our recognition of a foreign government with respect to its acts within its own territory prior to recognition, and the effect upon previous transactions consummated here between its predecessor and our own nationals. The one operates only to validate to a limited extent acts of a *de facto* government which by virtue of the recognition, has become a government *de jure*. But it does not follow that recognition renders of no effect transactions here with a prior recognized government in conformity to the declared policy of our own government. The very purpose of the recognition by our Government is that our nationals may be conclusively advised with what government they may safely carry on busi-

⁵ *Russian Government v. Lehigh Valley R. Co.*, 293 Fed. 133; 293 Fed. 135, aff'd 21 F. (2d) 396; *State of Russia v. Bankers Trust Co.*, 4 F. Supp. 417, 419, aff'd 83 F. (2d) 236. See also *Agency of Canadian Car & Foundry Co. v. American Can Company*, 258 Fed. 363.

ness transactions and who its representatives are. If those transactions, valid when entered into, were to be disregarded after the later recognition of a successor government, recognition would be but an idle ceremony, yielding none of the advantages of established diplomatic relations in enabling business transactions to proceed, and affording no protection to our own nationals in carrying them on.

So far as we are advised no court has sanctioned such a doctrine. The notion that the judgment in suits maintained by the representative of the Provisional Government would not be conclusive upon all successor governments, was considered and rejected in *Russian Government v. Lehigh Valley R. Co.*, *supra*. An application for writ of prohibition was denied by this Court. 265 U. S. 573. We conclude that the recognition of the Soviet Government left unaffected those legal consequences of the previous recognition of the Provisional Government and its representatives, which attached to action taken here prior to the later recognition.

Third. If the claim of the Russian Government was barred by limitation the United States as its assignee can be in no better position either because of the rule *nullum tempus* or by virtue of the terms of the assignment. We need waste no time on refinements upon the suggested distinction between rights and remedies, for we may assume for present purposes that the United States acquired by the assignment whatever rights then survived the running of the statute against the Russian Government, and that it may assert those rights subject to such plea of limitations as may be made by petitioner.

As has already been noted, the rule *nullum tempus* rests on the public policy of protecting the domestic sovereign from omissions of its own officers and agents whose neglect, through lapse of time, would otherwise deprive it of rights. But the circumstances of the present case admit of no appeal to such a policy. There has been no neglect or delay by the United States or its agents, and it has lost no rights by any lapse of time after the assignment. The question is whether the exemption of the United States from the consequences of the neglect of its own agents is enough to relieve it from the consequences of the Russian Government's failure to prosecute the claim. Proof, under a plea of limitation, that the six-year statutory period had run before the assignment offends against no policy of protecting the domestic sovereign. It deprives the United States of no right, for the proof demonstrates that the United States never acquired a right free of a preëxisting infirmity, the running of limitations against its assignor, which public policy does not forbid. *United States v. Buford*, 3 Pet. 12, 30; *King v. Morrall*, 6 Price 24, 28, 30.

Assuming that the respective rights of petitioner and the Soviet Government could have been altered and that petitioner's right to plead the statute of limitations curtailed by force of an executive agreement between the President and the Soviet Government, we can find nothing in the agreement and assignment of November 16, 1933, which purports to enlarge the assigned rights in the hands of the United States, or to free it from the consequences of

the failure of the Russian Government to prosecute its claim within the statutory period.

The agreement and assignment are embodied in a letter of Mr. Litvinov, People's Commissar of Foreign Affairs of the Soviet Government, to the President and the President's letter of the same date in reply. So far as now relevant the document signed in behalf of the Soviet Government makes mention of "amounts admitted to be due or that may be found to be due it as the successor of prior governments or otherwise from American nationals, including corporations, companies, partnerships or associations." It purports to "release and assign all such amounts to the Government of the United States" and the Soviet Government agrees, preparatory to final settlement of claims between it and the United States and the claims of their nationals, "not to make any claims with respect to . . . (b) Acts done or settlements made by or with the Government of the United States, or public officials of the United States, or its nationals, relating to property, credits, or obligations of any Government of Russia or nationals thereof." The relevant portion of the document signed by the President is expressed in the following paragraph:

I am glad to have these undertakings by your Government and I shall be pleased to notify your Government in each case of any amount realized by the Government of the United States from the release and assignment to it of the amounts admitted to be due, or that may be found to be due.

There is nothing in either document to suggest that the United States was to acquire or exert any greater rights than its transferor or that the President by mere executive action purported or intended to alter or diminish the rights of the debtor with respect to any assigned claims, or that the United States, as assignee, is to do more than the Soviet Government could have done after diplomatic recognition—that is, collect the claims in conformity to local law. Even the language of a treaty wherever reasonably possible will be construed so as not to override state laws or to impair rights arising under them. *United States v. Arredondo*, 6 Pet. 691, 748; *Haver v. Yaker*, 9 Wall. 42, 44; *Dooley v. United States*, 182 U. S. 223, 230; *Nielson v. Johnson*, 279 U. S. 47, 52; *Todok v. Union State Bank*, 281 U. S. 448, 454. The assignment left unaffected the right of petitioner to set up against the United States the previous running of the statute of limitations.

Fourth. Respondent assails the finding of the District Court that there was an unqualified repudiation by petitioner of its liability on the account, and in support of its contention presents an elaborate review of the evidence. The evidence is said to establish that petitioner's alleged repudiation was tentative and conditional, to await negotiations with a stable Russian Government upon its recognition by the United States. If this contention be rejected, respondent insists that at least there is a conflict in the evidence and in the inferences which may be drawn from it which, under the local practice, should have been resolved by a full trial rather than summarily on motion.

As these questions were not passed on by the Court of Appeals, the case will be remanded to that court for further proceedings in conformity with this opinion.

Reversed.

Mr. Justice CARDOZO and Mr. Justice REED took no part in the consideration or decision of this case.

UNITED STATES SPECIAL MEXICAN CLAIMS COMMISSION

[Under Act of April 10, 1935 (49 Stat. 149)]

Decision No. 1

GENERAL PRINCIPLES APPLIED BY THE COMMISSION IN THE DECISION OF CLAIMS

JURISDICTION

The jurisdiction of the Special Mexican Claims Commission is defined in the Act approved April 10, 1935 (49 Stat. 149), as amended by the Joint Resolution approved August 25, 1937 (Public Resolution No. 70, 75th Congress). Section 1 of the Act reads in part as follows:

Such Commission shall have jurisdiction to hear and determine, as hereinafter provided, conformable to the terms of the Convention of September 10, 1923, and justice and equity, all claims against the Republic of Mexico, notices of which were filed with the Special Claims Commission, United States and Mexico, established by said Convention of September 10, 1923, in which the said Commission failed to award compensation, except such claims as may be found by the Committee provided for in the Special Claims Convention of April 24, 1934, to be General Claims and recognized as such by the General Claims Commission. For the purpose of this Act, claims which were brought to the attention of the American Agency charged with the prosecution of claims before the aforesaid Commission, prior to the expiration of the periods specified in the Convention of September 10, 1923, for the filing of claims, but which, because of error or inadvertence, were not filed with or brought to the attention of the Commission within the said periods, shall be deemed to have been filed with the Commission within such periods.

Section 1 of the Joint Resolution provides that the jurisdiction of this Commission "shall not be deemed to include any of the claims found by the committee provided for in the Special Claims Convention of April 24, 1934, to be general claims," and Section 3 of the same resolution provides that "in the event of the reclassification as special claims of any of the claims found by the said committee to be general claims, the claims so reclassified shall be passed upon by said Special Mexican Claims Commission during its existence and thereafter by a Commission to be established in conformity with the said Act of April 10, 1935."

The jurisdiction of the Commission, as so defined, embraces 2,822 claims,

in the total amount of \$218,365,065.67, notices of which were filed with the Special Claims Commission, United States and Mexico, established under the Convention of September 10, 1923, and 11 claims, in the total amount of \$636,743.78, which are deemed to have been filed with the former Commission within the periods specified in the convention.

Of the 2,833 claims within the jurisdiction of this Commission, 2,693, in the total amount of \$206,661,867.12, were included by the Joint Committee under the Convention of April 24, 1934, in the computation of the lump sum payable by Mexico in settlement of the claims covered by the Convention of September 10, 1923. That sum, calculated on the basis of the general average percentage (2.6362) resulting from the settlements for similar claims presented against Mexico by Belgium, France, Germany, Great Britain, Italy, and Spain, was found by the Joint Committee in its report of June 27, 1935, to be \$5,448,020.14, subject to increase in the event that any of the claims classified by the Joint Committee as general claims were reclassified by the General Commission, United States and Mexico, as special claims. Two groups of claims of which notices were filed with the former Special Claims Commission were excluded from the computation of the lump sum settlement, pursuant to the terms of the Convention of April 24, 1934, for the reason that they had been disallowed or rejected by that Commission. The claims in one of these groups, filed under two docket numbers in the total amount of \$1,325,000, had been disallowed after consideration on their merits. The 114 claims in the other of these groups, in the total amount of \$10,043,412.41 were presented to the former commission between August 18, 1926, and February 18, 1927, and were rejected on the ground that no satisfactory reason was shown for their not having been filed on or before the first of these dates, as provided in Article VII of the Convention of September 10, 1923. The lump sum payable by Mexico has been increased by \$8,825.61 as a result of the findings of the Commissioners of the General Claims Arbitration, United States and Mexico, in their report of October 24, 1937, that 15 claims or parts of claims, in the total amount of \$334,876.11, which were classified by the Joint Committee as general claims, are in fact special claims. These 15 claims or parts of claims, which are now within the jurisdiction of this Commission, are among the claims of which notices were filed with the former Special Claims Commission. The lump sum payable by Mexico bears interest, as provided in the Convention of April 24, 1934.

The 11 claims, in the total amount of \$636,743.78, which are deemed to have been filed with the former Special Claims Commission within the periods prescribed in the Convention of September 10, 1923, notwithstanding the fact that they were not actually so filed, were brought to the attention of the Agency of the United States before that commission prior to the expiration of the periods specified in the convention. This Commission has found that the fact that these claims were not filed with or brought to the attention of the former commission within the periods specified was due to error or inad-

vertence. It has found also that there was no error or inadvertence, within the meaning of the Act, in connection with approximately 1,500 other cases in which it examined files of the Agency of the United States indicating the possibility that other claims should have been presented to the former commission. In the examination of these files this Commission took cognizance of the fact that the Agent of the United States, having in mind considerations of the public interest, was not obliged to present for adjudication all claims which might be brought to his attention. It considered, moreover, that the question of error or inadvertence in not filing a claim could properly arise only in a case in which the Agent had in his possession, within the periods specified by the convention, data indicating losses or damage, in amounts susceptible of at least approximate statement, suffered, through acts of forces during the revolutionary period, by an identified American citizen or concern on whose behalf a request for assistance in obtaining indemnity from the Mexican Government had been made to the Agent or to the Department of State or to an officer of the Foreign Service of the United States.

THE GENERAL BASIS OF DECISIONS

In compliance with the provisions of Section 3 of the Act of April 10, 1935, each member of the Commission, before entering upon his duties, made and subscribed a solemn oath that he would carefully and impartially examine and decide all claims according to the best of his judgment and in accordance with the evidence and the applicable principles of justice and equity and the terms of the Convention of September 10, 1923. As further provided in Section 3 of the Act, the decisions of the Commission are based upon the records in the cases as they existed before the establishment of the Commission, upon the additional evidence and written legal contentions presented within periods prescribed therefor by the Commission, and upon the results of independent investigations undertaken by the Commission in the exercise of the discretionary authority conferred on it. The records considered include all pertinent data in the possession of the Commission, whether presented by or on behalf of the claimants or derived from officials or other sources.

In Article I of the Convention of September 10, 1923, the claims which were to be submitted to the Commission provided for in that convention are identified as claims against Mexico of citizens of the United States for losses or damages suffered by persons or their properties during the revolutions and disturbed conditions which existed in Mexico, covering the period from November 20, 1910, to May 31, 1920. Such losses or damages, it is stated in the article, include losses or damages suffered by citizens of the United States by reason of losses or damages suffered by any corporation, company, association, or partnership in which citizens of the United States have or have had a substantial and bona fide interest, provided an allotment to the American

claimant by the corporation, company, association, or partnership of his proportion of the loss or damage is presented by the claimant to the Commission.

The words "during the revolutions and disturbed conditions which existed in Mexico, covering the period from November 20, 1910, to May 31, 1920" occur also in Article III of the convention. They are construed by this Commission as defining a period within which the claims arose and not as requiring proof of any connection between the losses or damages of a claimant and any particular revolution or disturbed condition, nor as requiring proof that such losses or damages were suffered in Mexico.

The Commission holds that the record, in order to warrant an award upon any claim, in conformity with the terms of the convention, must contain satisfactory proof of the American citizenship of the person or persons who suffered the loss or damage on which the claim is based and also of the American citizenship of the person or persons who owned the claim up to and including the date of its presentation to the former commission. Compliance with the allotment provision of the convention, in connection with claims for losses or damages suffered by American citizens by reason of losses or damages suffered by Mexican corporations, companies, associations or partnerships, has been considered by the Commission to be indispensable except in cases in which compliance with that provision is shown to have been impossible; in such cases convincing proof of the "substantial and bona fide interest" of American citizens in the Mexican corporations, companies, associations, or partnerships in question has been accepted without formal allotments.

In Article II of the convention it is agreed that it will be sufficient that it be established that the alleged loss or damage in any case was sustained and was due to any of the causes enumerated in Article III. The causes enumerated in the latter article are acts—

- (1) By forces of a Government *de jure* or *de facto*.
- (2) By revolutionary forces as a result of the triumph of whose cause governments *de facto* or *de jure* have been established, or by revolutionary forces opposed to them.
- (3) By forces arising from the disjunction of the forces mentioned in the next preceding paragraph up to the time when the government *de jure* established itself as a result of a particular revolution.
- (4) By federal forces that were disbanded; and
- (5) By mutinies or mobs, or insurrectionary forces other than those referred to under subdivisions (2), (3), and (4) above, or by bandits, provided in any case it be established that the appropriate authorities omitted to take reasonable measures to suppress insurrectionists, mobs, or bandits, or treated them with lenity or were in fault in other particulars.

The word "forces," used seven times in Article III, is construed by the Commission to embrace bodies of men in military units and bodies of men participating in mutinies, mob action, or banditry. It is considered broad enough to embrace isolated individuals belonging to military units or to bandit groups, provided that such individuals were acting on behalf of their units or

groups, or in furtherance of the aims or interests of their units or groups, or in the course of more or less integrated operations of their units or groups.

The "forces" enumerated in the first four paragraphs of Article III may be described more specifically as follows:

(1) Forces of a government *de jure* or *de facto*: The language is clear. The only question is as to what was a Government. This question arises specifically with respect to the "Governments" of Huerta (February, 1913 to July, 1914), Carbajal (July to August, 1914), Carranza (August, 1914 to October, 1915), and the Sovereign Convention (November, 1914 to October, 1915). The Government of Huerta, although not recognized by the United States, was doubtless an actual government during its entire existence. The same is true of the Government of Carbajal. The Government of Carranza was the only government in Mexico from Carranza's entry into Mexico City in August, 1914, to his withdrawal therefrom at the end of November, 1914. Although not recognized by the United States until October 19, 1915, it was doubtless a government in fact during the period just mentioned and continuously thereafter until it was generally recognized as a government *de jure* in May, 1917. The Government of the Sovereign Convention is regarded as having been a government *de facto* from about November 23, 1914, to about July 25, 1915, when it was finally driven from the capital by the forces of Carranza. Any doubt as to the status of the Government of Carranza or the Government of the Sovereign Convention during the periods mentioned would be resolved in a sense favorable to claimants in view of the fact that both the forces supporting Carranza and the forces supporting the Sovereign Convention are clearly within the contemplation either of paragraph (1) or of paragraphs (2) and (3) of the article.

(2) Revolutionary forces as a result of the triumph of whose cause governments *de facto* or *de jure* have been established, or revolutionary forces opposed to the forces first mentioned: Successful revolutionary forces (the forces first mentioned) embrace the forces which set up the Madero Government in May, 1911; those which set up the Huerta Government in February, 1913; those which set up the Carranza Government in August, 1914, and in July, 1915; those which set up the Government of the Sovereign Convention in November, 1914; and those which set up the Obregon Government in May, 1920, including those which, having adhered to the Conventionist Government in November, 1914, continued their opposition to Carranza until he was finally overthrown. The forces mentioned in the second part of the paragraph are revolutionary forces which were opposed to the forces mentioned in the first part. They include various forces, notably the Zapatistas, which coöperated with Carranza in bringing about the overthrow of Huerta but which did not join in the establishment of Carranza's *de facto* government.

(3) Forces arising from the disjunction of the forces mentioned in paragraph (2) up to the time when a government *de jure* established itself as a result of a particular revolution: Under this language the acts of separated

parts of the forces referred to in paragraph (2) afford the basis for claims. The Commission considers that the acts of various "bands of revolutionists" which continued to operate, more or less in the manner of bandits, up to the time of Carranza's regular election as President, in the spring of 1917, are within the terms of paragraph (3).

(4) Federal forces that were disbanded: The language here used is construed by the Commission to apply to the acts of forces of the Huerta army during their status as federal forces and for such further time as they continued to constitute forces, either integrated or separated into small groups, after their disbandment in August, 1914.

The requirement of proof of some fault on the part of the appropriate authorities in connection with the acts of "forces" mentioned in paragraph (5) is one which it is difficult for many claimants to meet. The hardship of their situation has been materially alleviated by the Commission's practice of considering the historical data in its possession and, in cases of doubt, obtaining additional data by independent investigation. The Commission has not, however, considered itself to be authorized to find that lenity or other fault on the part of the authorities existed in cases in which the records, as defined in the first paragraph of this section, contained no pertinent information. The question whether the loss or damage suffered by any claimant was the result of acts of any of the forces enumerated in Article III of the convention is a question of fact to be determined by the Commissioners as triers of the facts in each case. The causal connection between acts of forces and the claimant's loss is one of the essential elements of an awardable claim. Such connection, the Commission holds, must be proximate in the legal sense. Remote damages are held to be not recoverable. In this connection, attention is called to the principle of "repercussion," which is referred to in individual decisions as the reason for the disallowance of claims for certain losses. The principle here applied is that losses which are not the proximate result of the acts of forces involving Mexican liability, but are a "repercussion" of general revolutionary conditions, are not awardable. The Commission has not excluded from consideration anything in the nature of evidence presented with respect to loss or damage through acts of forces involving Mexican liability under the convention nor with respect to any other essential element of a valid claim. The Commission has uniformly required that the American citizenship of the claimant be satisfactorily proved, as already indicated; that the claimant's ownership of any personal property and his ownership or right of possession of any real property involved in the claim be proved by competent and reliable evidence; and that like proof be given of the value of any property alleged to be lost or damaged and the extent of any loss or damage suffered by property or persons. It has not, generally speaking, made awards solely on unsworn testimony or on the uncorroborated sworn testimony of interested parties. Corroboration of claimants' statements in sufficient measure to warrant awards has, however, frequently been found in

official reports available to the Commission. In some cases, moreover, the Commission has made awards on proof of general loss by claimants, even though it was unable to find specific proof of specific items of loss. Such awards are sometimes referred to as awards in equity, meaning that, on the whole record, the Commission found satisfactory proof of loss to the extent of the awards made.

Claims based upon loss of prospective profits have been disallowed on the ground that such losses were too speculative in character and have not been proved with a sufficient degree of certainty to warrant an award. Claims based upon alleged loss of prospective increase in herds of cattle and other livestock have been disallowed for lack of proof that they were due to acts of forces as distinguished from other factors. Claims for loss of the use of land have generally been disallowed as too speculative. An exception has been made in the case of subsistence homesteads, where it has been presumed that the owner or possessor would be able to make an income from the homestead sufficient for subsistence, and hence a reasonable allowance for loss of use has been made in cases of forced abandonment. Where premises owned by a claimant have been actually occupied by forces involving Mexican liability, the Commission has made an award for the rental value of the use and occupation.

The Commission has based its decisions on the entire records before it, including, besides evidence submitted by the claimant in a particular claim, inventories filed with the Department of State, diplomatic and consular correspondence, investigations and reports, the historical files and data of the former American Agency relative to Mexican revolutionary and insurrectionary forces, data and evidence in related claims before this Commission and also before the General Claims Commission, the reports of investigations by the Department of Justice, the Treasury Department, the War and Navy Departments, and, in general, pertinent data in the possession of the various Departments of the Federal Government or the State Governments, and the results of independent investigations.

In addition to the ordinary nontechnical principles of justice and equity generally applied in the judicial determination of questions of fact, the Commission has applied certain established equitable principles such as those expressly recognized by the courts as governing the distribution of a fund which is insufficient to pay all claimants in full. It has in all its decisions borne in mind the fact that any award made to one claimant reduces the fund available for awards to other claimants.

THE MEASURE OF DAMAGES

In determining the amounts which would constitute full indemnification, as provided in the Convention of September 10, 1923, for the awardable losses and damages of claimants or their predecessors in interest, the Commissioners, according to the best of their judgment and the applicable prin-

ciples of justice and equity, have given due weight in each case to such factors, wherever pertinent, as the following:

In death claims.—The decedent's age, position, and earning capacity at the time of his death; the degree of relationship between the decedent and the claimant or claimants; the extent of the financial dependence of the claimant or claimants upon the decedent; the life expectancy of the decedent and the claimant or claimants at the time of the decedent's death; and the mental suffering of the claimant or claimants as a result of the decedent's death.

In personal injury claims.—The nature and seriousness of the injury; the extent of the impairment of the claimant's health and earning capacity; the proved expenses and loss of time incident to the injury; and any aggravation of the injury by unusual cruelty.

In claims for loss or damage of property.—The quantity and value of property of various kinds owned by the claimant as shown by inventories filed prior to the origin of the claim; the market value, original cost, and depreciation of the property; and deterioration through lack of attention directly attributable to acts of forces. In this connection the Commission has applied the principle that, where the evidence does not satisfactorily establish a high or unusual value for property, an award should be made on the basis of the value of common or ordinary property of that class. For instance, in the case of cattle on ranches, where there is not satisfactory proof of an unusual value for the cattle, the value of ordinary range cattle in Mexico has been taken as the basis for an award. Similarly, in the case of loss of personal effects, in the absence of clear proof of exceptional values, awards have been made on the basis of the value of personal belongings which the claimant, from his occupation and condition in life, might reasonably be expected to have in his possession.

THE QUESTION OF INTEREST ON THE AMOUNT OF LOSSES AND DAMAGES DUE TO ACTS OF FORCES

The Act of April 10, 1935, provides that all claims coming before the Special Mexican Claims Commission for decision shall be decided in accordance with the best judgment of the Commissioners and in accordance with the evidence and the applicable principles of justice and equity and the terms of the Convention of September 10, 1923, between the United States and Mexico.

The Convention of September 10, 1923, provides for the payment of indemnifications by Mexico upon all claims filed on behalf of citizens of the United States as defined therein for losses or damages proved to have been sustained and to have been due to acts, during the revolutions and disturbed conditions of 1910 to 1920, by any of five groups or classes of forces specified in the convention. No reference is made to any liability of Mexico for interest on the amounts of losses or damages proved to have been due to the causes enumerated. The subsequent Convention of April 24, 1934, providing for the final

settlement of the special claims of the United States by the payment of a lump sum, likewise makes no direct reference to the subject of interest on the amounts of the losses or damages for which claims were filed. It is significant, moreover, that the lump sum determined by the Joint Committee appointed by the two Governments in pursuance of the Convention of April 24, 1934, was calculated on the basis of the amounts of the losses or damages alleged, exclusive of interest. The total amount of the losses or damages set forth in the claims falling within the jurisdiction of this Commission is, exclusive of interest, in excess of \$200,000,000. The sum available for the indemnification of all the claimants is approximately \$5,500,000.

Neither the Convention of September 10, 1923, nor that of April 24, 1934, contains any acknowledgment of legal liability on the part of Mexico with respect to the special claims of the United States. The undertaking of Mexico, in the Convention of 1923, to pay *ex gratia* to the United States full indemnification for the losses or damages shown to have been suffered by American citizens through acts of certain forces can hardly be held, in the light of the accord and satisfaction represented by the Convention of 1934, to have involved an obligation on the part of the Mexican Government to pay the amount of such losses or damages as of the date at which they were suffered and to add to that amount interest on the same because of the passage of time before payment.

In the absence of a clear mandate in the Convention of September 10, 1923, that interest be allowed on the amounts of the losses or damages due to the causes enumerated in that convention, the task of this Commission, in pursuance of the Act of April 10, 1935, must, in the opinion of the Commissioners, be viewed in the light of the situation created by the Convention of April 24, 1934, and be deemed to be that of ascertaining the amounts of such losses or damages, as of the dates of their occurrence, and of making such awards as may, in their judgment, be just and equitable. In view of the considerations suggested above, it is, in the judgment of the Commissioners, just and equitable to limit awards to the amounts of the losses or damages shown to have been due to the causes indicated, and it is therefore the decision of the Commission that interest will not be allowed on any of those amounts.

THE REDUCTION OF AWARDS AS PROVIDED IN SECTION 4 OF THE ACT AND SECTIONS
2 AND 3 OF THE JOINT RESOLUTION

Section 4 of the Act approved April 10, 1935, reads as follows:

If, after all claims have been passed upon and all awards have been entered, the Commission shall find that the total amount of such awards is greater than the amount that the Government of Mexico has agreed to pay to the Government of the United States in satisfaction of the claims, less the expenses of the Commission, it shall reduce the awards on a percentage basis to such amount, and shall enter final awards in such reduced amounts.

Section 2 of the Joint Resolution approved August 25, 1937, reads as follows:

That for the purposes of the reduction of awards on a percentage basis as provided for in section 4 of the Act approved April 10, 1935 (49 Stat. 149), the amount which the Government of Mexico has agreed to pay to the Government of the United States in satisfaction of the claims shall, subject to the provision in section 3 hereof, be deemed to be the sum of \$5,448,020.14, set forth in the report of the said committee provided for in the said convention of April 24, 1934.

Section 3 of the same resolution provides:

That, in the event of the reclassification as special claims of any of the claims found by the said committee to be general claims, the claims so reclassified shall be passed upon by said Special Mexican Claims Commission during its existence and thereafter by a Commission to be established in conformity with the said Act of April 10, 1935, and the total amount payable by the Government of Mexico to the Government of the United States on account of the claims so reclassified, together with interest on all deferred payments under the Special Claims Convention of April 24, 1934, shall be added to the sum of \$5,448,020.14 set forth in the report of the said committee. The total amount awarded by the Commission so established upon the claims so reclassified shall be added to the total amount of the original awards made by the Special Mexican Claims Commission, and any necessary readjustment of the awards of the Special Mexican Claims Commission and those that may be made by the Commission to be established pursuant to this section shall be made by the Secretary of the Treasury on the basis prescribed by section 4 of the Act approved April 10, 1935.

Pursuant to the provisions of Section 4 of the Act and Section 2 of the Joint Resolution, the amount which the Government of Mexico has agreed to pay to the Government of the United States in satisfaction of the claims before the Commission, with the exception of those reclassified as special claims by the Commissioners of the General Claims Arbitration, United States and Mexico, in their report of October 24, 1937, has been deemed by the Commission to be \$5,448,020.14. From this amount there will be deducted the expenses of the Commission. The remainder, subject to the provisions of Section 3 of the Joint Resolution, is the sum to be distributed by the Secretary of the Treasury (after the transmission of the list of awards to him by the Secretary of State, pursuant to the provisions of Section 9 of the Act) in ratable proportions among the persons in whose favor awards have been made upon the claims other than those recently reclassified as special claims, or among the assignees, heirs, executors, or administrators of record of such persons. The aggregate amount of the awards cannot be definitely established until after the expiration of the period allowed for the review of decisions upon petition of interested parties alleging error on the part of the Commission. The list of awards to be transmitted to the Secretary of State by the Commission pursuant to the provisions of Section 9 of the Act, will

show the amounts payable to the interested parties, subject to adjustment by the Secretary of the Treasury as provided in Section 3 of the Joint Resolution.

It is noted in this connection that the Commission has made a number of awards to the estates of deceased claimants. These awards were made payable to estates rather than to executors, administrators, trustees, legatees, next of kin, or other beneficiaries of such estates, because the records were considered insufficient to establish the identity of the persons entitled to receive the awards.

In such cases the determination of the identity of the persons entitled to the awards would appear to be for the appropriate authorities of the Treasury Department, upon such proof as it may require. Similarly, awards have been made to claimants in some instances in spite of the fact that the record indicated that the claimants had assigned the claims or parts thereof. In such cases the assignments were not given effect by the Commission, because the records did not, in the judgment of the Commission, clearly establish their sufficiency. The absence of recognition by the Commission of any assignment does not constitute a finding that the assignment is invalid.

Pursuant to the provisions of Section 3 of the Joint Resolution, the total amount which may be awarded by this Commission upon the claims reclassified as special claims in the above-mentioned report of October 24, 1937, will be added to the total amount of the awards (before reduction on a percentage basis) upon the other claims before the Commission, and subject to such readjustment as may be necessary in view of awards by a future commission upon claims hereafter reclassified as special claims, the total amount available for distribution among the beneficiaries of all the awards of the present Commission will be \$5,448,020.14 (the amount set forth in the report of the committee provided for in the Convention of April 24, 1934), plus \$8,825.61 (2.6362 per cent of the claims reclassified as special claims in the report of October 24, 1937), plus approximately \$200,000.00 (representing interest on deferred payments by Mexico, on the assumption that payments of principal will continue to be made at the rate of \$500,000 a year), minus the expenses of this Commission. The amounts to be actually received by the beneficiaries of the awards upon the claims reclassified as special claims in the report of October 24, 1937, will be determined by the Secretary of the Treasury, on a percentage basis, as provided in Section 3 of the Joint Resolution.

DETERMINATION OF FEES OF COUNSEL OR ATTORNEYS

Section 8 of the Act of April 10, 1935, reads as follows:

The Commission shall, at the time of entering an award on any claims, allow counsel or attorneys employed by the claimant or claimants, out of the amount awarded, such fees as it shall determine to be just and reasonable for the services rendered the claimant or claimants in prosecuting such claim, which allowance shall be entered as a part of said award: *Provided, however,* That the Commission shall determine just and reasonable fees, where there is a contract or agreement for services

in connection with the proceedings before the Commission and with the preparations therefor, only upon the written request of the claimant or claimants, or of the counsel or attorneys, made to the Commission within ninety days after notice of the entry of an award and notice of the provisions of this section shall have been mailed by the Commission to the claimant or claimants; and payments shall be made by the Secretary of the Treasury to the person or persons to whom such allowance shall be made in the same manner as payments are made to claimants under section 9 of this Act, which shall constitute payment in full to the counsel or attorneys for prosecuting such claim; and whenever such allowance shall be made, all other liens upon, or assignments, sales, or transfers of the claim or the award thereon, whether absolute or conditional, for services rendered or to be rendered by counsel or attorneys in the preparation or presentation of any claim or part or parcel thereof, shall be absolutely null and void and of no effect.

The Commission, in the performance of its duties under this section, has taken the view that the fees which it is authorized to determine are fees for legal services rendered by attorneys at law and that it is not authorized to fix compensation of persons who were not attorneys at law when services were rendered by them. It has, moreover, considered that no fee can be determined or allowed in any case in which the record does not contain definite information regarding the character and extent of the services rendered by attorneys at law. It has addressed inquiries to all attorneys at law who appeared from the records to have been employed by claimants and who did not appear from the records to have agreements with claimants regarding legal services, and it has sent to claimants for comment copies of the statements presented by such attorneys regarding such services. It has also notified both claimants and attorneys of the awards made upon claims as to which fee agreements appeared to exist, and it has duly considered and acted upon all requests, made within ninety days from the mailing of notices of awards, for the determination of fees. In every case in which legal services appear from the record to have been performed in connection with a claim upon which an award is made, the decision of the Commission contains a finding with respect to fees for such services.

BOOK REVIEWS AND NOTES *

Annual Digest of Public International Law Cases. Being a Selection from the Decisions of International and National Courts and Tribunals given during the years 1931 and 1932. Edited by H. Lauterpacht. London: Butterworth & Co., 1938. pp. xlv, 464. Index. 40 s.

The usual enthusiastic welcome may be accorded this sixth volume of the *Annual Digest*. This volume contains only 233 cases as against 302 in the preceding volume, but more cases than usual are cited or briefly described without being given a case number. The cases include decisions of fourteen international tribunals; of the national court decisions, the United States again leads with 36, Germany is second with 30, followed by 20 from France, 15 from Egypt, 11 from England and 10 from Italy. Among the national contributors, reporters for Danzig, Lithuania, Norway, Syria and Yugoslavia appear as newcomers to last year's list, and Portugal is omitted. The reviewer welcomes the restoration of the Classification which was omitted from the last volume. Also welcome is the editor's policy of including longer verbatim extracts from the cases reported with the frequent substitution of direct quotations for paraphrasing. There is obviously a physical limitation upon the extent to which this policy can be carried, but for a volume of this type, used in many places where the original reports are not available, the fullest possible quotation is eminently desirable. Another great reference digest, the *Fontes Juris Gentium*, stresses the fact that it intends to be merely an elaborated index guide to the sources; the *Annual Digest*, however, at least in the United States, is cited and quoted by attorneys and courts when the primary sources are not to be had. As the reviewer has pointed out with reference to the preceding volume of the *Annual Digest*, attorneys can not nowadays afford to brief cases involving points of international law without consulting the *Annual Digest*. It may also be said that no teacher of international law, especially if he uses a case-book, can neglect to make his students aware of this rich source of supplementary materials.

Since the current volume covers the years 1931 and 1932, the reader naturally finds a number of cases which are already old friends. Thus the American reader will note from the Permanent Court of International Justice such items as the Advisory Opinion on the Austro-German Customs Union, the Greenland case and the case of the Free Zones; from the courts of the United States, the Blackmer case, *The Mazel Tov*, the Factor case and *Burnet v. Brooks*. In view of the recent diplomatic correspondence between the

* The JOURNAL assumes no responsibility for the views expressed in book reviews and notes.—ED.

United States and Mexico, he will be interested in the cases drawn from the Claims Commissions between Mexico and Germany and Great Britain. Although they deal with problems of state succession, Cases 33-37 are also of interest in this same connection because of the discussion of the duty to respect private rights. Since our courts are still struggling with the problems raised by the Soviet decrees and the subsequent recognition of the Soviet Government, Cases 24 ff. and 69 ff. will be of interest. At pp. 7 ff., the various views represented regarding conflicts between statutes and treaties is highly illuminating, especially the decision of the Supreme Court of Canada. (Case No. 2.) One notes also that the Italian courts continue to deny state immunity in regard to acts performed *jure gestionis* (Case No. 14), and that the extent of territorial waters still gives rise to diversity of views (e.g., Cases No. 61, No. 62 and No. 82). Reminiscent of the Cutting case is the decision of the Mexican Supreme Court (No. 79) and of the Lotus case, the decision of the German Supreme Court for Civil Matters. (No. 97.)

The editorial notes and cross references are more complete and more useful than ever, although the reviewer misses a reference to Case No. 181 among the cross references at pp. 14-15 on the relation between international and municipal law. The gratitude of all students of international law must again be extended to Professor Lauterpacht, his Advisory Committee and contributors, and to the Carnegie Endowment for International Peace and the London School of Economics and Political Science whose support makes possible the continuation of this important work. PHILIP C. JESSUP

Ius Gentium. Annuario Italiano di Diritto Internazionale. Vol. I. Naples: Società anonima editrice Napolitana, 1938. pp. iv, 255.

When in 1907 the newly begun AMERICAN JOURNAL OF INTERNATIONAL LAW published a review of the likewise newly begun *Rivista di diritto internazionale* it confined itself to two sentences: "The Rivista embraces within its scope both public and private international law. Its first numbers are very creditable to Italian scholarship in the fields."¹ One would be justified to repeat this pronouncement for the new sister publication of the *Rivista* which is under review here. Curiously enough, apart from the publisher's name, there is no indication of the editorial board nor any preface or statement of the purpose or scope of the new periodical.

The *Annuario* contains three parts, entitled Doctrine, Treaties and Bibliography. The first part consists of eight articles by various authors dealing all except one with questions of public international law. Four of them discuss the legal significance of recent diplomatic events or controversies. Thus the first article, written by Professor Baldassarri, deals with "The international legal condition of Belgium." The author maintains that

¹ This JOURNAL, Vol. 1 (1907), p. 267.

Belgium's old neutralized status was lost by the Treaty of Versailles. A new situation was created through the Covenant of the League and the Locarno agreements, but Germany's denunciation of them altered it profoundly. The recent French-British declarations of April 24, 1937, releasing Belgium from her obligations but maintaining their duty of assistance, the Italian guaranty of the Belgian border pronounced in March, 1937, and Germany's assurance of Belgium's territorial integrity are the present foundation of Belgium's international situation.

Mr. Olivi gives a description of "The Chaco Question, or the conflict between Bolivia and Paraguay." At the time he wrote, the signature of the Treaty of Peace of July 21, 1938, and its subsequent ratification, according to Article 11, by the National Constitutional Convention of Bolivia and a plebiscite in Paraguay on August 10, 1938,² had evidently not yet happened. But since this treaty and its ratification, even though a "triumph of Inter-American conciliation,"³ is only "a first step"⁴ to be followed by the drawing of the final border-line by arbitral award on or before October 9 and its acceptance by the parties, it might be interesting to note that the writer deems Paraguay's claims legally justified.

Professor di Roccalta gives a discussion of the annexation of Austria. He points out that it was entirely legal from the viewpoint of municipal law, and that it was lawful or has, at least, become lawful by acquiescence with respect to international law.

Professor Strupp presents a detailed account of "The abolition of the capitulations in Egypt" which was commented upon by Professor Philip Marshall Brown in this JOURNAL.⁵

Apart from these four articles dealing with special diplomatic events, the *Annuario* contains an article by Dr. LaTerza on "Political Equilibrium and Collective Security." The author shows that in modern times, after the breakdown of the *Pax Romana*, first the idea of political equilibrium and later the idea of collective security have been thought to be a guaranty for peace, but that both were not workable. Only a comprehension of the real needs of peoples will remove causes of war.

The two remaining articles on public international law (and the most scholarly ones, too) deal with more theoretical questions which are related to each other. One, by Professor Monaco, is entitled "The internal regulations of international entities," the other, by Professor Rapisardi-Mirabelli, is called "The legal nature of the International Institute of Agriculture and the category of international institutional entities." The first author, under careful use and criticism of various jurisprudential theories, advances the thesis that the rule-making power of international entities is not based

² Cf. N. Y. Times of Aug. 14, 1938, Sec. 1, p. 25.

³ See 1938 Bulletin of the Pan American Union, p. 450.

⁴ See *Time* magazine, Aug. 1, 1938, p. 18.

⁵ See this JOURNAL, Vol. 31 (1937), p. 469.

upon a delegation by international law in the technical sense, but derives from their autonomy which is an essential feature of any "institution" (a concept which, of old canonistic origin, has had a surprising resurrection and evolution among recent continental authors). International law only attributes to these regulations the same efficacy as other international rules if and in so far as they concern relations outside their internal order. Professor Rapisardi-Mirabelli pursues a similar approach, but considers the regulations of the international institutes to be formed in virtue of a real delegation. The main part of his study demonstrates that the independent international institutes, like that of Agriculture, possess legal personality.

The remaining article by Professor Cavarretta deals with private international law and concerns the "International regulation of inheritance law in statutes and treaties." He proposes to distinguish between rules of a private and those of a public character. The latter ones lend themselves only to accords between groups of states. Unfortunately his ideas seem not sufficiently elaborated.

The treaties printed in the second part are the British-Italian accord with respect to the Mediterranean, the Anti-Communist Treaty of Germany, Italy and Japan, the treaty of amity between Yugoslavia and Italy, and the Accord of Montreux on the abolition of the capitulations. The bibliography contains books and articles on public and private international law which appeared in Italian during 1937.

STEFAN A. RIESENFELD

Le Conflit des Lois en matière de Contrats dans le Droit des États-Unis d'Amérique et le Droit Anglais comparés au Droit Français. By Jean-P. Barbey. Paris: Rousseau et Cie., 1938. pp. xix, 359. Fr. 60.

This volume is the latest addition to the publications of the Institute of Comparative Law of the University of Paris, whose eminent director, Professor Lévy-Ullmann, has inspired many studies in comparative law. The present volume is devoted to a comparison of the French rules of the conflict of laws in the matter of contracts with those of England and the United States. From a commercial point of view, it is most desirable that the rules governing the conflict of laws in this field should be uniform in order that the validity of contracts and the obligations arising therefrom be substantially the same wherever suit may be brought. It would be better still if a uniform law of contracts could be established for all countries. The obstacles to the realization of such an ideal are so great, however, that there is little hope of their being overcome at any foreseeable time in the future. Some progress in that direction is being made, nevertheless, even though by slow degrees, one of the latest and most encouraging sign-posts being the Uniform Laws for Bills and Notes and for Checks, adopted at Geneva in 1930 and 1931.

In the first part of the present study, M. Barbey states the law of England

and the United States governing capacity, formalities and the substance (essential validity and effect) of contracts from the standpoint of the conflict of laws. In the second part, he compares the principles of Anglo-American law with those of France, and in the third part he states his conclusions. He finds the law of the United States to be more divergent from the French than the English, owing to the fact that the conflict questions arise in this country principally between states of the same country, whereas in England and France they arise between foreign countries. For this reason, the courts of the United States show less hesitancy in applying the law of some other state than the law of the forum. In the estimation of the author, the same fact accounts also for the trend in this country in favor of a unitary law governing capacity, formalities and the validity of contracts in other respects. The most marked divergence between the law of the United States, England and France relates to capacity, emphasis being placed in this country upon the *lex loci contractus*, in England upon the *lex domicilii* and in France upon the *lex patriae*. Our author shows how these rules are qualified, however, in each country in practice, so that the differences are largely differences of technique and not of actual results in a given case. The same conclusion is reached with respect to formalities and the substance of contracts. In the light of these discoveries, the author expresses confidence in the future of the conflict of laws, based on the conviction that the diversities in the national spheres will not prevent a gradual elaboration of a universal system of the conflict of laws.

The reviewer would like to be able to share this optimism, but finds it difficult to do so. Agreement has been found impossible of attainment as regards the law governing capacity in the conflict of laws, even between countries subscribing to the personal law (*lex domicilii* or the *lex patriae*). How much greater the obstacles to find a common ground between these countries and those rejecting the personal law in favor of the law governing the contract in general! Not only that, granted that the decisions of the courts of France, England and the United States are approaching each other in the matter of contracts in broad outline, as the author has attempted to demonstrate, it does not follow that the same is true of other subjects in the conflict of laws. In the field of contracts, uniform results should be found more readily attainable than elsewhere, due to the fact that they are determined everywhere by practical considerations of the same character. The requirements of international trade are substantially the same in all countries, which is not true of other branches of the law, such as the family law or the law of succession.

The work as such is characterized by comprehensiveness of treatment, accuracy and vividness of style. It ought to rank with the best that have so far appeared in the series of comparative studies under the auspices of the Institute of Comparative Law of the University of Paris.

ERNEST G. LORENZEN

- ✓ *The Family of Nations. Its Need and Its Problems.* By Nicholas Murray Butler. New York and London: Charles Scribner's Sons, 1938. pp. xiv, 400. Index. \$3.00.

This book is a collection of 31 essays and addresses, published or delivered by President Butler during the last four years on various subjects, but all bearing directly on the necessity of creating or developing a family of nations for the preservation of civilization. The essays were published in various journals in the United States, England, France and Japan; the addresses were delivered in New York, London, Paris and other cities, some of them being broadcast over world-wide hookups. In some of the broadcasts Dr. Butler spoke and also introduced other speakers, including statesmen of various countries, each of whom spoke from a radio station in his own country to hearers in many lands. These addresses by foreign statesmen are all brief and are included in this volume.

Among the foreign speakers are Eduard Beneš, former President of Czechoslovakia; Baron Wakatsuki, former Prime Minister of Japan; Prince Tokugawa, President of the House of Peers; Viscount Cecil of Chelwood; Yvon Delbos, Minister of Foreign Affairs of France; Paul van Zeeland, Prime Minister of Belgium, and others.

There are commencement addresses, memorial addresses, Armistice Day addresses and addresses on many other occasions and on a great variety of subjects; but as all roads lead to Rome, so in this book all occasions and all subjects lead to a discussion of one great question — the necessity of a world-wide organization of nations, with the alternative of facing the decay of western civilization.

From whatever point Dr. Butler approaches the subject, his wide scholarship lends variety to his discussion and makes it stimulating. Those who share his convictions will find the volume an arsenal of argument.

H. W. TEMPLE

- Foreign Relations of the United States, 1922.* 2 vols. (Department of State Publications 1155, 1156.) Washington; Government Printing Office, 1938. pp. cxvi, 1075; cx, 1042. Indexes. \$1.75 each.

It has become almost a matter of routine in recent years for reviewers of new volumes of the *Foreign Relations of the United States* to take occasion to commend the policy of the Department of State in releasing the valuable source material contained in the volumes and in putting it at the disposal of the public in such attractive form and at such moderate price. The study of diplomatic history has grown greatly in importance of recent years, and it is vitally necessary that the gap between events and the official records of them be kept as narrow as possible. If the distance of fifteen years seems to many persons greater than necessary, it is to be explained by the policy which the Department of State has wisely chosen to follow of not publishing documents without the consent of the other states which are parties to the

negotiations. The useful press releases which come from the Department must in the meantime be resorted to for the texts of documents that are not confidential. These releases have recently been expanded and presented in more attractive form, for which scholars must express their further appreciation.

The material in the two volumes now appearing is divided into a "general" section, dealing with subjects of a multilateral nature, and a series of special sections dealing with individual countries. Much of the most useful material of the general section will be the documents relating to the Conference on the Limitation of Armament held at Washington, November 12, 1921, to February 6, 1922. They contain, in addition to the texts of the treaties signed at the Conference, many previously unpublished memoranda of conversations between the heads of the leading delegations at the Conference. Among the numerous interesting items are the papers relating to the inclusion or exclusion of the homeland of Japan in the phrase "insular possessions and insular dominions" in the Four Power Treaty. The general section also includes the important negotiations at Washington regarding the Tacna-Arica dispute between Chile and Peru.

The special sections are arranged in the alphabetical order of the individual countries. Under the head of Japan, Volume II prints a hitherto unpublished "understanding" in regard to the Lansing-Ishii agreement, together with the exchange of correspondence which resulted in the cancellation of the agreement. Under the head of Mexico is given the lengthy correspondence preceding the recognition of the Government of Obregon in 1923, together with the correspondence relating to Mexican foreign obligations and the International Commission of Bankers. Under the head of Turkey are printed the documents relating to the negotiations of the Ottoman-American Exploration Co. for the development of the Mesopotamian oil fields, popularly known as the "Chester Concession."

The compilation of the material contained in the two volumes was done under the direction of Dr. Cyril Wynne, Chief of the Division of Research and Publication of the Department of State, and his assistant, Dr. Ernest R. Perkins, to whom congratulations are due for the skill they have exhibited in the selection of the documents and the care with which they have been edited. The List of Papers admirably summarizes the documents and makes it possible to find particular subjects without undue loss of time.

It is to be hoped that teachers of history and international relations who find the present volumes, like other publications of the Department of State, of great help to them in the conduct of their academic work, will bring their personal influence to bear upon the Committee on Appropriations of the House of Representatives to increase the all too modest item allotted to publication in the Department of State appropriation bills. Considering the national importance of so many of the issues involved in the foreign relations of the United States, it is difficult to understand the reluctance

with which appropriations are made to enable the Department to give to the public the material necessary for a just comprehension of the policies of their government and of the factors that must be taken into account in reaching a decision.

C. G. FENWICK

Il riconoscimento di Stati nel Diritto Internazionale. By Giovanni Scalfati Fusco. Naples: Lorenzo Alvano, 1938. pp. 304. L. 30.

The legal nature and the effects of the recognition of states and governments is one of the most disputed and most complicated problems of international law, owing to its intimate connection with the very basic conceptions of an international legal order. The reviewer, who was for a lengthy period assistant to the Harvard Research in International Law for the topic "Recognition," has experienced that himself. Dr. Fusco's book is a new effort to clarify the confused field. His treatment is confined to the various problems around the recognition of states only. It is divided into eleven chapters relating to the usual questions dealt with in this connection. The author starts with a methodological discussion, turns after that to the significance of recognition in general and of recognition of new states in particular, and discusses in the next two chapters, first, the relationship between recognition and admission into the international community, and then the different theories about the legal character of recognition. After these more fundamental problems, Dr. Fusco tackles questions of a more secondary and specialized nature such as prerequisites for and conditions of recognition, right to and duty of recognition, non-recognition, modes and forms of recognition, retroactivity, revocability and conditionality of recognition. After a chapter on recognition and admission to the League of Nations, and a discussion concerning the units and organs competent to grant recognition, the author finally concludes with the legal position of the non-recognized state.

Dr. Fusco develops his own position on the various points by discussing and criticizing the numerous theories advanced by other authors. It is impossible to do more than indicate his basic notions. He is a rigid positivist and, therefore, almost as a matter of course, a partisan of the dualistic school. Recognition in general is, according to him, the renunciation of any claims arising out of a new situation, and recognition of states in particular signifies the commencement of normal diplomatic relations with the new entity which has legal personality and is subject to the rules of general international law (such as *pacta sunt servanda*) from its very formation. The author opposes therefore the "constitutive" theory as well as the "declaratory" theory, and adheres to the "intermediate" view advanced primarily by Professor Perassi at Rome.

The book is certainly an important and valuable contribution to the intricate problem. Its principal defect is that the writer has focused his attention too much on text-writers and theories. Cases are almost entirely

ignored, and the diplomatic correspondence and practice of the various states are not sufficiently used. Yet, with all its limitations, the study is a thorough job and contains pertinent criticisms and stimulating suggestions.

STEFAN A. RIESENFELD

Der Völkerbund: Organisation und Tätigkeit. By Otto Göppert. Stuttgart: W. Kohlhammer, 1938. pp. xvi, 734. Index. Rm. 16.

This latest volume in the well-known *Handbuch des Völkerrechts* series presupposes an introductory volume on the history of the League of Nations, which is next in order of publication by the same press. A work somewhat similar to the present volume appeared in 1923 from the pen of the late B. W. v. Bülow, Secretary of the German Foreign Office, a work intended by its author to serve as "a balance sheet of the Versailles League of Nations." But the fifteen years intervening were marked—and marred—by a number of major wars and by many failures of the League, which, in the opinion of Dr. Göppert, gave that institution a decided turn for the worse and has made a new balance necessary, "if for no other reason than to profit by the mistakes of the past." The present work, however, is not a political discussion, but primarily a legal explanation of the organization and activities of the League. And, since lack of space prevents the mention of details, it may be said in general that every phase of the subject, within the general outline, has been treated with a painstaking thoroughness that gives the work a completeness found in no other single volume on the present state of the League.

The work is divided into three "books": the first, comprising 207 pages, deals with the organization and procedure of the League; the second, on the various means of preventing war, covers 343 pages, and includes the general heads of disarmament, and arbitration and security; the third book (140 pages) on "political administrative activities and activities in the technical field," concerns such questions as mandates, minorities, Memel, Danzig, and various social problems. A concluding chapter on the reform of the League of Nations gives a history of the attempts to improve the League and the results that were obtained; and, in a "final word," the author summarizes the reasons for its failures, which were due not so much to the League as an idea, as to the legal set-up which connected the Covenant with the Treaty of Versailles and thus created an inner conflict that was irreconcilable: the enforcement of a peace that could not be lived.

KARL F. GEISER

L'Assistance Hostile dans les Guerres Maritimes Modernes. By Yves Le Jemtel. Paris: A. Pedone, 1938. pp. iv, 248. Fr. 50.

This is a study of what is generally called in English "unneutral service." The greater part of it is a restatement and recapitulation of the views of prior writers on the subject. Dr. Jemtel has adopted an elaborate scheme

of classification and organization, both substantive and chronological, which, while perfectly logical, leads to repetition and makes necessary the consultation of numerous widely separated passages if one wishes all the information on a given point. The chief new contribution in the book is the analysis of the French Instructions of March 8, 1934, and of the post-war trend. Brief summaries of the League sanction system, the recent neutrality laws of the United States and of the Spanish Civil War, with a brief note on the current Sino-Japanese conflict, conclude the volume. The author's chief substantive division is between direct and indirect unneutral service. Indirect unneutral service is performed by incidental transport of military persons or dispatches. Direct unneutral service includes provisioning a fleet, participation in hostilities and voyages primarily designed to carry military persons or dispatches. The chief distinction lies in the penalty, which in the case of direct unneutral service is more severe and extends to the cargo. The author calls attention to the danger of continuing notions prevalent during the World War period by which neutral vessels engaged in unneutral service were assimilated to belligerent vessels and ran the risk of destruction. Still worse was the presumption that presence in a war zone indicated unneutral service.

Dr. Jemtel sees a trend toward the assumption by neutral governments of a duty to suppress unneutral service, but he ignores the long history of this trend and erroneously dates it from the British Arms Export Prohibition Order of 1931. Although he touches upon the Rule of the War of 1756, he does not bring out the important underlying identity of principle. The reviewer believes that Dr. Jemtel proceeds on two erroneous assumptions: one, that a neutral state which violates its neutral duties should thereafter be treated as a belligerent; and, two, that individual citizens of neutral states have the same duties as the states themselves. In the usual French style, there is an analytical table of contents but no index.

PHILIP C. JESSUP

Essai sur la Condition des Étrangers en Iran. Avec une annexe comportant la traduction des lois concernant les étrangers, et quelques Traités types. By Abdollah Moazzami. Préface de M. Gilbert Gidel. Paris: Recueil Sirey, 1937. pp. x, 269. Fr. 65.

This admirably designed and substantial volume—all too modestly entitled “essay”—presents with a clarity and conciseness that commands attention from the opening page, a complete review of the “rise and fall” of the capitulatory system in Persia, and a summary of the legal position of foreigners in that country today. Honored by a preface from one of the leading French jurists and presented in the attractive form that characterizes publications bearing the name of Sirey, the volume is enriched by an extensive annex containing the text of all the more important legislation affecting foreigners, as also by translations of typical examples selected from

the series of separate treaties which followed the final disappearance of the capitulations in 1928. A careful bibliography of upwards of a hundred references is followed by one of those comprehensive analytical tables of contents, which, after the French tradition, so often, as here, serves in lieu of index. In the present case the lack of an index is not felt, but the absence of one reminds the American reader of what so frequently seems to be an inexplicable inadequacy in French legal literature.

Naturally enough, the volume divides itself into two parts—a historical review and a study of “la situation actuelle.” As compared with the more familiar field of the Ottoman capitulations, the story of the contact between Persia and the merchant from abroad offers a field of fresh and independent interest. In the proper sense of the word the capitulations came to Persia only in 1828 under the pressure of a victorious Czarist Russia. Before that date concessions had been freely conceded in the unimpaired exercise of sovereign rights, and these concessions had not, as in the case of Turkey, grown into a system of obligatory foreign privilege difficult to reconcile with territorial sovereignty. From 1600, when the Brothers Sherley, British merchants, secured from the Shah Abbas the Great a *firman*, one clause of which declared that “none of our judges shall have power over their persons or their goods for any cause or any act,” down to the Treaty of Turkman-Chai in 1828, and not forgetting an abortive “Treaty of Versailles,” signed in 1715 between Louis XIV and the famous Reza Bey—an ambassador, alas, with wholly defective credentials, whence woes to come—the author has a lively tale to tell of diplomatic rivalries and the shifting of foreign influences. An even century of capitulations pure and simple succeeds, and then, following upon the judicial reforms promised by the Constitution of 1906, and the rebuff of Persia by the Peace Conference in 1919 and the *coup d'état* of 1921, there comes the unilateral denunciation of the capitulations in 1928, and the beginning of the existing “transitory period” governed by separate treaties with the several Powers.

The subject of the present status and rights of foreigners, as reviewed in detail in the second part of this volume, is too extensive to be touched on here. Suffice it to say that as far as the letter of the law is concerned, and even taking into account the few points where the author concedes the need for further improvement, one receives the impression of a liberal modern régime, respectful of the principles generally accepted by continental jurists and by the Institute of International Law. Persia has thus given to the foreigner the assurance of liberal treatment under her laws, with, it may be remarked, a guarantee of the application of the foreigner's own law in proper cases. What counts now is the spirit in which these laws are to be applied. Friends of Persia look with confidence to the sure development of that “moral force from within,” which, our author assures us, has secured to Persia her present position of authority among the nations, and must lead her in her progress “towards the higher spheres of thought and action.”

"C'est le voeu, c'est le travail des jeunes générations, héritières de leurs aînées. Elles sont fidèles au passé, mais elles sont tout autant confiantes dans le progrès de l'avenir." In the realization of such high hopes lie the foreigners' guarantee for the future. This book does honor to the young generation for which it speaks so bravely.

J. Y. BRINTON

Colonial Blockade and Neutral Rights, 1739-1763. By Richard Pares. New York: Oxford University Press; Oxford: Clarendon Press, 1938. pp. x, 323. Index. \$7.00.

This book is a model for historical studies in international law, combining admirably the skills of a trained historian with a thorough understanding of the legal issues. Mr. Pares' earlier volume on *War and Trade in the West Indies* had already treated much background material, and references to it supplement the excellent footnotes to source materials. The book centers around the Rule of the War of 1756 and constitutes much the best analysis of the origins of that rule. As a part of that story, the author traces the evolution during his period (1739-1763) of the doctrine of Continuous Voyage. Mr. Pares is careful to point out that he has not attempted to write a general history of prize law, even during the middle eighteenth century, but he has fortunately prefaced his main contribution by two chapters (147 pages) in which he analyzes privateering and prize courts and procedure. Although he is led into full consideration of the domestic constitutional struggles in England which had so much to do with the regulation of privateering and the adjudication of prizes, and although he has not investigated many non-English sources except in France, his contribution to our knowledge of early prize law and procedure is great.

Mr. Pares stresses the fact that the Rule of the War of 1756 and its concomitant doctrine of Continuous Voyage sprang into effect at that period precisely because the wars of 1739-58 and 1756-63 were colonial wars. He brings out clearly the important point that the Rule of the War of 1756 penalized only trade with the colonies of France and Spain which was authorized by the French or Spanish Governments. "To be a lawful trader with the Spanish dominions by the prize law of England, you must be accounted a smuggler by the regulations of Spain" (p. 192). He says also that the rule "was not a mere technicality invented by lawyers; it was a policy which the Ministry desired and public opinion loudly demanded" (p. 180). His emphasis on the distinction between "trading *with* an enemy and trading *for* him" is a point to be kept in mind in any study of the later doctrine of "unneutral service."

It is impossible within the compass of this review to do justice to all the interesting material in this book, but the international lawyer will be especially repaid by reading pages 152 ff., where the nature of international law is analyzed. Throughout the book, and especially in Chapter IV on "The Diplomacy of Neutral Rights" (see, e.g., pp. 242 ff.), one is struck

by the underlying respect for treaties despite the frequent breaches and evasions. It is to be regretted that Mr. Pares did not include in the index for the benefit of the student of international law, headings like "treaty interpretation," "most favored nation principle," "preemption," "visit and search," etc.

The author has drawn chiefly on unpublished materials in the Public Record Office, the British Museum and French archives, and on other manuscript material as well as the published documents and treatises. He writes in a delightful style, illustrates his points with colorful examples enlivened by frequent flashes of humor and numerous biographical sketches of personalities involved.

PHILIP C. JESSUP

Britain and the Dictators. By R. W. Seton-Watson. New York: Macmillan Co., 1938. pp. xviii, 460. Index. \$3.50.

The author has in thirteen chapters passed from an introduction to an epilogue, upon the disappearance of Austria. During this passage he travels from Versailles to Locarno, then produces chapters on Britain and the dictators of Russia, Italy, Germany. These are followed by comments on small states and minorities, the Abyssinian fiasco, and the problem of intervention in Spain.

The author has been known for years as a persistent student of Middle Europe problems and the recurring restlessness of the Balkan States; thus his book is written from a deep personal knowledge of the effects of the World War on Middle Europe, and the minorities which are scattered from the Baltic to the Balkans. These minorities are made up of Wends, then Czechoslovaks in Austria, Slavs and Germans in Hungary, Albanians in Greece, Ukrainians in Czechoslovakia, Germans in Poland; indeed Middle Europe is a patchwork of minority areas. Statistically put, there are more than 13 million German-speaking people outside the Reich as defined by the Treaty of Versailles, and approximately 33 millions of people in eighteen European states which create the minority problems, which, as the author points out, were made by the Treaty of Versailles. All these minorities make for political and social unrest, but the so-called Great Powers and the League of Nations are unable to produce a policy to mitigate the situation so unfortunately created by the Peace Treaty.

There are seven main zones: Austria; German-Czech frontier; the North Italian frontier; German-Polish frontier; the Polish-Lithuanian and White Russian problems; and Hungary with four frontiers with at least seven different races along these four frontiers; finally the Balkan frontiers. Yet among these states, alliances have been made apparently for mutual defense which tend again to complicate existing problems. These treaties of alliance also fail to take into consideration the minority questions existing within the frontiers of the allied states. Superimposed on this hotch-potch of minorities are the dictator states, each of which stands for a form of totalitarianism

according to its particular political concept. The book is written with vigor and presents two aspects of modern thought, one of which demands that pacifists, no matter of what color, should view as a realistic picture the European Continent as a whole; and secondly, it deliberately refuses to be drawn into sectional arguments, but demands that the reader for once grasp the political landscape not as a system of groups, but as one human family.

When this volume is read and its facts and arguments are placed in juxtaposition to the speeches made for the so-called good neighbor trade treaty policy, it presents a commentary, which is as devastating as it is unpleasant in its realism. Britain enters the picture because of its balance of power theory and its well-known capacity of hesitating upon the many political brinks before selecting the one which seems most suitable for her survival.

BOYD CARPENTER

Private International Law. By George S. Streit and Peter G. Vallindas. 2 vols. (in Greek). Athens: "Pursou," 1937. pp. xxxii, 400; xvi, 573. Index.

Professor Streit has been for four decades now the leading authority on private international law in Greece. His teaching and his works have influenced the legal thinking of nearly two generations. In 1906 he published the general part of a *Treatise of Private International Law* which unhappily was never completed. The present work may be deemed to be the completion of the old undertaking, except that while the *Treatise* dealt with private international law in the broad sense, the present one is a work on the Conflicts of Laws. It is the first systematic treatment of the subject ever written in Greece, though many monographs and studies on specific subjects of private international law have appeared in the past. Mr. Streit himself gave a course of lectures at the Academy of The Hague in 1927 on the theory and practice of private international law in Greece.¹ In his present work Professor Streit has had the coöperation of Mr. Vallindas, who has done some brilliant work in this field.

The work is of outstanding value not only as an exhaustive statement of the Greek conflict of laws, but also and primarily for the general discussion of fundamentals and applications of private international law. From the latter aspect it is so invaluable that it may be hoped that Professor Streit will publish an edition in French or English so that his work may become available to non-Greek readers. By its arrangement of material, its exhaustive survey of authorities, the analytical exactness, and particularly the clarity and simplicity of treatment, it deserves first rank among works on the subject.

The first volume, constituting the general part, discusses the concept and nature of private international law, its foundation and purposes, the historical

¹ Published in reprint as *La conception du droit international privé d'après la doctrine et la pratique en Grèce*, Paris, 1929.

development and sources of law, methods of interpretation, the doctrine of *renvoi*, applicability of foreign law, and the so-called inter-local and inter-personal conflicts of laws. An appendix to this volume discusses the jurisdictional régime in Egypt following the abolition of capitulations by the Montreux Convention of 1937. The second volume covers the detailed analysis and divides the subject in the five conventional parts of the division of civil law (General Principles, Property, Contracts and Obligations, Family Relations, including marriage and divorce, paternity, adoption and tutelage, and Succession), thus tying up closely the rules of the conflict of laws with the private law to which they relate.

The authors analyze critically and reject the theories held by a large number of continental writers seeking to give to private international law an international basis either in positive or in natural international law (except to the extent that there is in the present day an axiom of international law that each country must have rules of the conflict of laws), and uphold the doctrine common in Anglo-American countries that this law is part of the national law of each country. It is admitted that there is a tendency of internationalization of this law, especially through codification, which is strongly supported (p. 171), but it is doubted whether this may ever be completed (p. 49). There is a concise presentation of the doctrinal development of the law and an exhaustive bibliography given for each country (pp. 105-155). The doctrine of *renvoi* is analyzed historically and critically with respect to its application in the principal countries, and the authors accept the prevailing juristic view that the doctrine is generally objectionable. The Supreme Court of Greece has never accepted the doctrine (p. 276). The principle of public order is also fully analyzed and its character as an exception to the application of the foreign law is strongly emphasized. Reluctant to define its meaning for general application, the authors insist that it may be applied only when absolutely necessary, *i.e.*, when the application of the foreign law would shake fundamental political, social, economic or moral conceptions of the domestic legal order.

Space is lacking to go into the detailed analysis in the second volume of conflict of laws problems arising out of various acts and relationships. Suffice it to indicate again that the authors weigh the positive law of Greece in the light of juristic theory and court decisions and of adaptability of the results to modern international life, while they also indicate the solutions adopted in other countries. The materials are drawn from an exhaustive survey of international and Greek authorities, which are fully given in text and footnotes. The conclusions in each case are cast in the mold of traditional canons of legal logic, and the ambiguity of any rules or paucity of provisions is supplemented by reference to principles of positive law. And once more the reviewer must emphasize how the work is a model of Greek thought in being both profound and eminently clear. Science is light indeed.

STEPHEN P. LADAS

Les Compromis d'arbitrage devant la Cour Permanente de Justice Internationale. By Henri Th  venaz. Neuchatel: Delachaux & Niestl  , 1938. pp. 110. Sw. Fr. 4.

In the voluminous literature concerning the Permanent Court of International Justice undeservedly slight attention has been paid to the nature of the special agreements between the parties conferring jurisdiction upon the Court (Article 36, paragraph 1, of the Court's Statute). Although the number of cases brought before the Permanent Court by special agreement is as yet rather limited, many intricate legal questions have arisen in those litigations, obviously due to the fact that it has not yet been fully determined to what extent the discretion of the parties in framing the terms of such agreements is restricted by the requirement that the agreements must be consistent with the spirit of the Court's Statute.

The present monograph attempts to clarify the legal problems created by the special agreements before the Permanent Court. In the first part of the book the author provides a theoretical discussion of the nature of agreements in the general field of international jurisdiction, supplementing the discussion with some observations on arbitration within the framework of the League of Nations Covenant. The larger part of the monograph is devoted to an analysis of the procedural and substantive questions concerning special agreements, as were raised in the practice of the Permanent Court. The author discusses primarily the problems with which the Court was confronted in the Loan Cases, in the Free Zones, as well as in the Oscar Chinn Case. His discussion of the complex problems occasioned by the Chinn Case appears particularly interesting. On the other hand, serious doubts are raised by his attempt to justify the Court's application of municipal law in the Loan Cases on the ground that the special agreement as such had created substantive international law.

Finally, the author endeavors to draw some conclusions and to ascertain certain special characteristics of the cases brought before the Court by special agreements. He believes that in this group of cases matters of jurisdiction will, as a rule, not arise, but that the problems will more frequently center around the question whether the Court, without deviating from the spirit of the Statute, is in a position to deal with, and to settle, the merits of the controversy submitted by special agreement.

SIDNEY B. JACOBY

BRIEFER NOTICES

International Law. By K. R. R. Sastry. (Allahabad: Allahabad Law Journal Press, 1937. pp. xxxii, 472. Index, 7s. 6d.) Designed as a textbook for students of law and politics in the Indian universities, this volume follows to a large extent the conventional arrangement of materials, with the addition of a short chapter on "Divergencies of International Law" and a final one on "Future of International Law." The author makes it clear that in an "objective study of international law" actual practice, rather than

philosophical bases, should be emphasized (pp. 53, 160). He refers at various points (as at pp. 275, 278, 281, 287, 355-358) to precedents from ancient India. The present status of India is described as "anomalous" (p. 40). Among the topics usefully treated in some detail are interoceanic canals, the interpretation of treaties, and prize law and procedure. The author apparently thinks that war and conquest may still be legal under certain conditions (pp. 67, 248), and that, while the promotion of pacific relations is an undoubted function of the law, the "regulation and humanization of war" are imperative (p. 403). He seems opposed to the idea of a League of Nations police force (p. 242), and attaches special importance to the possibility of entry of the United States into the Permanent Court of International Justice. Some of the factual information does not seem to be quite up to date (as at pp. 117, 224, 282-283). There are some few imperfections of a mechanical nature in the volume.

ROBERT R. WILSON

Aliens in the East. A New History of Japan's Foreign Intercourse. By Harry Emerson Wildes. (Philadelphia: University of Pennsylvania Press; London: Humphrey Milford, Oxford University Press, 1937. pp. viii, 360. Index. \$3.00.) In 29 chapters Mr. Wildes has gathered up the history of Japan's intercourse with the West from 1543 to 1864. He sets out to show as incorrect the thesis "accepted even by many professional historians" that "Japan was introduced to western culture by Matthew Calbraith Perry's visit in 1853." Most Americans assume, thinks Mr. Wildes, "that once the Japanese recovered from the shocked surprise, the amazed Orientals immediately accepted western ways with wild enthusiasm, that the nation emerged, almost in a summer's afternoon, from medieval superstition into the full light of western civilization. . . ." The author has combed the published narratives of early voyages, the publications of the many historical societies, and many other sources to show the extent to which Japan was brought into contact with the West by sailors, invaders, and, in the early decades of the 19th century, by the Dutch traders. Mr. Wildes appears also to have used "the files of the Hudson Bay Company, the Dutch and English East India Companies," and "hitherto secret documents of the Bakufu, the Foreign Office of the Tokugawa Shogunate, and diplomatic correspondence of the early days of Japan's foreign intercourse." There are no footnotes and in the text relatively few citations of sources. The bibliography does not specifically mention or describe the manuscript or archival material alluded to in the Foreword. It is, therefore, impossible for the student to follow Mr. Wildes through the very interesting chapters with any certain clues as to the sources of the information other than the published material. He does not appear to have used the manuscript material available in the various collections in the United States, of which there is a great deal. The author's conclusion is that "Japan has never liked the foreigners." This would appear to be sound. In a concluding chapter under the caption, "The Past Explains the Present," Mr. Wildes has given a valuable interpretation of modern Japan which, while consistent with the material presented in the earlier chapters, appears to have been drawn from much personal observation.

TYLER DENNETT

Le Régime des Baies et des Golfes en Droit International. By Jean Mochot. (Paris: Nizet et Bastard, 1938. pp. vi, 191.) The writer of this monograph devotes his first fifty pages to an explanation of his views and preconceptions on the nature and extent of territorial waters, straits, islands,

ports, and harbors. He admits that his discussions thereon cannot be extensive, but he feels that he owes it to his readers. That leaves him about 120 pages for his main thesis. Most of this space is devoted to a useful survey of the "concept of a bay" in doctrinal opinion, treaties, international arbitrations, attempted codifications, and the national legislation of France, Great Britain, the United States, Norway, and Sweden. He is critical of the geometrical methods suggested by Mr. S. Whittemore Boggs for the delimitation of bays and territorial waters.¹ In an attempt at a strictly "realistic" approach, he concludes: (1) that no rules of international law regulate the jurisdiction over bays; (2) the ten-mile rule has some support in practice but is not international law; (3) that the concept of "historic bays" is not logical; (4) that each state has the competence to determine the juridical régime of every bay entirely surrounded by its territory, but this must be in accordance with the "principles of the freedom of the seas and the supremacy of the common interest over particular interests." The monograph is chiefly valuable as a convenient summary of doctrine and practice with reference to bays.

HERBERT W. BRIGGS

La Guerre d'Espagne et le Droit, by Louis Le Fur (Paris: Éditions Internationales, 1938, pp. 73), deals with the legal status of the contestants, the principle of non-intervention and state sovereignty, the League of Nations and collective intervention, the current non-intervention system, and the recognition of the Nationalist Government. The author holds that an administration illegally destroying constitutional rights and institutions, and levying civil war against the majority of the citizenry cannot properly be regarded as the "regular and legal government" of the state. Under such circumstances, insurgents are entitled to a legal status superior to that of rebels and traitors. The principle of non-intervention is viewed as a limitation upon sovereignty, approved by Article 10 of the League Covenant. The present non-intervention system is spoken of as a "double embargo," embracing the ban on the sale of arms and the refusal to allow interference with foreign shipping upon the high seas. Insisting that the Nationalists are true belligerents, and applying international law, it is argued that Britain departed from a policy long and tenaciously held in maintaining that belligerents must confine their operations to territorial waters. The actions of rebel submarines during 1937 are treated as violations of the laws of maritime warfare rather than as constituting piracy *jure gentium*.

NORMAN J. PADEFORD

Das Schulrecht der deutschen Volksgruppen in Ost- und Südosteuropa. By Kurt Egon Freiherr von Türrke. (Berlin: Carl Heymanns, 1938. pp. xvi, 710. Rm. 32.) Minorities assert themselves against two kinds of oppression: against the deprivation of their economic basis and against the undermining of their cultural vernacularism. Cultural autonomy cannot exist without the right to speak freely the mother tongue, and to teach it to the coming generation. Any infringement of school privileges creates, therefore, anxiety and unrest on the side of the minorities, and international complications between the mother nation and the nation in which the minority resides. The difficulties which have arisen from the fact that the German minorities in eastern and southeastern Europe insisted on the maintenance of

¹ This JOURNAL, Vol. 24 (1930), pp. 541-555.

existing, and creation of additional, school privileges are well known, and they could not find a better reverberation than in this voluminous collection of multi- and bilateral agreements, provisions of constitutional and statutory law, and administrative orders bearing on the subject in question. Interesting to the non-German reader is the use of a new terminology which has its origin in political thinking: the author speaks of the law of the "Volksgruppen," that is, of the "groups of the German people in eastern and southeastern Europe," rather than of the law of the German "minorities." He also deviates from the conventional mode of presentation of the European minority law, which usually centers around a description of the rules which are valid in Poland; rather, he presents the law for each state as a separate, compact unit. Thus the book can be used as a source book by the various minorities in the struggle for their cause. The international lawyer will respect it as an industrious collection of materials which were previously not, or not easily, accessible.¹

WILLIAM B. STERN

Heritage of Yesterday. By Richard von Kühlmann. Translated from the German by D. Hastie Smith. (London, Edinburgh, Glasgow: William Hodge & Co., 1938. pp. xii, 200. 7s. 6d.) The familiar facts of nineteenth and twentieth century history which are interestingly presented in this book—although apparently not intended to do so—show that today's heritage from yesterday is the problem of preparing adequately to fight the wars of tomorrow. The causes of these wars and the only means of waging them "successfully" in the future are stated indirectly by the author and may be summarized as follows: Strategic bases of naval operations in the Mediterranean and the Pacific; the increase of population for man-power; the increase of nationalism; the industrial revolution (with especial emphasis on machinery, railroads and shipping); the overthrow of oligarchies by dictatorships based on popular consent (this obtained by propaganda through the radio and parades); increased demand and supply of coal, oil, metals and wood; increased and diversified armaments capable of waging both siege and mobile warfare by means of entrenchments, "lines" of fortifications, military railroads and motor trucks, "tanks," aéroplanes (bombing, poisoning, and incendiary), super-dreadnoughts, and submarines; the organization of all civilian life for military purposes; military alliances; the struggle for (and sharing of?) empire; the building of tariff barriers (especially by the United States and Great Britain, followed by the rest of the world).

There is no suggestion from this former, long-experienced Minister of Foreign Affairs in Germany as to how this formidable program for fighting future wars may be escaped. He does hint that economic power and stability may mitigate it—at least for some nations (*cf.* France, pp. 103-105); and that the League of Nations, which has thus far been a failure, might help if it were "reformed," although he gives no specifications for this (pp. 42-45, 59-60).

WILLIAM I. HULL

¹ The American law regarding teaching in languages other than English is set out in *Meyer v. State of Nebraska*, 262 U. S. 390, and *Bartels v. State of Iowa*, 262 U. S. 404. In these decisions, state laws which permitted the teaching of foreign languages only to students who had passed the eighth grade were declared unconstitutional because, in the years after the World War, "no emergency has arisen which renders knowledge by a child of some language other than English so clearly harmful as to justify its inhibition with the consequent infringement of rights long freely enjoyed" (p. 403).

Morocco as a French Economic Venture. A Study of Open Door Imperialism. By Melvin M. Knight. (New York and London: D. Appleton-Century Co., 1937. pp. xii, 244. Index. \$2.25.) With world statesmen losing more than their usual quota of sleep over the ever-present colonial question, Professor Knight's case study will be welcomed as a timely and scholarly addition to the literature of the field. Basing his work on first-hand observations as well as documentary materials, the author first discusses Morocco in its geographical and historical setting, paying particular attention to the events which led to the establishment of the open door (Act of Algeciras) and the French protectorate (1911-1912). He then turns to the economic development of Morocco and graphically pictures French attempts to fit the new protectorate into the French imperial system. Among other things, France was forced to circumvent the open door by the creation of a number of Moroccan "State" enterprises—coal mining, phosphate extraction, etc.—in order to "keep them in strictly French hands." So-called open doors, therefore, "have not been really open, but merely unlatched on the inside." Even so, Morocco has been "an expensive national luxury", as Mr. Knight clearly shows in his interesting conclusions on Imperial Economy. Yet it must be remembered that Morocco has a strategic importance difficult to evaluate in any balance sheet, for it occupies the key position from the standpoint of imperial defense. And, significantly enough, the "Left and Extreme Left [in France] are little more inclined to relinquish the colonies than the Center and the Right." True Frenchmen all, they grin and bear their extra burden, for the prestige of *la grande nation* hangs in the balance. There is a brief but interesting prefatory note by Charles A. Beard. Unfortunately, there is no bibliography.

FRANCIS O. WILCOX

Pages Africaines et Asiatiques. By M. Moncharville. (Paris: A. Pedone, 1938. pp. 303. Fr. 50.) This volume is divided into two sections. The first 138 pages deal with the mandates granted to the French Republic and those granted to Japan; then come a few comments upon schools for young Mussulmans in Tunis and a few remarks upon certain aspects of Algerian developments. Having set these out, the author deals with the Sino-Japanese conflict of 1931; takes a glance at the work being done at the Imperial University of Tokio; thereafter there is a thirty-page Survey of Korea before and after its annexation to Japan, finally a few remarks on the Roads of Formosa. The breadth of the author's grasp of the problems is hidden gracefully under his attractive style. Hence the volume will be useful to those who are adequately acquainted with the problems of expansion since the turbulent twentieth century was thrust upon us.

BOYD CARPENTER

Aspects Juridiques de l'Indépendance Estonienne. (2d ed.) By Gabriel Heumann. (Paris: A. Pedone, 1938. pp. 169. Fr. 35.) Dr. Heumann's contribution to the wealth of literature dealing with the new states created by the World War treats historically and topically of the Estonian acquisition of independence, its recognition by foreign Powers, membership in the League of Nations, and the responsibilities assumed as a full-fledged state. The monograph is divided into two parts, the first carrying the title "The Period of Presumptive Personality" and the second "The Period of Irrevocable Personality." Two valuable tables are included at the end, one listing the secondary works, the other the original sources cited or used. Detailed analyses of the laws governing recognition, accession to personality, and wars

of liberation as they apply to Estonian independence are undertaken. The work is well done, the author having collected and correlated much useful information which hitherto has been available only in scattered and often inaccessible sources. The technical and scholarly tone throughout does not make for light reading, and at times the author unnecessarily repeats himself. The summaries are excellent. The interpretations, evaluations, and judgments seem sound. Students of international law and relations—especially those who are unfamiliar with the Baltic area—will find Dr. Heumann interesting and valuable.

THORSTEN V. KALIJARVI

I Marchi di Fabbrica e di Commercio nel Diritto Internazionale Privato. By Angelo Piero Sereni. (Milan: Dott. A. Giuffrè, 1938. pp. xii, 208. Index. L. 25.) In this book the young Italian scholar, known to students of international law from his various contributions to the *Rivista di diritto internazionale* and his book on Agency in International Law (*La rappresentanza nel diritto internazionale*, 1936), gives the first exhaustive treatment of the Italian rules of conflicts relating to trade-marks. The title of the book is consequently broader than the content as the restriction to Italian law is not indicated. After three shorter chapters of general and introductory nature, Professor Sereni discusses in the two following chapters, which are really the core of the book, the "recognition of trade-marks in private international law" and the "principles of private international law with respect to facts, legal transactions and relationships involving trade-marks." The principal bases of the treatment are the rather antiquated Italian statute of 1868 and the international conventions regarding the subject-matter to which Italy is a party and which she has put into force (i.e., the Union of Paris of March 20, 1883, modified by the Hague Convention of November 6, 1925, and the Arrangement of Madrid of April 14, 1891). The author also gives, however, due consideration to the Convention of London of 1934, which is not yet in force, and to the new Italian law of September 13, 1934, which has likewise not yet been put into force and which is designed to remedy the faults of the old statute and to adapt the general statutory law of Italy to the system of the international conventions. The treatment is clear and concise. The American lawyer who is interested in the protection of American trade-marks in Italy and in her application of the conventions to most of which the United States also is a party, will get valuable information. It is a shortcoming, however, that one looks in vain for a list of the states which have ratified and rendered executory the various conventions. It is a defect also, at least from the Common Law point of view, that in the few places where reference to foreign law is made, only bibliographical notes are given. Foreign cases are almost entirely ignored. Thus, in the author's discussion of the famous affair of the trade name "Chartreuse," the American reader will miss a mentioning of the House of Lords decision of *Lecouturier v. Rey*, [1910] A. C. 262, and of the U. S. Supreme Court decision of *Baglin v. Cusenier* (1911), 221 U. S. 580. The book contains an elaborate footnote on the legal nature of the International Bureau at Berne (at p. 91 ff.) which will interest the student of public international law.

STEFAN A. RIESENFELD

Grundfragen der Rechtsauffassung. By Reinhard Höhn, Theodor Maunz, and Ernst Swoboda. (München: Duncker & Humblot, 1938. pp. viii, 114. Rm. 6.) Published here are three papers originally read at the Second Hague

Conference on Comparative Law (August, 1937): *Volk, Staat und Recht* (Höhn); *Die Staatsaufsicht* (Maunz); and *Die aktuellen Tendenzen im öffentlichen Recht und im Privatrecht* (Swoboda), together with an essay in English by A. H. Campbell, "Some Reflections of an English Lawyer on Kelsen's Theory of Law and the State." As Dr. Ernst Heymann states in his foreword, the principal papers reflect the struggle to replace formalism with an ethical foundation for law, but in any event they contrast the National Socialist conception of law with other conceptions. Dr. Höhn develops the conception of *volk* as a *juristische Staatsperson*. Dr. Maunz stresses comparatively the Nazi solution of the problem of establishing centralized legal control over subordinate areas of government. The analysis of present legal tendencies by the Sudeten Dr. Swoboda, of the German University of Prague, has current interest in its explanation of the conflict between Nazi and Czech legal principles.

H. ARTHUR STEINER

Conflicto das Leis Nacionais dos Conjuges nas suas Relações de Ordem Pessoal e Economica e no Desquite. By Haroldo Valladão. (São Paulo: Empresa Graphica "Revista dos Tribunaes," 1936. pp. ii, 225.) The author devotes himself to a working out of the law affecting marriage and divorce from the international point of view. As is to be expected, most attention is paid to the situation as concerns Brazilian citizens. However, the work has special value as to all questions relating to marriage and divorce coming in anyway under the code given the name of "Bustamante," and as developed in the various conferences and agreements on Latin American private international law in this hemisphere, as well as at The Hague and Stockholm. These are all carefully reviewed. The authoritative character of the book is shown by a review by Judge Bustamante, who praises it as showing the erudition of the author. It is rich in its bibliography, profundity of judicial thought, and clarity of expression, most appreciable in this branch of law, so often complicated and sometimes so obscure.

JACKSON H. RALSTON

Handbook of Latin American Studies. A Guide to the Material Published in 1936 on Anthropology, Art, Economics, Education, Folklore, Geography, Government, History, International Relations, Law, Language, and Literature. By a number of scholars. Edited by Lewis Hanke. (Cambridge: Harvard University Press, 1937. pp. xviii, 515.) This is the second issue of the *Handbook*. Prepared under the auspices of a national Committee on Latin American Studies and supported by a grant from the American Council of Learned Societies, it is now apparently well established as an annual publication. It is a coöperative enterprise on a large scale. The list of contributing editors numbers 25, and numerous individuals in the United States and Latin America gave the editor assistance in the preparation of the volume. The section on International Relations, contributed by Professor J. Fred Rippy, consists of a brief general statement and a list of some 150 items published as books, brochures, or articles in periodicals. The section on Law, contributed by Mr. John T. Vance, is prefaced by a more extended general statement. The items listed under the head of International Law scarcely exceed a dozen. Taken together, the two sections form a convenient source of information regarding current publications of interest to the readers of this JOURNAL.

J. B. L.

La Convention des Détroits (Montreux, 1936). By Georges D. Warsamy. (Paris: A. Pedone, 1937. pp. viii, 155.)

L'Égypte et le Régime des Capitulations. La Conférence de Montreux, 1937. By Léon-Roger Christophe. (Paris: A. Pedone, 1938. pp. viii, 164. Fr. 40.)

Les Actes de Montreux (Abolition des Capitulations en Égypte). By Raoul Aghion and I. R. Feldman. (Paris: A. Pedone; Courtrai: Jos. Vermaut, 1937. pp. xvi, 253. Index.)

At a time when treaty engagements in Europe are being cynically repudiated, the little town of Montreux beside placid Lake Lemman is happily identified with the peaceful and legal process of negotiation to alter the status quo in the Near East. The Conference of 1936 which agreed that Turkey should resume control over the Straits of the Dardanelles and the Bosphorus was a monument to the wise and honorable diplomacy of the Turkish Government. The Conference of 1937 was likewise a great triumph for the Egyptian Government in obtaining the assent of the nations enjoying extraterritorial privileges under the régime of the Capitulations to their abrogation. Both conferences were by implication a painful reflection on the methods of other nations in getting free of irksome obligations.

The brochure on the Straits Convention by M. Warsamy is, as M. Politis, the Greek Minister to Paris who attended this conference, says in the preface, a vivid and exact analysis of the negotiations and the results attained by the Montreux Conference. The historical summary of the whole thorny question is excellent.

The brochure by M. Christophe on the Montreux Conference of 1937 is also a thorough analysis of a most complicated series of problems. Without laboring unduly the mass of historical material already published on the subject of the Capitulations, the author enables one to understand more clearly the nature of the difficulties under that régime and the solutions reached by the conference.

The compact little volume containing the *Actes de Montreux* has the great merit of having been edited by two technical experts who attended the conference, M. Aghion for the French, and M. Feldman for the Egyptians, who, as M. Politis says in his gracious preface, "have known how to make use of the lessons of their experience in order to present without delay a practical guide concerning the application of the new régime for foreigners in Egypt." Their work has been done with obvious skill. M. Politis, who also attended this conference, comments guardedly, however, on the curious fact that the notes exchanged by the signatory Powers with Egypt on the most important question of inheritances and the professional interests of foreigners have been omitted by the editors "for special reasons." PHILIP M. BROWN

✓ *The Invasion of China by the Western World.* By E. R. Hughes. (New York: Macmillan Co., 1938. pp. xvi, 324. Index. \$3.50.) This book is one in the series of "Pioneer Histories . . . intended to provide broad surveys of the great migrations of European peoples . . . into the non-European continents." It is not, however, essentially a "history" but rather an examination of the effects of Western ideas upon the Chinese civilization, with chief attention to the influence of the English-speaking peoples and with almost negligible reference to that of Russia. There is, however, an introductory chapter, admirably organized and by no means lacking in originality of critical opinion, giving a summary history of Sino-foreign relations up to the

success of the Nationalist military campaigns in 1928. The body of Mr. Hughes' work is divided into five chapters, each in the nature of an independent essay, on the topics: "The Missionary Influence," "The Influence of Western Political Thought," "The Destruction of the Old Education," "Western Science and Medicine," and "The New Literature." These chapters combine appreciation of Chinese culture, exceptional knowledge of the writings of Chinese thinkers—literary men, philosophers, statesmen, politicians—revealed by refreshing quotations from their works, broad information in the several fields discussed, critical judgment upon both Western and Chinese programs, and an absence of prejudice which is perhaps aided by avoidance of political controversies. The series is announced as one for the "intelligent citizen" now called upon to consider international affairs. Mr. Hughes has written in a style and form that will attract the general reader. But he has also added rather notably to materials supplementary to those in the political field. Moreover, though he refrains from suggesting it, his emphasis upon the cultural interchange of Europe, America and China cannot but impress with the inevitable controversy between Western civilization and any other which aims to dominate the mind of China.

China, the Powers and the Washington Conference. (Columbia University thesis.) By Albert E. Kane. (Shanghai: Commercial Press, 1937. pp. viii, 233.) The thesis of this book as stated in the preface is that co-operation between the states in their relations with China usually has been beneficial to those states and to China, and that rivalry ordinarily has proved disastrous, at least to China. The author prefaces his study of the Washington Conference with an historical sketch of China's international relations, in which he does not emphasize his thesis, and even in his more extensive treatment of the Conference his writing is expository rather than argumentative. The account of earlier history is marked by numerous errors and inaccuracies and is written in the style of an abstract. References to secondary materials are more numerous than necessary and the method of citation is irregular. The value of the work, which derives from the author's extensive use of contemporary sources, particularly of Far Eastern newspapers published during the period of the Washington Conference, is considerably reduced by his unsystematic and uneven presentation. The evidence concerning the interdependence of the Four-Power Treaty and the Treaty for the Limitation of Naval Armament is of special interest, and the extended discussion of the former by American senators and Japanese and European editors reads strangely today. Apparently the author found an insignificant amount of such comment concerning the Nine-Power Treaty and other acts of the Conference, as his treatment of these topics is little more than a review of the evolution of the Open Door doctrine and a summary of the Conference discussions.

HAROLD S. QUIGLEY

Le Canada et la Doctrine de Monroe. By Pierre Sebillau. (Paris: Recueil Sirey, 1937. pp. viii, 219.) The title of this thesis at the University of Paris is in itself interesting, perhaps prophetic. The author, through French eyes, views the future of Canadian foreign policy as increasingly dominated by that of the United States. He traces the evolution of Dominion status out of the earlier separatism, and, by contrasting the differing Canadian attitudes toward this country, emphasizes the growing significance of the Monroe Doctrine for continued Canadian independence. Three quarters of the study is devoted to a portrayal of the historical background of

political organization and ideas in our northern neighbor. There is little new by way of materials or viewpoint here. The last quarter is a more suggestive interpretation of the post-war period. He envisages alternative possibilities for Canada as an independent state in foreign relations. One is to be the "interpreter" of the United States to Great Britain, and *vice versa*—appearing English on this continent and American in Europe in her policies. The other is to be the "call-boy" (*avertisseur*) of Great Britain in the Americas. The author argues that the former is not only the preferable but the inevitable rôle which Canada will play by reason of her own intense nationalism and of her increasing need of the support and defense of this country politically as well as economically.

Problèmes Actuels de l'Organisation du Monde. By Karl Strupp and J. G. Guerrero. (Leiden: A. W. Sijthoff, 1937. pp. 59. Fl. 1.20.) The two lectures contained in this brochure are of current interest as representing the thought of two outstanding international lawyers on questions quite different in character. Professor Strupp's essay on The Law of Prophylaxis (*Le droit prophylactique*) of War of the Covenant of the League of Nations and of the Paris Pact indicates his reasons for placing greater reliance on the development of international conciliation and on the jurisprudence of the Permanent Court than on these constitutional instruments. Dr. Guerrero does not hesitate to express, although without acrimony, his disappointment at the restricted character of the Pan American Union as compared with the League of Nations. He places his chief hope for the future of international organization in a closer integration of activity between the two organs rather than in a separatist policy and organization within the Union.

Compte-Rendu de la XXXIII^e Conférence de la Union Interparlementaire. Paris, 1-6 Septembre 1937. (Geneva and Lausanne: Payot et Cie., 1937. pp. xvi, 756. Index.)

Annuaire Interparlementaire. Vie Politique et Constitutionnelle des Peuples, 1937. By L. Boissier and B. Mirkine-Guetzévitch. (Paris: Recueil Sirey, 1937. pp. 244. Index. Fr. 45.50.)

The volume of the Proceedings of the Interparliamentary Conference of 1937 follows the pattern of previous annuals. The report of the Secretary General is, as always, a trenchant review of events and an unequivocal argument for pacific settlement of disputes. The 1937 conference considered four topics—regional economic agreements, especially in the Danubian countries, access to raw materials, unemployment among intellectual workers, and parliamentary disqualifications. The debates on the first and second questions were enlivened by a few clashes of opinion among representatives of the "have" and the "have-not" countries. Otherwise the discussions and resolutions, including one item introduced from the floor—collective security—remained discreetly vague and somewhat sterile. Twenty-four countries were officially represented—including Austria, perhaps for the last time in many years. The value of the conferences lies, no doubt, more in the personal contacts, official and social, of parliamentary leaders than in direct results in legislative action.

The *Annuaire Interparlementaire* also follows the usual pattern, listing information as to the personnel of governments and legislatures in all members of the Union. Short notices of political changes and the reproduction of important constitutional documents add to the reference value of the volume.

PHILLIPS BRADLEY

On the Mandate. Documents, Statements, Laws and Judgments Relating to and Arising from the Mandate for Palestine. By Max M. Laserson. (Tel-Aviv: "Igereth," 1937. pp. xlviii, 206. Index.) This book is a comprehensive compilation of the sources of international and constitutional law in the contemporary Palestine mandate, including also the "leading cases" of the Palestine courts and of the appeals to H. M. Privy Council, a convenient and valuable book of reference. In an introduction the author emphasizes the fact that not only Article XXII of the Covenant but also the Balfour Declaration are the two legal pillars of the law of Palestine which, therefore, is completely based on supra-ordinated international law. The Balfour Declaration is internationally binding upon the mandatory Power and it is, therefore, the international duty of Great Britain not only to establish, but also to develop the National Jewish Home. In consequence, it is legally untenable, urges the author, and in contradiction with basic conceptions of the Common Law, which prevails in Palestine, that Palestine courts have set up a tradition holding that the mandate treaty has force of law in Palestine only in so far as it is incorporated into the municipal law of Palestine by Order-in-Council, whereas H. M. Privy Council has correctly held that the mandate as such is an integral part of the law of Palestine.

Transjordanien im Bereiche des Palästina Mandates. By Josef Schechtmann. (Vienna: Heinrich Glanz, 1937. pp. 275. S. 12.60.) This book is not primarily a juridical study, but, on the one hand, a description of Transjordan (geography, climate, history, economy, political situation), and, on the other hand, an impassioned attack against the separation of Transjordan from Palestine proper, against the setting up of a separate Arab State, nominally independent, but in fact a British protectorate, against the fact that Transjordan has not only been taken out of the application of the Balfour Declaration, but is practically completely closed to Jewish immigration, although having a territory twice as large as Palestine proper, with a population of only 300,000 Arabs. This attack is based on a full discussion of the origin of the special position of Transjordan; on a legal analysis of the Balfour Declaration and of Article XXV of the Palestine mandate; on an investigation of the legality of the British policy and of the British-Transjordan Treaty of February 20, 1928; and on a review of the attitude taken by the Mandates Commission of the League. It is these parts of the book which will be found of particular interest to the international lawyer.

JOSEF L. KUNZ

Problems of the Pacific, 1936. Proceedings of the Sixth Conference of the Institute of Pacific Relations, Yosemite National Park, California, 15-29 August, 1936. Edited by W. L. Holland and Kate L. Mitchell. (Chicago: University of Chicago Press, 1937. pp. x, 470. Index. \$5.00.)

The Problem of Peaceful Change in the Pacific Area. A Study of the Work of the Institute of Pacific Relations and its Bearing on the Problem of Peaceful Change. By Henry F. Angus. (London and New York: Oxford University Press, 1937. pp. viii, 193. \$2.00.)

The reports of the periodic meetings of the Institute of Pacific Relations are always welcomed, and in *Problems of the Pacific, 1936*, the excellence of its editorial policy has been more than maintained. After a brief introduction in which a few highlights of the Pacific scene, 1933-36, are sketched, the volume is divided into three parts—Summary of Conference Discussions, Documents, Appendixes. The arrangement seems most satisfactory, for the

chapters have been made to correspond fairly closely "in substance and sequence with the round table topics," while in Part II a selection of data papers is presented as illustrative supplementary material. It being obviously impossible to produce a verbatim record of the proceedings, it was necessary for the editors to select the significant and representative opinions presented, and out of such material give a composite picture of the discussion. This necessarily places an increased responsibility upon the editors, but they have proved equal to their task. The discussions and papers reveal more thorough preparation and study of the problems under consideration than were made for previous conferences. Particularly welcome is the inclusion for the first time of representatives of the U.S.S.R., and the value of this additional point of view is revealed in their conflict of policies as relates to the Japanese. Indeed, one senses that throughout the conference the Japanese were constantly put on the defensive by delegates from other nations. In the final chapter on "The Changing Balance of Political Forces in the Pacific and the Possibilities of Peaceful Adjustment," it is a serious commentary to be reminded that "The existing system of diplomatic machinery has failed to prevent serious international friction which at any moment may culminate in open warfare." The difficulties in remedying this situation are revealed in the wide divergence of the points of view presented throughout the discussions. A word should be added concerning the very informative material presented in Part II. Such "documents" include papers on—"Trade and Trade Rivalry Between the United States and Japan," "Factors Affecting the Recent Industrial Development of Japan," "The Resources and Economic Development of the Soviet Far East," "Recent Developments in the Chinese Communist Movement," "The Reconstruction Movement in China," "The Working of Diplomatic Machinery in the Pacific." All the data papers listed in Appendix II could not be included in a single volume, and it is doubtful if such a course would be wise, but students of the Far East can only hope that more of them will be made generally available.

In *The Problem of Peaceful Change in the Pacific Area* may be found an excellent example of the scientific work of the Institute of Pacific Relations illustrating as it does the objective study of current problems. This little volume makes an analysis of various publications of the Institute over a period of years which have a bearing on the problems of peace. This is an extremely useful service, for in this compilation of points of view we have a digest of years of research supplemented by bibliographical references at the end of each section. But Professor Angus is more than a compiler; he analyzes; he brings into focus discussions covering a series of conferences; and, what is equally important, he draws conclusions which, while individual, are forceful because of the pungent style of presentation. A good example of his careful reasoning may be found in the section on "Comparative Standards of Living" where the complexity of the problem is presented effectively in less than four pages.

LIONEL H. LAING

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* Mention here does not preclude a later review.

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